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NEGLIGENCE AND COMPENSATION CASES ANNOTATED

THE WORKMEN'S COMPENSATION, EMPLOYERS' LIABILITY AND CURRENT NEGLIGENCE CASES DECIDED IN THE FEDERAL COURTS OF THE UNITED STATES, THE COURTS OF LAST RESORT OF ALL THE STATES AND TERRITORIES AND THE ENGLISH AND CANADIAN COURTS

WITH PLEADINGS AND FORMS

By JAMES C. CAHILL
ASSISTED BY THE PUBLISHERS' EDITORIAL STAFF

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NEGLIGENCE AND COMPENSATION CASES ANNOTATED

VOL. XIX.

KINZELL v. CHICAGO, MILWAUKEE & ST. PAUL RY. CO.

[Supreme Court of the United States, May 19, 1919.]

250 U. S. 130, 63 L. Ed. 893, 39 Sup. Ct. 412, rev'g 31 Idaho 365, 171 Pac. 1136.

1. **Federal Employers' Liability Act—Interstate commerce—When employee engaged in—Guide for determining.**

What is at least a guide to a determination of the question whether an interstate railroad employee, engaged in work on the railroad right of way, was

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engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act, may be found in the questions: Was the work being done independently of the interstate commerce in which the railroad company was engaged or was it so closely connected therewith as to be a part of it, and was its performance a matter of indifference as far as such commerce was concerned, or was it in the nature of a duty resting upon the carrier?

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2. Federal Employers' Liability Act—Interstate commerce—What work constitutes employment in.

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I. Trainmen.

A. Conductors.

1. Work train distributing ties.

Plaintiff was employed by the defendant as conductor on a work train being used in distributing ties at various points along the line between stations within the state. The defendant's railroad, however, extended into another state and did an interstate business. At night after a day's work the plaintiff was returning to a certain point on the work train, with the train crew and

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3. Federal Employers' Liability Act—Interstate commerce—When employee engaged in—Keeping interstate track free from earth and stones falling on it as result of filling work.

Where an interstate railway company was engaged in filling a trestlework bridge which spanned a dry gulch and which was, during the progress of the work, used for interstate trains, and the fill had reached the level of the tops

several section men who had assisted in unloading ties. A stop was made on account of some defect in the engine, and the caboose of the work train was run into by a regular freight train. In the collision the plaintiff was injured. He brought an action under the Federal Employers' Liability Act, and at the trial recovered judgment. On appeal the judgment was affirmed, the court holding in part that upon the facts shown the plaintiff, when injured, clearly was engaged in work so closely related to interstate commerce as to be a part thereof, so that the cause was determinable under the federal act. Ely v. Chicago Great Western R. Co., — Iowa —, 166 N. W. 739 (1918).

2. Switch crew making up train.

A yard conductor in the employ of the defendant railroad company had entire charge of the switch engine and crew in a particular yard, and was directing the movement of the crew in making up, during the night, certain trains, including a train that regularly carried both intrastate and interstate shipments, and which on this occasion contained several cars loaded with interstate freight. It appeared that the presence of the employee in question was necessary to the making up of this train in time for it to depart on schedule. While the train was being assembled he was missed. Soon thereafter his dead body was found between the rails of the track on which the train was being placed. One of the wheels was on his foot. No one witnessed the accident. Proceedings were had under the state Workmen's Compensation Act, and the Industrial Board, while finding that the deceased was engaged in interstate commerce, nevertheless made an award in favor of his dependent mother, holding that the employer had not been shown guilty of negligence, and that therefore the case was determinable under the state statute rather than the federal act. In considering an appeal the court said that the employment of the deceased at the time of his death clearly was in interstate commerce, as the Industrial Board had found, but held that the action of the board in making the award must be reversed, because the occurrence of the accident in interstate commerce brought the case within the purview of the federal act which, as was well settled, operated to exclude the state statute. McKenna v. New York Cent. R. Co., 202 Mich. 103, 167 N. W. 900 (1918).

B. Engineers.

1. Helper engine returning light.

Plaintiff was a locomotive engineer employed by defendant to run an engine which was used to help other engines haul trains up a steep grade. On the day of the accident plaintiff was given two separate orders—one to assist a certain interstate train to the top of the grade, the other to return to the starting point. Plaintiff had no further orders, and the accident occurred on the return trip. An action was brought under the Federal Employers' Liability Act and there was a verdict for plaintiff. The case was

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of the ties, and had become of such width that the earth when dumped would pile up near the track so as to fall back on it if not removed, such fill had become a part of the railway and an employee of the company who was employed to keep the track clear of earth and stones, by means of "dozer" and shovel, was employed in interstate commerce within the meaning of the Federal Employers' Liability Act.

beard on appeal on defendant's exceptions to the denial of its motion for a directed verdict, on the ground that the evidence failed to show that the plaintiff was engaged in interstate commerce at the time of the accident. Overruling the exceptions, the court held that the evidence warranted a finding that the plaintiff, while returning to the point where his service in interstate commerce originated, was still engaged in such commerce, the return to the starting point being an incident of the assignment of duty originally given, and that the two orders given for the operation of the engine were, properly considered, but two parts of one order, which, taken together, made up the directions given him at the time he attached his engine to the interstate train. Callahan v. Boston & M. R. R., — N. H. —, 106 Atl. 37 (1919).

2. Riding home on engine after work.

In the case of Ewig v. Chicago, M. & St. P. R. Co., 167 Wis. 597, 167 N. W. 442, 169 N. W. 429 (1918), in which the suit was one by an administratrix to recover on account of the death of her intestate, a locomotive engineer in the employ of the defendant, caused by his being run down by an engine in defendant's yard, there was evidence tending to show the following facts: That the deceased arrived in the yard at the end of a run at about 9:40 a. m., placed the engine on a sidetrack, inspected it and turned it over to an engine dispatcher who took it to the roundhouse yard; that the decedent remained on the engine, however, after delivering it to the dispatcher, and remained on it to make out his report and time slip and to change his clothes; that the dispatcher after placing the engine near the roundhouse left it, the deceased being still upon it and engaged in washing his face; that the dispatcher then went to the roundhouse and got an engine that he had been ordered to take back to the station; that after taking the engine to a water tank the dispatcher started to back it to the station, and on the way, at a point at which it was customary for employees leaving the roundhouse for their homes after work to pass in leaving the yard, the engine ran over and fatally injured the plaintiff's decedent. There was evidence tending to show that the cause of the accident was negligence on the part of the engine dispatcher in failing to keep a proper lookout. It was stipulated at the trial that if the decedent was an employee of the defendant at the time of the accident, then the action should be tried under the Federal Employers' Liability Act. The trial judge directed a verdict for the defendant. On appeal from a judgment entered, the court held in part that there was sufficient evidence to take to the jury the issue as to whether the deceased was in a legal sense at work as an employee of the company at the time of the accident, the transportation in connection with which he had been working being admittedly interstate in character. On this point the court said in part: "It is now quite well settled by federal decisions that 'in leaving the carrier's yard at the close of his day's work' the employee is but dis-

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Certiorari to the Supreme Court of Idaho to review a judgment reversing the judgment of the lower court in favor of the defendant in an action under the Federal Employers' Liability Act for injuries to a laborer. Reversed.

For petitioner—James A. Wayne (John P. Gray and William D. Keeton, on the brief).

charging a duty of his employment, and that, if he was employed in interstate commerce while actually at work, he was, in legal contemplation, so engaged while leaving the yard when the actual work was ended. * * * Of course the employee must be leaving by the proper and usual way, or at least by a way known to and expressly or tacitly permitted by the employer. We think that there was sufficient evidence in the present case to take this question to the jury. The evidence is plenary that engineers were permitted, at the end of their run, to ride out to the roundhouse yard with the engine dispatcher if they chose, and it is clearly proven that such was the almost universal practice of the deceased. * * * There is absolutely no affirmative evidence to show that he was visiting or idling away his time, and we do not think that the length of time which elapsed necessarily proves the fact." A contention was made on the appeal that the deceased should be held to have assumed the risk of injury. This contention the court overruled, saying that although assumption of risk remains a defense under the Federal Employers' Liability Act, the doctrine "does not include risk of unexpected negligent acts of coemployees"; and that under the evidence here it was not an unreasonable inference that failure of the engine dispatcher to keep a lookout on the south side of the cab was such a negligent act. The judgment was reversed and the cause was remanded.

3. Switching cars to coal pocket.

The plaintiff was employed by the defendant as engineer on a switch engine in one of its yards, and at the time of the accident was engaged with his crew in placing three cars of supply coal upon a trestle to be dumped into pockets, from which it was to be taken indiscriminately to coal engines used in interstate and intrastate commerce. The three cars in question had arrived several days before from a point outside of the state and had been standing during the intervening time upon a siding. While the plaintiff was reaching under the engine to examine a brake beam, which was down, the fireman suddenly backed the engine, so inflicting the injuries for which the plaintiff sued. From a judgment of the appellate division affirming a judgment for the plaintiff, the defendant appealed. The court of appeals affirmed the judgment upon the theory that the interstate transportation of the cars in question was not ended until they were delivered upon the trestle to be unloaded. The case having been brought to the United States Supreme Court, however, the judgment was reversed, the court holding that the interstate movement ended when the cars were placed upon the siding, and that their later removal to the trestle to be unloaded was purely an intrastate movement. Lehigh Valley R. Co. v. Barlow, 244 U. S. 183, 61 L. Ed. 1070, 37 Sup. Ct. 515 (1917), rev'g 214 N. Y. 116, 107 N. E. 814 (1915).

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For respondent—George W. Korte (Heman H. Field on the brief).

The following are the pleadings in the action:

Complaint.

The plaintiff in the above entitled action alleges and respectfully shows to the court:

I.

That during all of the times hereinafter mentioned the defendant, Chicago, Milwaukee & St. Paul Railway Company, was, ever since has been, and still is,

C. Firemen.

1. In general.

The plaintiff was a fireman upon an engine of the defendant which was engaged in interstate commerce between points in two different states. While so engaged, by reason of the defective condition of the floor of the engine cab and of the water tank on said engine, he was thrown against the wall and side of the engine and severely injured, receiving as a result of the accident a rupture in the right groin. An action was brought under the Federal Employers' Liability Act and from a judgment for the plaintiff, the defendant appealed. The court reversed the judgment on other grounds and remanded the case for a new trial, but held that the plaintiff was engaged in interstate commerce at the time the injury was received. Chicago, R. I. & P. Ry. Co. v. Hughes, — Okla. —, 166 Pac. 411 (1917).

2. Repairing tank spout.

The plaintiff was a fireman serving on a freight train making an interstate run. A stop was made at an elevated tank for the purpose of taking necessary water. The spout of the tank had been knocked down, and it was necessary to replace it before the tender could be filled. The pumper and three assistants were endeavoring to replace the spout. The plaintiff, as he testified, was requested by the pumper, and also by the engineer, to help in the work. He proceeded to comply, and in doing so was injured by the fall of the spout upon his head. In the course of a decision affirming a judgment entered on a verdict for the plaintiff, the court held that the plaintiff when injured was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, saying in part: "The important inquiry is, Was the appellee [plaintiff], when injured, performing duties within the scope of his employment? If he was, then it follows that he was still engaged in interstate commerce. It is true that under the evidence the appellee had been engaged by the appellant to perform only the duties of a fireman. But does it follow that under all circumstances a fireman is not expected to do something more than merely supply his engine with water and fuel? * * * The evidence shows that it was a part of the fireman's duty to supply the engine with water, and that it was necessary to take water at that particular place in order that the train might proceed on its journey. Had the fireman, upon reaching the water tank, found some slight derangement about the waterspout which it was necessary to repair and which he could easily have adjusted, it would reasonably be regarded as his duty to make the required adjustments. The extent to which he would be expected to go in such instances must depend upon the facts of each particular case. At the time of the injury appellee was assisting in doing

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a railway corporation duly organized, created and existing under and by virtue of the laws of the state of Wisconsin and engaged in operating a line of steam railway as a common carrier, for hire of passengers, merchandise, livestock and other personal property by rail between the city of Chicago, in the state of Illinois, and the city of Seattle, in the state of Washington, and that the said defendant during all of said time was engaged in running and operating locomotives and freight trains and passenger trains in the transportation of interstate commerce and freight from points in the state of Idaho, Montana, South Dakota, Minnesota, Wisconsin, Illinois and other states to points in the state of Washington, and from points in the state of Washington to points and towns and cities in other states.

That during all of the times hereinafter mentioned the plaintiff was a resi-

something necessary for the further operation of the train, and which required no extended delay. The jury had a right to conclude that he was performing a service incidental to his principal employment." Texas & P. Ry. Co. v. Williams, — Tex. Civ. App. —, 200 S. W. 1149 (1918). A rehearing was denied.

3. Putting engine on storage track.

The husband of the plaintiff, immediately prior to his death, was engaged as a fireman on one of the defendant's locomotives pulling an interstate train. At the time of the accident, the train had completed its journey and the engine after being uncoupled was being placed by the engineer and the husband of the plaintiff upon a storage track, where it was to remain until required for further use on the following day. A proceeding having been instituted under the state Death Act, the plaintiff was nonsuited and appealed. On appeal the judgment was affirmed, the court holding that the plaintiff's remedy, if she had any, was under the Federal Employers' Liability Act, since the deceased was engaged in interstate commerce at the time of his death. Garber v. Missouri Pac. Ry. Co., — Mo. —, 210 S. W. 377 (1919).

4. Walking home after work.

A locomotive fireman came in from his run on Saturday evening, and went home. At about 11 a. m. on Sunday he started to the roundhouse to get his tools from a "pony engine," for the purpose of placing them on the "pick-up" engine, on which he was scheduled to leave, in interstate commerce, on Monday morning at 3:45 o'clock. An additional purpose in his going to the pony engine was to get his soiled overalls in order to take them home to be washed. While walking through the railroad yards on his way to the roundhouse he was struck by an engine and killed. His administratrix brought suit against the railroad company, his employer, under the Federal Employers' Liability Act, and at the trial obtained judgment. On appeal, however, the court held as a matter of law that the deceased when killed was not engaged in interstate commerce so as to enable the administratrix to maintain an action under the federal law. In reaching its decision the court pointed out that it was important to bear in mind that the accident happened on Sunday. "There is nothing to show," the court said, "that decedent was under any obligation, or under any orders to work on that day, or even that the defendant knew that he proposed to be at the railroad yard. It was unlawful for him to work on Sunday, unless in certain special circumstances, which are not shown to have existed in this case. * * * Where the act at the time is prima facie illegal, employment cannot be presumed." The judgment was reversed and a new trial was granted. Hansen v. New York Cent. & H.

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dent and citizen of the state of Washington, residing at Lavista, in the state of Washington.

That the main line of the railway of the defendant runs in and through the county of Shoshone, state of Idaho, and the said defendant maintains ticket offices and stations in said county of Shoshone, state of Idaho.

II.

That on the 16th day of February, 1916, and at the time of the injury herein complained of, and for some time prior thereto, the plaintiff was an employee of the defendant and engaged in working upon the tracks and bridges of the defendant, which were being used and which for a long time prior thereto had been used in interstate commerce, and in keeping in a proper

River R. Co., 91 N. J. L. 197, 103 Atl. 200 (1918).

D. Brakemen.

1. In general.

The plaintiff was a member of a crew operating a local train which contained three interstate cars. Part of the duty of the crew, if requested to do so by the person in charge of the yard, was to shift cars in the various yards located along the road. At the time of the accident, the crew was engaged in switching an empty car which had been standing in a local yard for several days. In transferring the car to another track, the loaded cars constituting the train were not detached, but remained in their position and the empty car was coupled to the rear end. The plaintiff was ordered to "ride the empty car" down the switch and apply the brake at the proper time. He used a pick handle as a brake stick and the resistance of the brake wheel suddenly giving way, the pick handle broke, causing the plaintiff to lose his balance and fall from the car to the ground between the tracks and receive the injury complained of. An action under the Federal Employers' Liability Act resulted in judgment for the defendant, from which the plaintiff appealed. The court affirmed the judgment. "Even though we assume three of the cars attached to the train were interstate cars," said the court, "it does not appear that the work in which the crew, including plaintiff, was employed at that particular time, was in connection with interstate commerce. On the contrary, the crew was occupied in the purely local act of shifting cars from one part of the yard to another, as the owner might require, in accordance with the customary duties performed daily in the various yards along the road. The switching operation was not shown to be incidental to or made for the purpose of delivering interstate freight, nor was the crew at the time engaged mainly in the operation of an interstate train. Its primary duties were intrastate, and became interstate only as they were from time to time engaged in the delivery of through freight from other states. Accordingly the burden was on plaintiff to show that at the time of the accident the main purpose of the switching operation was to further the delivery of the particular cars in the train consigned from points beyond the state. That burden he failed to sustain." Murray v. Pittsburgh, C., C. & St. L. R. Co., — Pa. —, 107 Atl. 21 (1919).

At the trial of an action by a railroad brakeman against his employer, to recover on account of personal injuries sustained through being thrown from a freight car by the unusually sharp recoil of a tightly set brake, the undisputed evidence showed that at the time of the accident the defendant was engaged in interstate commerce and that the car on which the plaintiff was working when injured was one loaded with cotton

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state of repair and improvement such instrumentalities and keeping the same in proper condition during such use.

III.

That at the time of the accident and injury to the plaintiff hereinafter alleged, on the 16th day of February, 1915, the plaintiff was engaged in employment on the main line track of the defendant railway company extending from said city of Seattle, Washington, to the said city of Chicago, Illinois, and between the towns of Lavista, Washington, and Ewan, Washington, over which said tracks the defendant was and for a long time prior thereto had been daily operating locomotives hauling interstate passenger trains and interstate freight trains.

being shipped to a point in another state, but was about to be taken, in transit, to a point within the state for the purpose of being compressed. In passing upon an appeal by the defendant from a judgment in the plaintiff's favor, the court held that clearly the parties were at the time of the accident so engaged in interstate commerce as to render applicable and controlling the Federal Employers' Liability Act. The court held, further, that the state constitutional provision making the defense of assumption of risk in all cases whatsoever a question of fact for the jury, had no application, and that the law applicable to the defense of assumption of risk was, under the Federal Employers' Liability Act, "that of the common law as it existed prior to the passage of said act, except where the carrier violates the provisions of some statute enacted for the safety of its employees." The court added that since the evidence showed that tightly set brakes on freight cars were not unusual and there was always a recoil to a released hand brake, commensurate with the tightness with which it had been set, that since the sound made by the brakes when the engine moved the cars would apprise the plaintiff of the fact that the brakes were set, and since as the plaintiff did not call for help, but voluntarily attempted to release the brake himself, it should be held as a matter of law that in this case the plaintiff assumed the risk of such an accident as that which caused the injuries. The judgment had by the plaintiff was therefore reversed and the cause was remanded. Chicago, R. I. & P. Ry. Co. v. Hessenflow, — Okla. —, 170 Pac. 1161 (1918). A rehearing of the appeal was denied.

The plaintiff was employed as a brakeman on an interstate freight train of the defendant railroad, and, while attempting to place a car of coal upon an elevated track leading to the defendant's coal chutes, was caught and crushed between the tender of the engine and the coal bins, which were negligently built too close to the track to permit the body of a person to pass. The plaintiff was at the time upon the side of the tender, where he was ordered by the conductor to be, in order to uncouple the car and place it in a position for being unloaded upon such coal chutes. It appeared that the coal chutes were used to supply interstate engines with coal. An action for damages resulted in a verdict for $20,000 in favor of the plaintiff, from which the defendant appealed. The court of civil appeals in — Tex. Civ. App. —, 146 S. W. 667 (1912) affirmed the judgment, and the defendant brought the case by writ of error to the supreme court, which reversed the judgment and remanded the case, holding that the plaintiff was engaged in interstate commerce at the time of the accident. Chicago, R. I. & G. Ry. Co. v. De Bord, — Tex. —, 192 S. W. 767 (1917). The United States Supreme Court denied a writ of certiorari.

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That the plaintiff at the time of the injury herein complained of had charge of a machine called a doser machine or dirt spreader, which was used in connection with spreading gravel or dirt used by the defendant in the improvement of its bridges and tracks. That at the time of the injury to the plaintiff the plaintiff had been engaged under the direction of the defendant in filling a bridge, which bridge was called No. E E 140. That the said bridge and railway track on both sides thereof had for several years prior to the said 16th day of February, 1915, been used by the said defendant in interstate commerce. That the defendant was engaged in filling its said bridge on its main line track with dirt and gravel. That the said defendant hauled, or caused to be hauled, the gravel to the bridge by trains of gravel cars from a point on its line westerly from the place where the plaintiff was working,

245 U. S. 652, 62 L. Ed. 532, 38 Sup. Ct. 12 (1917).

2. Alighting to signal train.

Plaintiff was a brakeman on a construction train which was proceeding to a trestle on a branch road of the defendant to engage in its repair. An interstate freight train was due to follow, and to prevent a collision with the construction train, the plaintiff was directed by the conductor of his crew, in accordance with the orders given for the operation of the train, to alight near the west end of the trestle and signal the approaching train to stop. The plaintiff, in attempting to carry out this order, missed his footing in alighting from the train, fell, and was injured. It was undisputed that the branch road was used for both interstate and intrastate traffic and that the repair of the trestle was necessary for the transportation of such traffic. An award was made by the Industrial Accident Commission and the defendant petitioned for a writ of review. Annulling the award the court said: "It thus seems clear that when injured Rouse [the plaintiff] was engaged in the performance of an act which had direct relation to a train carrying interstate commerce; and, conceding that the stopping of the approaching interstate train had for its object the protection also of the intrastate train, the latter fact is immaterial in the determination of the question." Southern Pac. Co. v. Industrial Acc. Commission, — Cal. —, 178 Pac. 706 (1919).

3. Spotting cars.

Plaintiff was employed as a brakeman on a freight train of defendant's railroad which operated between terminals in two different states. The train on which the plaintiff was working had taken a sidetrack to permit the passage of a train going in the opposite direction. In order to do this, it had been necessary to displace certain cars at the station which had previously been "spotted" for loading, and it was in the attempt to "respot" them after the other train had passed that the accident to the plaintiff occurred. He had mounted one of the "spotted" cars in order to set the brakes when it arrived at the proper place. The loose cars had been incorporated in the train and were being pulled slightly up grade, when the car immediately behind the caboose of the freight train became detached because of a defective coupler. By the time the train reached a point where it should be stopped, a considerable space had intervened between the detached cars and the caboose. When the plaintiff, who had not observed the separation of the cars, gave the signal to stop, the train was brought to a quick standstill; but the detached cars continued to roll on towards the caboose, and finally struck it with such violence that the plaintiff was thrown to the ground and sustained the injuries for which he

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and it was the duty of the plaintiff in operating the said doser or dirt spreader, after gravel cars had dumped the gravel or dirt alongside the track, to operate the said doser along the track for the purpose of spreading out the gravel on each side of the defendant's said track, the doser or dirt spreader having wings on either side for that purpose which were adjustable.

That at the time of the accident and injury to the plaintiff the said doser or dirt spreader was near the west end of the bridge above referred to, and the gravel was being brought from a point westerly of said bridge.

That the train hauling said gravel and train crew thereon were not under the supervision or control of the plaintiff and the plaintiff had no authority or supervision over the said employees on said gravel train. The plaintiff, how-

subsequently brought an action under the Federal Employers' Liability Act. From a judgment for the plaintiff, the defendant appealed, but the judgment was affirmed, the court holding that while the plaintiff was engaged at the time of the injury in replacing, in a proper position, cars intended for purely local traffic, this was a duty incidental to the movement of an interstate train, so as to make plaintiff's performance thereof an engagement in interstate commerce. Texas & P. Ry. Co. v. Lester, — Tex. Civ. App. —, 207 S. W. 555 (1918).

4. Train hauling empties.

In Hester v. East Tennessee & W. N. C. R. Co., 254 Fed. 787 (1918), there was a regular movement of empty hopper cars to and from Cranberry, N. C., and a smelter near Johnson City, Tenn. The regular train was not running on the day the accident in question occurred, and the crew of which the plaintiff's decedent was a brakeman were called upon, as was usual in such circumstances, to move a train of the empty cars to Blevins, Tenn., with their switch engine, which was regularly used in a yard at Johnson City. The engine and crew of a different railroad were accustomed, when the regular train was not running, to take these cars from Blevins on to Cranberry, N. C. Plaintiff's decedent fell under the cars from the engine shortly before arriving at Blevins, however, and the crew, to get him quickly to a doctor, took the six or seven hopper cars at the front of the train and went on to Roan Mountain, Tenn. These cars were picked up the following morning by the other railroad, moved on to Cranberry, loaded, and returned to the smelter near Johnson City within the next 3 or 4 days. The action was brought under the Federal Employers' Liability Act and a verdict directed for the defendant on the ground that the deceased was not engaged in interstate commerce at the time of the accident. In reversing judgment and holding the case should have been submitted to the jury, the court pointed out that the movement of the train in question was an interstate movement because it carried cars which were going to Cranberry, N. C., Blevins, Tenn., being in no sense the destination of the hopper cars, as there was no possible use for them at that point. The hauling of empty cars from one state to another, the court stated, was interstate commerce, and the presence of interstate cars in a train made it an interstate train.

5. Riding home after work.

In the completion of a movement of interstate freight a train of the defendant had been taken into the yard, the cars had been detached and run upon a sidetrack and the caboose, running alone, had been sent on a descending grade, towards the freight office. The conductor was in the caboose on his way to the freight office where he was to deliver the

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ever, did advise and direct the said employees as to the points where he desired dirt or gravel to be dumped.

The machine above referred to and called a doser was constructed upon wheels, and ran along the said track, and was so constructed that it could be coupled to one of the gravel cars. It was the duty of the employees of the defendant in charge of the gravel train, before dumping the said gravel, to couple the said train onto the doser and push the said doser back along the rails of the railroad. That the defendant provided brakemen for that purpose, and the plaintiff had no authority or responsibility in connection with coupling the said doser onto the said train or the operation of the said train, other than to advise the employees of the defendant on said train as to where he desired the gravel to be dumped.

waybills. As the caboose was thus coasting towards the freight house it was overtaken by a train and struck, with the result that an employee in the caboose was injured. He brought suit against the employer under the Federal Employers' Liability Act. In the course of a decision reversing a judgment and order in the defendant's favor, it was held that the injured employee was at the time the accident occurred so employed in or connected with interstate transportation as to bring the case within the Federal Employers' Liability Act. "The interstate transportation," the court said, "was not ended merely because the cars had come within the yard. The conductor had also to deliver the waybills at defendant's freight office, * * * which was as much a part of the interstate transportation as was the movement across the state line." O'Neill v. Erie R. Co., 182 N. Y. App. Div. 729, 169 N. Y. Supp. 1008 (1918).

6. Taking up intrastate car.

The plaintiff was a brakeman on an interstate freight train of the defendant railroad which was made up both of empty and loaded cars. At the station where the accident occurred, the engine was detached for the purpose of taking up an empty intrastate car on a siding and connecting it with the train. While this was being done, the plaintiff was mounted on top of the car, and when the car ran off the track and was carried down an embankment he was severely injured. An action under the Federal Employers' Liability Act having been instituted, the jury found that the defendant was negligent, that the plaintiff was free from contributory negligence, and that his damage was $8,500. The plaintiff then moved for a general verdict. Granting the motion, the court held that the plaintiff was engaged in interstate commerce though at the moment engaged in attaching an intrastate car to the train. "It is 'the effect of the injury upon interstate commerce' which controls," said the court. "By his injuries the work of interstate commerce was interrupted, and he is therefore entitled to the benefit of the act." Daley v. Boston & M. R. R., 166 N. Y. Supp. 840 (1917).

7. Train hauling ballast car.

The plaintiff's decedent was in the employ of the defendant interstate railroad as a brakeman on a freight train, which at the time of the accident was operating wholly within the state. Two interstate cars originally formed a part of the train, but before the injury occurred had been disconnected and only cars from points within the state were being hauled. Among these, however, were several which were loaded with crushed rock to be used as ballast in improving the roadbed over which interstate commerce was carried. At the place where this ballast was to be used the engineer, without warning, pushed the forward part of the train

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IV.

That about eleven o'clock on the said 16th day of February, 1915, while the plaintiff was in the orderly and regular discharge of his duties upon said doser, and engrossed in his duties, the defendant and its employees in charge of said gravel train carelessly, recklessly and negligently so operated the said locomotive engine and gravel train over and upon said track and at such a high and excessive speed as to run the said train into the said doser upon which the plaintiff was then in the orderly and regular discharge of his duties, and to strike the said doser with great and unusual force, thereby knocking the plaintiff off the said doser and in between the said gravel cars and the doser, and dragged the said plaintiff over the said rails, ties, and dirt alongside thereof, and injured the plaintiff as hereinafter alleged.

containing the cars loaded with ballast, which had been uncoupled from the merchandise portion of the train, backward against the rear section so that the deceased, while in the performance of his duties as a brakeman, was crushed between the uncoupled portions of the train. An action brought under the Federal Employers' Liability Act resulted in a verdict and judgment for the plaintiff in the sum of $2,000, to review which the defendant prosecuted a writ of error. The court reversed judgment and remanded the case on other grounds, but held that "the railroad * * * being already in use as an instrumentality for interstate commerce, and the train, at the time of the accident, carrying ballast to be used in better preparing the roadbed for the transmission of such commerce," the deceased was engaged in interstate commerce. Warren v. Jackson, 204 Ill. App. 576 (1917).

E. Switchmen.

1. Shifting cars in yards.

a. Empties.

Plaintiff was a switchman in the railroad yards of the defendant. He was engaged in moving from one track to another two empty cars, neither of which was either beginning or ending a transit. He was riding the end car, with his foot over the forward end, and sustained injury through collision of the car he was riding with a third car which was standing on the switch track along which the two cars were being moved. The two cars the plaintiff was moving were intrastate cars. The car with which the moving cars collided was an interstate car, and the injury to the plaintiff was due to the fact that the interstate car was not equipped with a drawhead or end sill, so that its body came against the body of the other car, crushing the plaintiff's leg. In the course of a decision reversing a judgment had by the plaintiff and dismissing the complaint, the court ruled that "as the plaintiff was engaged in moving intrastate cars merely, he was not employed in the furtherance of interstate commerce, and no liability arose therefrom under the Federal Employers' Liability Act." Ward v. Erie R. Co., — N. Y. App. Div. —, 172 N. Y. Supp. 691 (1918).

b. Loaded, to aid consignee.

While plaintiff, who was a member of the local switching crew at a station on the defendant's road, was setting the brake on an open coal car which was being switched from a siding on one side of the station to a switch on the opposite side, he sustained injuries that resulted in the loss of his left hand and of his left leg below the knee. The car in question had arrived at the station from an interstate journey and had been placed on the first switch 2 days before it was ordered by the consignee to be transferred to the second siding. An action under the Federal

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V.

Plaintiff further alleges that at the time of the injury herein complained of the engine which was being operated by the defendant was pushing a large number of dump gravel cars, about twenty-five in number.

That in the train crew operating said train there was an engineer, fireman, conductor, and two brakemen. That it was the duty of the defendant company in operating its said train to have one of its employees upon the front of said train as it was being pushed along said track in order to keep a proper lookout and to give proper and adequate signals and warnings. And it was the duty of the defendant company to further have a second brakeman between the front brakeman and the engineer to transmit, when necessary, the signals by the brakeman on the front of the train to the engineer.

Employers' Liability Act resulted in a verdict in favor of the plaintiff in the sum of $25,057.31. By a writ of error the plaintiff brought the case to the circuit court of appeals. Reversing the judgment, the court held that since the interstate journey of the car in question had ended when the car was placed upon the first switch, and since all switching in the yard thereafter for the convenience of the consignee was intrastate commerce, it followed that, when injured, plaintiff was not employed in interstate commerce. Delaware, L. & W. R. Co. v. Peck, — C. C. A. —, 255 Fed. 261 (1918).

c. Reloaded with interstate goods.

The plaintiff's decedent was a switchman in the employ of the defendant in its yards at C. At the time of the accident the deceased with his crew was switching four cars, three of which were boarding cars billed to C from a point outside the state, and were being moved to a different track to be sent to another point within the state. The fourth car contained a shipment from outside the state, which had been transferred within the state to a local train and after being transferred into a refrigerator car was to be placed in another local train and proceed to its destination within the state. The engine backed up and kicked the four cars so that they would go to their proper places. The brake on the head car, however, was set and the cars after moving a short distance stopped. The deceased was upon the head car, and after releasing the brake, turned, and walked towards the other cars. The engine shunted the cars again whereupon the deceased fell to the ground where he was run over and killed. A suit under the state law resulted in a verdict and judgment for the plaintiff for $4,000, from which the defendant appealed. The court reversed the judgment, holding that the deceased was engaged in interstate commerce at the time of his death. This result followed, the court pointed out, because the movement of the refrigerator car was purely interstate, though its interstate movement had been interrupted by several transfers. Louisville & N. R. Co. v. Meadors' Adm'r, 176 Ky. 765, 197 S. W. 440 (1917).

d. Empty, to scale track.

The plaintiff, a switchman in the employ of the defendant railroad, was engaged, when injured, in switching an empty car to the scale track to be weighed in order to determine the net weight of an interstate load. Standing on the track were three empty cars, the southernmost of which was a "coke" car. In the switching movement just before the accident occurred, two empty flat cars were being pushed north on this track by an engine for the purpose of coupling to the "coke" car the north flat car on which the plaintiff was riding. At the first impact the cars failed to couple. The engine

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That there was a brakeman on the front car, which was being pushed by the said engine, but the remaining employees upon said train were in the cab of the engine, and there was no brakeman between the said front brakeman and the engine.

Plaintiff alleges that the employees in charge of the defendant's said train and the said engine were negligent and careless and reckless in not keeping a proper or any lookout in the direction in which the said train was being pushed.

VI.

Plaintiff further alleges that the said train was being pushed and propelled over the said track at a high, negligent and excessive rate of speed,

came to a stop and the plaintiff went between the flat car and the "coke" car to adjust the knuckle on the latter, and after adjusting it gave a signal to the engineer to go ahead. In walking out, however, he stepped on a piece of coke, causing his left foot to slide under the wheel of the car about the time of the second impact, when again there was a failure to couple. An action under the Federal Employers' Liability Act resulted in a judgment for $5,000, from which the defendant appealed. The appellate court reversed judgment with a finding of fact, and denied both a rehearing and a writ of certiorari to the supreme court, but held that the plaintiff was engaged in interstate commerce, in the absence of any evidence to show that the car being weighed had at the time been withdrawn from interstate transportation. Curran v. Chicago Short Line Ry. Co., 198 Ill. App. 154 (1916).

2. Making up interstate train.

The plaintiff was a member of a switching crew composed of six employees of the defendant railroad company, working in one of its yards. In the course of their work the crew coupled seven cars on a straight lead and moved them upon and along a ladder lead that connected all the switch tracks in that part of the yard. They then kicked one of the cars in upon a track, and the plaintiff rode it for 100 yards. After he had set the brake on it he alighted and walked down the main track toward three of the cars, which were to be placed by the crew in a train to be taken into another state. It was his duty, after the cars had been kicked in upon the track, to stop them at the proper place by applying the brakes. As he was approaching them for this purpose his foot became caught between a guardrail and a stock rail, at a switch, and he was held so that when the cars came to the place his foot was cut off by the wheels. In disposing of an appeal by the defendant from a judgment entered upon a verdict returned in the plaintiff's favor, the court ruled that upon the showing made the plaintiff when injured was employed in interstate commerce, so that the case was governed by the Federal Employers' Liability Act, under which, in distinction from the statute law of the state, the doctrine of assumption of risk would be recognized as a defense, holding, further, that the plaintiff, a man with 11 years' experience as a brakeman, familiar with the yard in which he was working and with the existence and location of the guardrail in question and chargeable with knowledge of every condition bearing upon the accident causing his injury, must be held to have assumed the risk. The judgment was reversed. Gaddy v. North Carolina R. Co., 175 N. C. 515, 95 S. E. 925 (1918).

3. Breaking up interstate train.

In yards designed and used for the assembling and breaking up of inter-

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to wit, the speed of at least 10 miles an hour, and plaintiff alleges that any speed in excess of 4 miles an hour would have been and was unreasonably high and dangerous, and it was the practice and custom of the defendant and its employees to approach said bridge at a slow rate of speed and not to exceed 4 miles an hour.

Plaintiff alleges that the said defendant recklessly, carelessly and negligently propelled its said train up against the said doser car upon which the plaintiff was engaged in the performance of his duties, and struck and bumped and collided with the same at said high and dangerous rate of speed.

VII.

Plaintiff further alleges that he saw the train approaching some distance

state trains, a switchman riding on a car in a train that had come from another state, and assisting in the breaking up of the train so that the freight could be distributed to various destinations, local and more distant, within the state, was injured through the negligent kicking of a certain string of cars against the train. It was held, in a decision affirming a judgment had by the plaintiff in an action under the Federal Employers' Liability Act, that the plaintiff employee when injured was engaged in interstate commerce so that the case was determinable under the federal law and not under the compensation act. Southern Pac. Co. v. Stephens, — Tex. Civ. App. —, 201 S. W. 1076 (1918). A rehearing of the appeal was denied.

The deceased was a member of a night switching crew engaged in breaking up a freight train and distributing cars to various tracks to properly group them for delivery to different railroads or to their respective local destinations. The train which the crew was breaking up consisted of forty-one cars, of which at least four carried interstate freight. One interstate car placed shortly before the accident had not been placed far enough past the switch to afford a safe operating clearance between it and other cars which might be moved in upon the adjoining track. Cars were placed upon the adjoining track a short time later, and then, as the remainder were being pulled onto the main track, the deceased was caught between the corner of the car placed on the adjoining track near its clearing point and the middle of a car in the train on which he was riding. An action under the Federal Employers' Liability Act resulted in a verdict and judgment for the plaintiff for $6,000, from which the defendant appealed. The court affirmed the judgment saying: "In view of the evidence showing that deceased was engaged as a member of this crew in breaking up a train containing both interstate and intrastate cars, which were being handled by the engine and crew indiscriminately, we think that a prima facie showing was made that he was engaged in interstate commerce at the time of his injury, * * * or that he was performing an act 'so directly and immediately connected with such business as to substantially form a part or necessary incident thereof.' * * * We are of the opinion that the evidence adduced made the matter a question for the jury; and it was duly submitted by an instruction given at plaintiff's request." Roberson v. St. Louis, M. B. Terminal Ry. Co., — Mo. App. —, 213 S. W. 873 (1919).

4. On way to get work clothes.

Plaintiff's decedent was employed by the defendant railroad company as a member in a crew of a switch engine used regularly in making up departing trains and breaking up trains arriving in a certain division of the defendant's yards. This division was

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away and observed the front brakeman on the front of said train, and relying upon the said defendant and its employees to proceed cautiously and with due care in performing their duties to the plaintiff, who was in plain sight upon the said doser, and where his duties required him to be, plaintiff proceeded with the performance of his duties and became engrossed therein, and was examining and looking at the said bridge for the purpose of ascertaining just where the load should be dumped, and was examining to see that the said doser was in proper position, and the said train thereupon approached the said doser and ran into and bumped the said doser at such unusual and excessive speed and with such great and unusual force as to jar and knock the plaintiff off of said doser and between the wheels of said doser and the wheels of the said gravel cars, as hereinbefore alleged, and injuring the plaintiff as hereinafter alleged.

used exclusively for interstate trains, although some of the trains carried intrastate as well as interstate cars, and both classes of cars were moved by the switch engine. The work of the deceased began at midnight. He was killed about 8 minutes before midnight, after he had entered the yard on his way to work and as he was going towards the place at which he was to report and to a shanty from which he was to obtain his working clothes. Death was caused by contact with a moving engine. In a decision reversing a judgment of the appellate division of the supreme court, and reinstating a judgment of the trial term in favor of the plaintiff, it was held that the deceased was killed while working in connection with interstate commerce in such a sense as brought the case within the operation of the Federal Employers' Liability Act. It was said: "In walking through his employer's yards to reach his place of work with that purpose solely in view, and with the time when that work must begin closely approaching, he is performing a duty which his master requires of him, a necessary incident to his work, and when killed under such circumstances it would be a narrow construction to hold that in the language of the federal statute he is not then 'employed by such carrier in such commerce.'" Knowles v. New York, N. H. & H. R. Co., 223 N. Y. 513, 119 N. E. 1023 (1918).

5. On way to take up new work.

The plaintiff, serving as a brakeman in a crew engaged in switching freight cars in the defendant's yard, assisted in switching some 50 or 60 cars, all on the same string, some of them containing freight that had been carried through the state from other states, others loaded with freight in process of being transported out of the state into other states, and still others containing goods being shipped between places wholly within the state. After the switching of this string of cars had been completed at a time when the working day had not ended and as the plaintiff was crossing certain tracks of the yard to rejoin his engine for the purpose of continuing his regular work which throughout the day would consist in the shifting of cars bearing intrastate freight and also cars bearing interstate freight, he was injured as a result of the collision of a moving car with a stationary car. It appeared that the next switching movement performed by his crew, subsequently to the occurrence of the accident, consisted in the moving of 3 cars containing coal which had been transported from another state into the state in which the yards in question were situated. It was held that the plaintiff when injured was engaged in interstate commerce, and so was within the Federal Employers' Liability Act. The court

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VIII.

Plaintiff further alleges that the said defendant was further negligent in not having a tail air hose on the rear car of said train—that is, a tail air hose on the car furthest from the engine, so that the brakeman on the front car of the train, in operating the said air hose by means of a valve, could stop the train in case of necessity. That if the defendant had had a tail air hose and valve on said train at the position of said brakeman on the train, the said brakeman could have stopped the train by the application of said air brakes before striking the doser upon which the plaintiff was engaged in the discharge of his duties. And even if the plaintiff was knocked from said doser and between the wheels of said doser and the wheels of said gravel car, by use of said tail air hose and valve, had one been provided and used, the

cited particularly the case of Erie R. Co. v. Winfield, 244 U. S. 170, 61 L. Ed. 1057, 37 Sup. Ct. 556, 14 N. C. C. A. 957 (1917), and said: "This crossing of the tracks [by the plaintiff just before the accident] was as much a necessary incident of the operation of switching the cars above referred to as the crossing of the tracks was an incident of the employment in interstate commerce in the Winfield case." Erie R. Co. v. Downs, 162 C. C. A. 485, 250 Fed. 415 (1918).

A railroad employee met his death while working, as he customarily did daily between the hours of 7 a. m. and 11 a. m., as a member of a switching crew. The cause of death was his falling from the footboard of the engine as it was being driven over certain cross tracks, with no cars attached to it, from a place at which the crew had just set a train containing interstate cars, and towards another train which also contained interstate cars. The only purpose in crossing the tracks was to reach the second train in order to move it. It was held, that as the determination of whether work being done was in connection with interstate or with intrastate commerce depended upon the immediate purpose for which such work was done, and since it appeared in the record that the only purpose in crossing over the tracks mentioned was to move the engine from the point of completion of one act of interstate commerce to the point of commencement of another act of interstate commerce, the deceased when killed was employed in interstate commerce so as to bring the situation within the purview of the Federal Employers' Liability Act, and to render inapplicable the state Workmen's Compensation Act. Wangerow v. Industrial Board, 286 Ill. 441, 121 N. E. 724 (1918). A rehearing was denied in February, 1919.

F. Operator of yards speeder.

In the case of Illinois Cent. R. Co. v. Industrial Board of Illinois, 284 Ill. 267, 119 N. E. 920 (1918), the employer, in seeking reversal of a judgment of the circuit court confirming an award by the Industrial Board of compensation under the Workmen's Compensation Act, in part contended that the applicant's decedent, when killed, was engaged in interstate commerce so that the Federal Employers' Liability Act, and not the Workmen's Compensation Act, applied. It appeared that the employing railroad company was engaged in both interstate and intrastate commerce. The deceased met his death as the result of a collision between a gasoline motor car which he was operating and a bad order car of the employer standing on a track. The purpose of the operation of the motor car at the time was the bringing of switchmen from one part of the yard to another, in order that they might break up trains, which might contain cars for either class of commerce. At the time of the accident he was taking the motor car

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said train could have been stopped almost immediately and the injuries to the plaintiff avoided. Plaintiff further alleges that when being thrown from the said doser his clothing caught in an arch bar bolt on the front gravel car.

IX.

Plaintiff further alleges that the said doser and this plaintiff were in plain sight of the approaching train for a quarter of a mile at least, and the injury to the plaintiff could have been avoided after the plaintiff was or should have been discovered by the employees of the defendant upon the said train, if they were or had been keeping a lookout.

Plaintiff further alleges that this plaintiff was discovered (*Amendments permitted by order of court, October 31, 1916. L. R. Adams, Clerk District

to the north end of the yard in order that he might bring back to another point three switchmen who had lately ridden to the north end five cars loaded with company coal consigned to a point within the state but subject to possible reconsignment to any point within or without the state. In affirming the judgment, the court held that the railroad company had not sustained the burden, which was upon it, to show that the work being done at the time of the injury was in interstate commerce. The deceased, when injured, was not, the court said, "handling or engaged in any way in the movement of cars shown to have been employed at the time in interstate commerce, and there was no showing that the nature of the work he was doing at the time of the injury was any part of interstate commerce."

G. Operator of electric car.

1. Conductor.

The defendant interurban electric railroad extended between points located wholly within the state. The claimant's decedent was a conductor and on the return trip a car billed to a point out of the state was a part of the train. On arrival at the end of the line, the car was placed on the transfer track of the railroad which was to carry it to a destination without the state. The train then proceeded to the defendant's yards, where it was placed on a siding, while the motor with the caboose only attached proceeded to the yard office of the defendant. There deceased boarded the caboose and signaled the motorman to place the motor in the barn. At some point between the yard office and the barn the conductor fell from the platform of the caboose and was fatally injured. Proceedings having been instituted in the name of the claimant, as widow of the decedent, under the Workmen's Compensation Act, there resulted an award to the claimant. This, on appeal, was reversed by the district court, but on further appeal the judgment of that court was reversed, the court holding that the deceased was engaged wholly in intrastate service from the time the interstate car of the train was left on the transfer track of the connecting carrier. At that time, the court pointed out, his connection with interstate commerce ended, and his injury having occurred thereafter on the way to the car barn, his right of recovery under the state law could not be questioned. Smith v. Interurban Ry. Co., — Iowa —, 171 N. W. 134 (1919).

2. Motorman.

In Nelson v. Ironwood & B. Railway & Light Co., 204 Mich. 347, 170 N. W. 45 (1918), the defendant railroad operated a street railway and interurban system between points in two different states. The duties of the plaintiff, who was a motorman,

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Court. By C. J. Callahan, Deputy) *or should have been discovered, by the said defendant and its employee, to wit, the said brakeman upon the front car, *who saw or should have seen the plaintiff, in ample and sufficient time to have stopped the said train after the said brakeman discovered this plaintiff in a position of danger and engrossed in the performance of his duties, notwithstanding which the defendant continued to propel said train and cars over said track without reducing the speed thereof or attempting to stop the same until after the doser was struck.

X.

Plaintiff further alleges that after the said doser was struck and plaintiff knocked off the train, the said engineer in charge of said engine negligently

were to take cars from a certain point at one of the terminals to a suburb, after which the same car was taken by another motorman across the line into the other state. On the night of the accident, while the plaintiff was making a return trip from the suburb, the trolley wheel came off the wire. In replacing it, plaintiff was compelled to stand between the rails of the track at the rear of his car and manipulate the rope attached to the trolley pole. While he was thus engaged an interurban car approached rapidly from the rear and collided with his car, crushing plaintiff between the cars and so severely injuring him that he lost one leg at the thigh. As the defendant railway company had not elected to come under the Workmen's Compensation Law, a common-law action was brought, which resulted in a verdict for the plaintiff in the sum of $12,500. On a writ of error to the supreme court, the judgment was reversed and a new trial granted, on the ground that the plaintiff, in being employed on a car which went from one state to another, was engaged in interstate commerce and should have brought his action under the Federal Employers' Liability Act.

II. Roundhouse employees.

A. Working with engine.

1. Overhauling for run.

The plaintiff was a hostler in the employ of the defendant railway company in its yards at Oakdale, Tenn., a division terminal. He was engaged at night in firing a certain engine No. 813 which had been scheduled to pull an interstate passenger train from Oakdale to Danville, Ky. Engines of the class to which this one belonged were too wide to be used on bridges south of the division terminal at Oakdale, and in practice and of necessity such engines "were to all intents and purposes used exclusively and habitually in runs * * * from Oakdale to Danville." No. 813 had come in from Danville, and after lying at Oakdale for 13½ hours was to haul a return train to Danville. As part of the preparation for the departure of the engine the plaintiff undertook to fire it, using a blowpipe inserted in the smokestack. When he came to remove the blowpipe one of its sections became detached and fell back into the boiler. He secured assistance from the boiler maker in opening the boiler head and getting the section of blowpipe out. In the performance of this operation, the plaintiff ascended the pilot and took a position in front of the smokestack. While he was there, leaning over and reaching down to receive the section of blowpipe being taken out by a helper, an inspector, who had entered the engine cab and did not see the plaintiff, brought some pressure to bear on the oval metal hood attached to the smokestack, in the process of testing it, with the result that the hood fell forward, striking and injuring the

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and carelessly failed to apply the automatic air brakes upon said engine and train and thereby the plaintiff was pushed and dragged and rolled along and over the said track and rails and ties between the wheels of the said doser and the said gravel car.

Plaintiff further alleges that the said engineer in charge of said train, had he been keeping a proper or any lookout, could have seen the said doser upon said track and this plaintiff thereon in ample time to have stopped the train before striking said doser.

Plaintiff alleges that the said defendant and its employees in charge of said train negligently, carelessly and recklessly propelled the said train at such unusual and high rate of speed against the said doser without having proper or adequate control thereover.

plaintiff. A judgment had by the plaintiff having been reversed by the court of civil appeals, the case was taken to the supreme court on petition for certiorari, filed by the plaintiff. The principal question raised for the decision of the court was whether, when injured, the plaintiff was engaged at a task falling within the scope of the Federal Employers' Liability Act. In holding, in the course of a decision reversing the decision of the court of civil appeals and affirming the judgment had by the plaintiff in the trial court, that the case was determinable under the federal law, the court said: "There was a specific designation of the engine in question for an interstate journey before Morgan [the plaintiff] began to fire it. * * * The character of the engine, therefore, did not depend on any probability or upon any accidental later event. The test event of designation preceded Morgan's going upon it, and we think firmly fixed its status as an instrumentality of interstate commerce, so far as his rights are concerned. * * * The chance that there would be a countermand of the order of designation was itself if a probability, then one too remote for consideration, as a practical question; and until in fact given Morgan's status for recovery, it seems, would not be changed. At the moment of the injury that status was one controlled by the [federal] act." Cincinnati, N. O. & T. P. Ry. Co. v. Morgan, — Tenn. —, 201 S. W. 128 (1918).

2. Making tool box.

The plaintiff was employed by the defendant as a night box packer to work upon both interstate and intrastate engines. His duties consisted in packing the journal boxes of locomotives, changing brasses, and doing other incidental work upon locomotives under the direction of his foreman. The plaintiff thought that in his work he needed a tool box in which to carry his tools and to sit on when working under an engine. The foreman was unable to secure one for him and said: "When you get time, make it yourself." Accordingly, the plaintiff, before leaving work on the morning of the accident went from the roundhouse to the car shop adjoining, and started to make such a tool box. In attempting to saw a piece of wood with an electric circular saw he lost four fingers of his left hand. An action under the Federal Employers' Liability Act resulted in a verdict and judgment for $5,000. In reversing the judgment and dismissing the action, the court held that the plaintiff was not engaged in interstate commerce at the time of the accident, saying: "The making of a tool box was no part of interstate commerce, and it was entirely outside the line of plaintiff's employment. He was employed as an engine box packer, and not as a carpenter. His employment and his duties were in the roundhouse." Froelich v. Northern Pac. Ry. Co., — N. D. —, 173 N. W. 822 (1919).

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Plaintiff further alleges that it was the duty of the defendant to either stop the said train before coupling onto the said doser, or at the time of coupling onto the said doser, or to make an easy coupling thereof, and that the defendant was negligent and careless in bumping into the said doser in the manner hereinbefore alleged.

XI.

Plaintiff further alleges that prior to the happening of said accident and injury to the plaintiff so caused by the negligence of the defendant, the plaintiff was in good, sound, strong bodily health, free from physical imperfection or ailment; by trade and occupation a locomotive engineer, and able to earn and did earn at his said calling the average sum of $200 per month. That

3. Washing boiler.

The deceased, a locomotive boiler washer, was shot and killed by a fellow employee while engaged in washing a boiler on a locomotive standing in a roundhouse, not assigned at the time to any particular train, but antecedently used in both interstate and intrastate commerce. A proceeding under the Workmen's Compensation Act resulted in an award which was confirmed by the circuit court. The supreme court, in affirming the award, held that the deceased was not engaged in interstate commerce. Chicago, R. I. & P. R. Co. v. Industrial Commission, 288 Ill. 126, 123 N. E. 278 (1919).

J was engaged by a railroad company as a boiler washer. His duty was to wash boilers of engines engaged in interstate commerce. He registered off duty by the time clock at about 7 o'clock p. m., but was requested by his foreman to return that evening and wash the boiler of a pile-driver engine. In obedience to such order he returned to the railroad company's yards preparatory to entering upon the duty of washing this boiler. It did not clearly appear whether J really washed the boiler or not, but he was last seen at the roundhouse about 9 o'clock. He was found dead the next morning in a pit in which a turntable was located about 20 feet from the roundhouse. In going to and coming from his work J was obliged to pass around this turntable, upon which the engines which he washed were turned. The night was dark and there were no lights near or on the turntable. Action was brought by the administratrix of the estate of J against the receivers of the railroad company. Affirming a judgment for plaintiff for $5,600, the court held that the deceased was engaged in interstate commerce within the provisions of the Federal Employers' Liability Act. The court also remarked, in the course of the opinion, that a requested instruction, placing the burden of proof upon the plaintiff to establish that both the railway company and the deceased were engaged in interstate commerce at the time of the accident complained of, by a preponderance of the evidence, was a correct statement of the law. It was further held that when both allegations and proof brought a case within the provisions of the Federal Employers' Liability Act, then the case was controlled by that act, although its provisions were not referred to in express terms in the pleadings. Lusk v. Bandy, — Okla. —, 184 Pac. 144 (1919).

4. Jacking up dead engine.

Plaintiff, while employed as a coach cleaner in one of the roundhouses of the defendant railroad, was directed, with the assistance of one helper, to jack up an engine. While the two were exerting their strength in lifting up on the lever of the jack, the companion of the plaintiff released his lift on the lever without

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the plaintiff's earning capacity has been practically destroyed. That plaintiff was long confined to a hospital and in bed, during all of which time he suffered excruciating and terrible pain. And plaintiff is forever barred because of said injuries from holding a position with any railroad company as engineer.

At the time of plaintiff's injury he was 29 years of age and his expectancy of life was over 36 years.

XII.

That as a result of said injury the plaintiff was crushed, bruised and maimed, and suffered the following injuries, to wit:

A fracture of the right shoulder blade; an injury to the right shoulder

warning, so that it came down with a jerk and injured the plaintiff. The engine in question, when in service, pulled an interstate train, but at the time of the accident had been placed in the shop for repairs and was commonly called a "dead" engine. An action at law having been instituted, a judgment was given for the plaintiff, from which the defendant brought error. In affirming the judgment, the court held that the engine in question was not engaged in commerce of any kind at the time of the accident, though used in interstate commerce both before and soon thereafter, and that consequently the plaintiff was not injured while employed in interstate commerce. Chicago, R. I. & P. Ry. Co. v. Cronin, — Okla. —, 176 Pac. 919 (1918).

5. Running to ash pits.

Lindstrom v. New York Cent. R. R. Co., 186 N. Y. App. Div. 429, 174 N. Y. Supp. 224 (1919), was an action under the Federal Employers' Liability Act to recover damages for injuries sustained by the plaintiff, a laborer employed in cleaning out the ash pans and coaling the locomotives at the end of their runs in preparation for their next runs. At the time of the accident the plaintiff and a companion were in the act of running two engines coupled together out to an ash pit to be cleaned. One engine was used solely in interstate commerce while the other was used in interstate and intrastate commerce indiscriminately. Ordinarily the plaintiff would clean these two engines, they would be run back to the station, and two other engines would be run over the pit to be cleaned by him. During the time the engines were off the pit, he would shovel the ashes out of them. At the time of the accident, he was riding out to the pit to begin work, that being the way provided by the defendant to get him to the ash pit. It did not appear in which kind of commerce the last engine he cleaned was engaged, nor which engine he would have cleaned first if the accident had not happened. The trial court submitted to the jury the question whether the plaintiff was engaged in interstate commerce and rendered a judgment upon a verdict in favor of the plaintiff. Affirming the judgment the court said: "We are satisfied that the plaintiff, at the time he was injured, while on his way to his work on an engine provided by the defendant, was in the service of the defendant; that he was engaged, when doing his regular work, in both interstate and intrastate commerce; that his trip on the engine * * * to his work was a necessary incident of his service and of the nature of his work as a whole; and that he was therefore, at the time, engaged in interstate commerce within the meaning of the act and the controlling decisions thereunder."

The locomotive concerned in this case had, on its arrival from an interstate journey, been delivered by the engineer to an engine repairer, who

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joint; a paralysis of the right circumflex nerve; deep flesh wounds over the left hip and lower part of the spine; a deep flesh wound in the region of the rectum, and as a result of these he is and will be forever unable to move the right arm more than 20 degrees from his body; that his right arm has been permanently destroyed for the performance of any manual labor and forever disabled; that he suffered a permanent injury to the tendons, nerves, ligaments and muscles and bones in and about his right shoulder and right arm, and his right arm is paralyzed; that the injuries to his rectum have permanently affected the control of his bowels, (Amendment permitted by order of court, October 31, 1916. L. R. Adams, Clerk District Court. By C. J. Callahan, Deputy) and has further suffered a permanent injury to his left hip permanently and seriously interfering with the use of the said left hip and leg, and that

took it to an ash pit where the fires were cleaned, coal, water and sand put in, and the engine made ready for its next run. The work of the locomotive was such that it had to be stored during the night, and as a result it was always taken from the ash pit to the storage track. While placing it there and coupling it, for what purpose did not appear, to another engine standing on the track, the plaintiff sustained injuries that resulted in the loss of his hand. On the following day the locomotive was put back on the same interstate run and it appeared that it was regularly devoted to that run every day in the month, except when in the repair shop. An action was brought under the Federal Employers' Liability Act which resulted in a verdict and judgment for the plaintiff in the sum of $6,000. The presiding judge decided as a matter of law that the plaintiff was engaged in interstate commerce and to this the defendant excepted. From an order denying a motion to set aside the verdict and for a new trial, the defendant appealed. The court reversed the judgment and granted a new trial on other grounds, but held that the trial judge properly ruled that as a matter of law the plaintiff was engaged in interstate commerce. The court observed: "Everything that was done incidentally to this use of this locomotive was also directly related to interstate commerce," and as it was permanently devoted to that run "all of the work of taking care of the engine overnight and preparing it for its next day's work was just as much interstate commerce as drawing the cars" from one state to another. Palermo v. Erie R. Co., 185 N. Y. App. Div. 637, 173 N. Y. Supp. 456 (1918).

6. Engine sander.

Plaintiff was employed by defendant railroad company as an engine sander. He and three associates prepared the sand to be used and placed it in the engines that came into defendant's yard, whether such engines were engaged in interstate or intrastate commerce. The work of preparing the sand consisted in drying it in stoves built for the purpose in what was known as the "sand house." The stoves were heated with soft coal, and it was in line with the plaintiff's general work to supply the coal to the stoves and to remove the ashes to an ash pit some 30 feet distant. To reach the ash pit it was necessary to cross some tracks. On the night in question plaintiff had sanded 7 engines which were going to other states. Having sanded his last engine at 9 o'clock, a half hour later he began carrying ashes from the stove in the sand house, and in doing so crossed one of the tracks. He dumped his pail and left it on the ground, while he went to the engine room to get a drink of water, and in so doing was compelled to cross another track; starting back to get his pail he was hit by an engine, with the result that he lost his left leg

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as a result of said injuries the plaintiff suffered great mental and physical pain and anguish and still suffers said severe pain from the said injuries and will continue to suffer from the same during the rest of plaintiff's life. That the result of said injuries was to render the plaintiff permanently maimed and crippled and disfigured, to his damage in the sum of $50,000, no part of which has been paid.

Wherefore, plaintiff prays judgment against the defendant in the sum of $50,000, and for his costs and disbursements herein sustained.

Motion to Elect, Motion to Strike, and Demurrer.

Comes now the defendant, the Chicago, Milwaukee & St. Paul Railway Company, and moves the court to require the plaintiff to elect whether he is

two or three inches below the knee. Action was brought under the Federal Employers' Liability Act. Affirming a judgment for the plaintiff for $20,000, the court held that the plaintiff was at the time of his injury engaged in interstate commerce. The court argued that the act of sanding the locomotives being clearly an act done in interstate commerce, the act of drying the sand in the stoves, performed by the same man who sanded the engines, was so much related to the act of sanding the engines that the removal of ashes in furtherance of the drying process came within the scope of work done in interstate commerce. Erie R. Co. v. Szary, — C. C. A. —, 259 Fed. 178 (1919).

B. Foreman taking men to work.

The plaintiff was a division foreman of a roundhouse on the defendant's railroad and his general duties consisted in superintending the repairing of cars and engines used interchangeably in interstate and intrastate commerce. The work required both a day and a night shift, and as the men lived in a nearby town the plaintiff was required, in addition to his general duties, to convey both shifts to and from work on a gasoline motor car. On the evening in question he was returning to the roundhouse with the night shift when the motor car ran upon a cow lying on the track which could not be seen because of the darkness and the failure of the defendant to furnish proper headlights for the car. Among other injuries sustained by the plaintiff, a small stone about the size of a grape became imbedded in his skull, which caused severe pains in his head and finally led to the loss of sight in both eyes. It did not appear whether the crew on this particular evening were expected to engage in work on an engine or car used in interstate commerce or on one used in intrastate commerce. A suit for damages, brought under the state law, resulted in a verdict for the plaintiff in the sum of $20,000, from which the defendant brought error. The court affirmed the judgment, holding that the precise work in which the plaintiff was engaged at the time of the injury—namely, transporting workmen from their place of residence to the roundhouse of the company—was too remote from interstate commerce to be practically a part of it. St. Louis, I. M. & S. Ry. Co. v. True, — Okla. —, 176 Pac. 758 (1918).

III. Yard employees.

A. Car inspector.

In the case of Miller v. Grand Trunk Western R. Co., 201 Mich. 72, 166 N. W. 833 (1918), in which the court reviewed an award by the State Industrial Accident Board, under the Workmen's Compensation Act, of compensation in favor of the widow of a deceased employee of the railway company, the claim was based upon the fact of death caused by in-

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seeking to recover under the common law, or is seeking to recover under the act of Congress of April 22, 1908, as amended on April 5, 1910, entitled: "An Act Relating to the Liability of Common Carriers, by Railroad, to their employees in certain cases," commonly referred to as the Federal Employers' Liability Act, to the end that the defendant may assert its defenses given to it under either of said rights of recovery.

The defendant moves to strike from the said complaint the following matter:

I.

To strike the last four (4) lines of paragraph five (5) of said complaint upon the ground that the whole of said matter contained therein is a con-

jury sustained by the deceased while in the course of his employment he was inspecting and repairing an air hose on one of the employer's trains. In the proceedings before the court on review the defendant contended that the Industrial Accident Board had acted without authority of law, having no jurisdiction to entertain the claim because, as was alleged and not disputed, the train upon which the deceased was working at the time he was injured was an interstate train, so that the Federal Employers' Liability Act exclusively applied. The court sustained this contention, and the award appealed from was vacated.

B. Car repairers.

1. Passenger car in mixed service.

The plaintiff alleged that her intestate, a car repairer in the employ of the defendant railway company, had, while mounted on a ladder working upon a passenger coach, been thrown, with the ladder, to the cement floor and killed, as a result of the negligent moving of the coach. In the course of the complaint it was averred that the defendant at the time was engaged in carrying both interstate and intrastate passengers and freight, and that the car on which the deceased was working when the accident occurred was used in commerce of both classes, and had been brought to the shop for repairs a short time before the occurrence of the accident, with the purpose of preparing it for continued use in both classes of commerce. In a decision reversing an order of the circuit court directing the removal of the cause to a federal court, the court held that the liability of the defendant, under the statute of the state or under the Federal Employers' Liability Act, would "follow the proof" as to the class of commerce into which the car on which the deceased was working would have been placed, after the repairing. "If it turns out by the testimony that the car was to be forthwith turned to state service, then the state law fixes the rights and duties of the litigants. If it turns out that the car was to be forthwith turned to interstate service, then the act of Congress fixes the rights and duties of the parties." Cook v. Southern Ry. Co., 109 S. C. 377, 96 S. E. 148 (1918).

2. Freight car after interstate run.

See Defenbaugh v. Union Pac. R. Co., 102 Kan. 569, 18 N. C. C. A. 754, 171 Pac. 647 (1918).

3. Light repairs, cars of both classes.

In an application for a writ of review upon an award of compensation made by the Industrial Accident Commission, the question raised was whether or not the commission had jurisdiction to make the award, or whether the liability of the petitioning employer was governed by the Federal Employers' Liability Act. It appeared that the deceased em-

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clusion, and not a statement of fact, and is immaterial and redundant on that account.

II.

For the same reasons the defendant moves to strike the last five (5) lines of paragraph six (6) of said complaint.

III.

For the same reasons the defendant moves to strike the last eleven (11) lines from paragraph ten (10) of said complaint.

IV.

For the same reasons, and for the further reason that the alleged matter

ployee involved was a member of the repair gang employed by the petitioner to make light repairs upon cars sidetracked and detained upon tracks reserved respectively for inbound and for outbound freight traffic in the petitioner's yards. Such detention on the tracks mentioned was in part for the purpose of having the cars inspected for defects and in part to permit the making of such light repairs as might be necessary in order that the cars might be taken on to their destinations. "Light repairs" were made without moving the cars from their positions in the "cuts" or "drags" on the sidetracks, while "heavy repairs" were made by cutting out the cars and transferring them to tracks used especially for repair work. About 40 per cent of the traffic in the yard at that time was interstate business, while the rest was intrastate. The tracks, on which the cars repaired by the men with whom the deceased was working stood, were part of the system of switching tracks in the yards and were tracks essential in the movement of interstate as well as intrastate commerce. During the day the light repair men ordinarily repaired about 100 cars. The decedent's duties obliged him to pass from one car to another and from one track to another hunting out the cars that had been tagged by inspectors as requiring light repairs. He and his assistant, shortly before the accident, had released the air on a string of cars, some of which contained interstate freight, while others carried intrastate. While the deceased was crossing one of the switches he was killed by an empty freight car that was suddenly moved against him as the result of the kicking against it of another car. It did not appear whether the next car which would have been repaired by the deceased would have been loaded with interstate or with intrastate goods. Whether it would be loaded with one or the other would depend upon the sort of car that he should happen first to discover tagged for light repairs. It was held that the deceased when killed was working in interstate commerce, and so was within the operation of the Federal Employers' Liability Act. The character of the employment, the court said, seemed "to approach more nearly to that of a switch engineer, as a 'single and indivisible task,' than to that of a 'heavy repair' man, whose work might be properly characterized as a 'succession of separate tasks.'" Southern Pac. Co. v. Industrial Acc. Commission, — Cal. —, 175 Pac. 453 (1918).

Plaintiff was employed by the defendant as a car repairer in its yards. His repair work in general was done on freight cars which he said "went to other states and came from other states." On the morning in question plaintiff was bolting up a coupling on a car of the railroad which had been placed on the track for that purpose, when his foreman sent him out to another of defendant's yards to in-

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is argumentative, speculative, and has no proper place in the pleading, the defendant moves to strike from paragraph eight (8) all that portion, commencing with the words: "that if the defendant," found in the sixth line from the top of said paragraph, down to the word "avoided," found in the third line from the bottom of said paragraph eight.

V.

For the same reasons, last above asserted, the defendant moves to strike from paragraph nine (9) the first six (6) lines thereof.

The defendant demurs to the complaint of the plaintiff, served herein, upon the grounds:

spect incoming cars in place of the regular inspector. The foreman also told him that if he received any letters he was to take them to another repairer who would tell him what to do. This repairer told him that upon finishing his temporary inspection he was to get certain bolts and repair a certain car in the Twenty-Second Street yards, adding that it was a "rush car for Philadelphia." Doing as directed, plaintiff was going back with the bolts on his shoulder to repair the "rush car for Philadelphia," walking in the space between two railroad tracks, when he was hit from behind by an engine moving in the direction in which he was going. Affirming judgment for plaintiff in the sum of $7,847.39, the court held that he was engaged in interstate commerce. It was further held that the statement that there was a car of the Pennsylvania Railroad on the repair track, taken together with the order to work on a "rush car for Philadelphia" was sufficient in the first instance at least to meet the initial burden which was on the plaintiff to show that he was employed in interstate commerce. It then became the duty of the defendant to overcome it and show the contrary. The court also held that while the statement "rush car for Philadelphia" was hearsay, it was too late, on appeal, to raise the objection, no exception having been taken on the trial below. Central R. Co. of New Jersey v. Sharkey, — C. C. A. —, 259 Fed. 144 (1919).

4. Going to repair superior's house.

In the case of Walden v. Cumberland R. Co., 181 Ky. 100, 203 S. W. 854 (1918), the facts of which appear in the opinion rendered on a former appeal [Cumberland R. Co. v. Walton, 166 Ky. 371, 179 S. W. 245 (1915)], the plaintiff was a car repairer in the service of the defendant company, which operated a small railroad lying within the limits of a single county. He was struck and injured by the caboose of a freight train while he was walking along a path near the track on his way to the station for the purpose of boarding a train in order to go, under orders from his foreman, to the residence of an officer of the company for the purpose of making repairs on the latter's house. The case came before the court of appeals on appeal from a judgment for the defendant entered on a directed verdict at a second trial of the case, on an amended petition setting up that at the time of the occurrence of the injury the defendant was engaged and the plaintiff was employed in interstate commerce, so as to bring the case within the operation of the Federal Employers' Liability Act. In a decision affirming the judgment, the court, after observing that it was very doubtful if the railroad company was engaged in interstate commerce, held that, however that might be, it was clear that the plaintiff when injured "was not at the time employed by the company in interstate commerce, or

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(a) That the said complaint does not state facts sufficient in law to constitute a cause of action.

(b) That the said complaint is indefinite and uncertain in the following particulars:

I.

That it is alleged in paragraph four (4) that "plaintiff was in the orderly and regular discharge of his duties upon said doser, and engrossed in his duties," and it is not stated therein of what plaintiff's duties consisted, and in what duties plaintiff was engrossed.

II.

That it is stated in paragraph four (4) that said train was running at a

in a service so closely related thereto as to be a part thereof."

C. Car cleaners.

1. Filling passenger car water tank.

The plaintiff was a coach cleaner, and while he was filling one of the water coolers of a passenger coach by means of a hose which he had carried to the top of the coach, the hose parted, he was thrown to the ground and a freight train passing on a parallel track ran over one of his feet, crushing it so that it had to be amputated. The coach upon which the plaintiff was working at the time made an interstate journey during the day, returning to the starting point in the evening, when it was run onto a storage track and left to be cleaned for the next day's run. It appeared that the coach in question was permanently appropriated to interstate service and that it was merely stopped overnight to be put in order for a continuance of the interstate work the next day. The petition of the plaintiff contained two counts; the first pleading the Federal Employers' Liability Act, and the second based on common-law negligence. The trial court instructed the jury that no recovery could be had on the latter count, and from a verdict and judgment for the plaintiff, on the first count, the defendants appealed. The supreme court affirmed the judgment, holding that the plaintiff was at the time of the injury engaged in interstate commerce. Cassin v. Lusk, — Mo. —, 210 S. W. 902 (1919).

2. Cleaning empty foreign box car.

The deceased was engaged in cleaning a car standing on a track in a freight yard when his clothes caught fire and he received such burns that he died. The car on which he worked had recently come from Georgia to New York, been unloaded, and billed out empty on a home route card to Virginia. It was during a temporary suspension of its journey that the accident occurred, and the day following it was picked up and continued on a journey beyond the state. A proceeding under the Workmen's Compensation Law of New York resulted in an award for the claimant, which the court held should be reversed on the ground that the car was making an interstate journey at the time, so that the deceased, while cleaning it, was engaged in interstate commerce. Kinsella v. New York Cent. R. Co., 186 N. Y. App. Div. 856, 175 N. Y. Supp. 363 (1919).

3. Filling storage ice box.

The plaintiff was a car cleaner in one of the defendant's railroad yards, his duties being to clear the yard of papers and other refuse, and clean and ice cars, both interstate and intrastate. When the ice wagon arrived, the plaintiff and the other yard employees were required to go to the chute through which the ice came from the wagons

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"high and excessive speed," and it is not stated therein at what speed said train was running.

III.

That it is not stated what the duties of the plaintiff were, or consisted, at the time he claims he saw the train approaching him, and at the time he observed the brakeman on the front of said train, and it is not stated in what duties he claims he was at the time engrossed, as set forth in paragraph seven (7) of said complaint.

The defendant further demurs to the said complaint upon the ground that it is uncertain in this: That the allegations set forth in paragraphs four (4), five (5), six (6), and seven (7) are inconsistent, and in conflict with the alle-

to the yard. Their duty was to put a push car on the track, put the ice on it, push it to an ice box, and place the ice in the box. It was from this box that plaintiff in the course of his employment took the ice and put it on the cars as it was needed. On the day of the injury the plaintiff, in response to the call that the ice had arrived, went to the push car to aid in putting it on the track. While waiting by the belt line track for other employees to arrive, he turned to look at an engine approaching on the main track. At that instant he was struck by a switch engine running rapidly on the belt line track. But for the accident, the plaintiff in due course would have iced both interstate and intrastate cars, but the first to have been iced would have been one used in interstate transportation. An action was brought under the Federal Employers' Liability Act, and from a judgment for the plaintiff the defendant sued out a writ of error. In reversing the judgment the court stated: "It is immaterial that the plaintiff's last previous work may have been cleaning an interstate car, or that his next work would certainly have been icing an interstate car from the ice box. * * * He had entered upon the work of receiving ice from the chute and transporting it to an ice box. This work was too remote from interstate commerce to be regarded as a part of it." Southern Ry. Co. v. Pitchford, — C. C. A. —, 253 Fed. 736 (1918).

IV. Bridge and building employees.

A. Bridge gang.

1. Foreman with pile-driving car.

Plaintiff was foreman of a bridge gang which used a pile driver attached to a flat car. This flat car and other cars were at the time of the injury being pushed along the defendant's track, but when the flat car was opposite one of the doors of a coal chute which had been built too close to the track, the superstructure of the car was struck by it, causing a part of the pile driver to injure the plaintiff. An action for damages proceeded in part upon the theory of liability under the Federal Employers' Liability Act, but the court held that from the very meager evidence bearing upon the point of whether the plaintiff was engaged in interstate commerce, the conclusion must be drawn that he was not so engaged. Matthews v. Alabama Great Southern R. Co., — Ala. —, 76 So. 17 (1917).

2. Foreman going home on speeder.

The plaintiff's intestate was a foreman in charge of a building and bridge gang in the employ of the defendant railway company. Certain tiling, designed for use in replacing, from time to time, wooden culverts on the defendant's interstate railroad, had been shipped from a point in the state of Washington to a point in Idaho. It became the duty of the decedent and his gang, who were

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gations set forth in paragraphs eight (8), nine (9) and ten (10). All the allegations in the former are opposed to the allegations contained in the latter.

Answer.

Comes now the above named defendant, and for answer to plaintiff's complaint says:

Answering paragraph one (I) of plaintiff's complaint, the defendant, the Chicago, Milwaukee & St. Paul Railway Company, admits that it is a corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin, and engaged in operating a line of steam railway as a common carrier, for hire, of passengers, merchandise, live-stock and other personal property, by rail, between the city of Chicago, in the state of Illi-

equipped with a gasoline car, to unload the tiling. After finishing a day's work of unloading, the gang started to go home on the gasoline car, and on the way the deceased was killed in a collision with a freight train. In disposing of an appeal by the defendant from a judgment in the plaintiff's favor, the court held in part that the decedent was not, by virtue of the ultimate use in interstate commerce to which the tiling was to be put, engaged at the time of his death in interstate commerce. "As it seems to us," the court said, "the dominant thought underlying the question of whether in a given case an employee was or was not engaged in 'interstate commerce' is this: Would the performance of the act in which the employee was engaged directly and immediately tend to facilitate the movement of interstate commerce, or, conversely, would the failure to perform the act directly and immediately interfere with or hinder the movement of such commerce? In applying this test, the three essential factors to be considered are time, place, and intent. That is to say, Was the act which the employee was performing in point of time, place, and intent so directly connected with interstate commerce as to constitute an integral part of interstate transportation? If it was, the employee is entitled to the protection of the act. If not, he is not. * * * The unloading of the concrete tiles did not tend to facilitate interstate commerce, or, conversely, directly or immediately interfere with or hinder the movement of such commerce. It was work incident to the repair and upkeep of the road. It possessed the element ultimate intent, but it lacked the other essentials time and place. The record would not sustain a holding that the tiling or any other considerable part of it was to be used immediately or within a reasonable time. It was to be used as needed for replacements, and was being stored for such future use. * * * The intended use of material is not a certain test, and, although the tiling may have been thereafter actually placed in the roadbed, it would not follow that the act of unloading was directly or immediately connected with interstate business." The court added that the plaintiff was not entitled to a favorable decision upon a contention that because the tiling had been shipped from another state it was, when unloaded by the deceased and his gang, still "impressed with an interstate character," having been unloaded "a very short time after its arrival," and that the unloading was therefore a part of interstate transportation. On this point the fact that the tiling had arrived only a short time before unloading did not, it was said, affect the case. "If the movement had ended and the thing transported were left ready for other movement by other hands, the element of lapsing time could not affect the rule one way or the other." The judgment that had been entered for the plain-

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nois, and the city of Seattle, in the state of Washington; and that the said defendant was engaged in running and operating locomotives, freight trains and passenger trains in the transportation of interstate commerce from points in the states of Idaho, Montana, South Dakota, Minnesota, Wisconsin, Illinois and other states to points in the state of Washington, and from points in the state of Washington to points and towns and cities in other states.

But defendant denies that it was or is engaged exclusively in interstate commerce, and alleges the fact to be that it was at said time, and all the times mentioned in plaintiff's complaint, engaged in interstate commerce and intrastate commerce, and, in fact, was doing many things connected with the operation of its railroad which were not in any respect interstate commerce, but pertained solely to matters outside of any commerce, whatsoever, of commerce moving between the states.

tiff was reversed, with instructions that the action be dismissed. Morrison v. Chicago, M. & St. P. Ry. Co., 103 Wash. 650, 175 Pac. 325 (1918).

3. Cook in charge of camp cars.

Plaintiff was employed by the defendant railroad company as a "carpenter laborer," in connection with a gang of bridge carpenters. His principal duties were to take care of the camp car, and to do the cooking while the bridge carpenters were engaged in repairing a bridge abutment supporting tracks used in interstate commerce. The plaintiff, while in the camp car cooking dinner for the carpenters and himself, was injured as the result of a collision caused by the negligent running of an engine on the sidetrack on which the camp car was standing. The state court held that the plaintiff when injured was engaged in interstate commerce, and that a recovery allowed under the Federal Employers' Liability Act should be affirmed. This judgment the Supreme Court of the United States upheld, saying, after stating the facts as above: "As thus stated, the relation of plaintiff's work to the interstate commerce of his employer would seem to be rather remote. But upon a closer examination of the facts the contrary will appear. Taking it to be settled by the decision of this court in Pederson v. Delaware, Lackawanna & Western R. R. Co., 229 U. S. 146, 152 [3 N. C. C. A. 779], that the repair of bridges in use as instrumentalities of interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it, it of course is evident that the work of the bridge carpenters in the present case was so closely related to defendant's interstate commerce as to be in effect a part of it. The next question is, what was plaintiff's relation to the work of the bridge carpenters? It may be freely conceded that if he had been acting as cook and camp cleaner or attendant merely for the personal convenience of the bridge carpenters, and without regard to the conduct of their work, he could not properly have been deemed to be in any sense a participant in their work. But the fact was otherwise. He was employed in a camp car which belonged to the railroad company, and was moved about from place to place along its line according to the exigencies of the work of the bridge carpenters, no doubt with the object and certainly with the necessary effect of forwarding their work, by permitting them to conduct it conveniently at points remote from their homes and remote from towns where proper board and lodging were to be had. The circumstance that the risks of personal injury to which plaintiff was subjected were similar to those that attended the work of train employees generally and of the bridge workers themselves when off duty, while not without significance, is of little moment.

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Further answering paragraph one (I), defendant denies that during all of the time, or at any time, mentioned in plaintiff's complaint, plaintiff was a resident or citizen of the state of Washington, residing at Lavista, in the state of Washington, or at any other place in the state of Washington.

Further answering paragraph one (1), the defendant admits that the main line of its railway runs in and through the county of Shoshone, in the state of Idaho, and that said defendant maintains ticket offices and stations in said county of Shoshone, state of Idaho.

II.

Answering paragraph two (II) of plaintiff's complaint, the defendant admits that on or about the 16th day of February, 1915, the plaintiff was an

The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. If, instead, he had brought their meals to them daily at the bridge upon which they happened to be working, it hardly would be questioned that his work in so doing was a part of theirs. What he was in fact doing was the same in kind, and did not differ materially in degree. Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act.'' Philadelphia, B. & W. R. Co. v. Smith, 250 U. S. 101, 63 L. Ed. 869, 39 Sup. Ct. 396 (1919), aff'g 132 Md. 345, 103 Atl. 945 (1918).

4. Member of crew unloading tile.

A carload of tiling was transported from one state into another and taken into the yards of the defendant railway company, where it was switched from one track to another, for the purpose of being unloaded and stored. Whether the tiling was afterwards to be used by the defendant, and if so, when and where, did not appear. The plaintiff, a member of a bridge gang in the employ of the defendant, was injured while assisting in the unloading. He brought suit, declaring under the Federal Employers' Liability Act. On appeal from a judgment in his favor the supreme court, in the course of a decision reversing the judgment and remanding the case, held that the interstate movement of the car containing the tiling had terminated before the plaintiff attempted to do work in connection with the unloading, and that therefore when injured the plaintiff was not employed in interstate commerce, and recovery under the federal law could not be sustained. Southern R. Co. v. Maxwell, 117 Miss. 62, 77 So. 905 (1918).

B. Painter going for supplies.

Plaintiff's decedent was one of a gang of painters engaged in painting various structures on the line of the defendant, an interstate railroad. The supply of paint had become exhausted and the deceased had been sent on a three-wheeled hand car, called a ''speeder,'' to get an additional supply. On his return he was overtaken by a fast interstate train, and while attempting apparently to remove the speeder was struck, either by the pilot beam of the engine or by having the speeder driven against him, and killed. A proceeding under the Workmen's Compensation Act having been instituted, an award of $573.20 was made, from which the defendant brought error after the same had been confirmed both by the Industrial Board and the circuit court. The court affirmed the judgment, holding

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employee of the defendant, and that on or about the said date, while the plaintiff was in the employ of said defendant, said plaintiff was injured.

The defendant denies that at said time, or prior thereto, or at any time, the plaintiff was engaged in working upon the tracks or bridges, or upon any track or bridge, of the defendant, which were used in interstate commerce or in keeping in a proper state of repair or improvement such interstate lines, or any interstate lines, or in keeping the same in proper condition, during such use or any use.

III.

Answering paragraph three (III) of plaintiff's complaint, defendant denies that at the time of the alleged accident or injury to the plaintiff, or on

that the attempt of the deceased to remove the speeder, which was an obstruction to interstate commerce, did not bring him within the federal act. The court said: "It is the employment that determines whether or not the injury to the employee is within the purview of that act, and not the act of the employee just at the time of his injury. The employment of the deceased was in painting, * * * and not in removing the speeder or an obstruction from in front of said train." Jackson v. Industrial Board of Illinois, 280 Ill. 526, 117 N. E. 705 (1917).

C. Plumber making repairs on depot.

The husband of the plaintiff was a plumber employed in the maintenance of ways department of the defendant railroad. At the time of his death, he was engaged in inspecting and repairing pipes which constituted a part of the plumbing apparatus beneath one of the defendant's stations. While thus employed he had occasion to cross the tracks in front of the station, was struck by an engine, and killed. A proceeding under the Workmen's Compensation Law having been instituted and an award made by the Industrial Commission, the defendant appealed. The court reversed the award and dismissed the claim, holding that the plaintiff's decedent was engaged in interstate commerce at the time of his death. The court said: "The stations actually in use in the carrying on of interstate commerce are clearly instrumentalities of such commerce, and it is necessary to their proper maintenance that the plumbing should be kept in repair. The position of Vollmers [the deceased] was not merely of a plumber called in to do an incidental job; he was in the employ of a department of the corporation devoted, not to the construction, but to the maintenance of ways, and this required him to be in and about the railroad properties generally, doing such repairs as were needed, whether in the station houses or outside of them." Vollmers v. New York Cent. R. Co., 180 N. Y. App. Div. 60, 167 N. Y. Supp. 426 (1917).

D. Carpenters.

1. Repairing coal pockets.

The deceased was a carpenter in the general employ of the defendant company, and at the time he met his death was repairing its coal pockets on a sidetrack, coal from the pockets being used from time to time for locomotives used in either interstate or intrastate commerce as desired. A proceeding under the Workmen's Compensation Act resulted in an award in favor of the plaintiff from which the defendant appealed. The court affirmed the award, holding that the plaintiff's decedent was not engaged in interstate commerce at the time of his death. Gallagher v. New York Cent. R. Co., 180 N. Y. App. Div. 88, 167 N. Y. Supp. 480 (1917).

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or about the 16th day of February, 1915, or at any time, the plaintiff was engaged in employment on the main line track, or any track, of the defendant railway company, extending from said city of Seattle, Washington, to the said city of Chicago, Illinois, and between the town of Lavista, Washington, and Ewan, Washington, over which said tracks the defendant was, or for a long time prior thereto had been, daily operating locomotives, hauling interstate passenger trains or interstate freight trains.

Further answering paragraph three (III), the defendant admits that the plaintiff at the time of the alleged injury was in charge of a machine called a doser machine or dirt spreader, but denies that said machine was used in connection with the spreading of gravel or dirt, or used by the defendant in the improvement of its bridges or tracks.

2. Building forms for concrete walls.

The plaintiff was a carpenter employed by the defendant to assist in elevating the roadbed of its interstate line by building forms on the margins of the right of way into which concrete was to be poured for the purpose of forming retaining walls. The forms were to be removed after the concrete set and the space between the walls was to be filled with material upon which the elevated tracks would rest. While the plaintiff was at work sawing a timber, the wind blew the dust into his left eye so as to injure the sight and cause a temporary total incapacity. A proceeding under the Workmen's Compensation Law having been instituted, the plaintiff was awarded $143.55 for compensation and $67 for medical attention. The circuit court affirmed the award, and a writ of error was sued out to review that judgment. The court affirmed the judgment, holding that the work of the plaintiff had no connection, even remote, with interstate transportation, saying: "It was preliminary to the erection of a structure which might eventually form a part of a roadbed used in interstate commerce. The forms were not instrumentalities of interstate commerce, and the retaining walls, which had not yet been built, could not be such instrumentalities until the filling which they were to retain and upon which the tracks were to rest had been deposited in place." Dickinson v. Industrial Board of Illinois, 280 Ill. 342, 117 N. E. 438 (1917).

E. Tunnel workers.

The deceased was working in a tunnel of the defendant railroad when struck by one of its trains. It appeared that the tunnel was not used in the business of interstate commerce. A suit under the Federal Employers' Liability Act resulted in a nonsuit, from which the plaintiff appealed. The court affirmed the judgment, holding that the deceased was not engaged in interstate commerce at the time of the accident. Tilli v. Philadelphia & R. Ry. Co., — Pa. —, 107 Atl. 330 (1919).

Plaintiff was a laborer employed by the defendant in the construction of a tunnel to shorten the main line of its interstate railroad. The tunnel had not yet been completed, when the pick of the plaintiff struck a charge of dynamite which, through the defendant's negligence, had not been removed. The resultant explosion caused plaintiff to sustain serious injuries. From a judgment for the defendant, dismissing the petition, the plaintiff brought error, but the circuit court of appeals affirmed the judgment. A writ of error to the Supreme Court of the United States having been sued out, that court affirmed the judgment, holding, in so doing, that the plaintiff was not engaged in interstate commerce at the time of the accident. As the court pointed out, the tunnel was at the time only partially bored, and consequently was not then in use as an instrumentality of commerce, interstate or otherwise. Raymond v. Chi-

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Denies that, at the time of the alleged injury to the plaintiff, the plaintiff had been engaged under the direction of the defendant, or at all, in filling a bridge designated as No. E E 140, or any bridge.

Admits that said bridge No. E E 140, and the railroad track on both sides thereof, had for several years prior to the 16th day of February, 1915, been used by the said defendant in interstate commerce.

Denies that the defendant was engaged in filling said bridge, or any bridge, on its main line track, or any track, with dirt or gravel or at all. Denies that the defendant hauled, or caused to be hauled, or moved at all, the gravel, or any gravel, to the bridge, or any bridge, by trains or gravel cars from a point on its line westerly, or from any point, from the place where the plaintiff was working.

cago, M. & St. P. R. Co., 243 U. S. 43, 61 L. Ed. 583, 37 Sup. Ct. 268 (1917).

F. Other laborers.

1. Excavating for new bridge.

The deceased was an employee of the defendant engaged in the construction of a cut through a fill approaching a bridge, on the defendant's interstate road, which was about to be removed to make place for a new one. The cut was to make a place for a wooden bent, which, with another on the north side of the abutment, was to hold up the track and bridge while the abutment was removed and another permanent structure built in its place. While the deceased, with others, was engaged in removing dirt from the fill, a large portion of it fell upon him, causing his death. An action under the Federal Employers' Liability Act resulted in a judgment for the plaintiff, from which the defendant brought error. The court affirmed the judgment, the parties admitting, and the court finding, that the deceased was engaged in interstate commerce. Cincinnati, N. O. & T. P. R. Co. v. Hall, 155 C. C. A. 606, 243 Fed. 76 (1917).

2. Building warehouse.

In the case of Matti v. Chicago, M. & St. P. Ry. Co., — Mont. —, 176 Pac. 154 (1918), the plaintiff sought recovery against the defendant railway company, his employer, on account of injury to his foot caused by the fall upon it of a brick which escaped from an alleged defective brick-carrying device being used by a fellow employee, while the plaintiff was working with a wheelbarrow removing the bricks from a car on a spur track to a point near a new warehouse of the company that was under construction. The warehouse at the time was not, apparently, being used in any way by the defendant. It was not completed until 2 or 3 months after the accident. To bring himself within the Federal Employers' Liability Act the plaintiff alleged that at the time of the injury the company was engaged in interstate commerce, and that he was employed in such commerce. The latter allegation was put properly in issue, the trial court granted a motion for nonsuit, and from an order denying a new trial the plaintiff appealed. In a decision sustaining the trial court, it was held that the allegation in question was not supported by the evidence. The court among other authorities cited the case of New York Cent. R. Co. v. White, 243 U. S. 188, 61 L. Ed. 667, 13 N. C. C. A. 943, 37 Sup. Ct. 247 (1917), in which it was held that the admitted fact that a new station and tracks were designed for use, when finished, in interstate commerce, did not bring the case within the federal act so as to make the act applicable to the suit of a watchman injured while guarding tools and material intended to be

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Denies that it was the duty of the plaintiff, in operating the said doser or dirt spreader, after gravel cars had dumped the gravel, or any gravel or dirt alongside the track, to operate the said doser along the track for the purpose of spreading out the gravel or any gravel on each side of the defendant's said track, or any track.

Admits that the said doser or dirt spreader had wings on either side which were adjustable.

Further answering paragraph three (III), the defendant states that it has no information and belief as to whether or not, at the time of the alleged accident and injury to the plaintiff, the said doser or dirt spreader was near the west end of the bridge above referred to, and the gravel was being brought from a point westerly of said bridge, and therefore by reason of the lack of said information the defendant denies that, at the time of the alleged accident

used in the construction work, which was still in progress.

V. Track laborers.

A. Unloading discarded ties.

A member of a crew of workmen, employees of the defendant electric railway company, was working with the crew in moving a quantity of old and worthless ties from a place where they had been thrown beside the track to a fill at another point on the line. At the latter point there had formerly been a trestle, but this had been replaced by a fill composed of ties, cinders, ashes and other refuse taken from different places on the road. The company had continued, afterwards, to dump on the sides of this fill similar discarded material for the purpose, as was contended in the action, of strengthening the fill. The company contended, however, that the purpose of dumping this matter was not to strengthen the fill, but simply to dispose of the material. The employee in question, with the rest of the crew, loaded a truck with worn-out ties from the place indicated, and ran the truck out on the fill in order to throw the ties out upon the side of the fill. While helping the others in the work of unloading he sustained in some way injuries which subsequently resulted in his death. The tracks supported by the fill were used, admittedly, in carrying interstate trains. At the trial of an action brought by the injured employee under the Federal Employers' Liability Act a verdict and judgment were had by the plaintiff in the sum of $10,000. The employee's death occurred after judgment, and the administrator became the appellee in an appeal which the defendant prosecuted to the court of appeals. The evidence being in conflict upon the issue as to the purpose of dumping material on the fill, and the court being of opinion that the evidence was sufficient to support a finding that the purpose of dumping was to strengthen the fill, it was held that the judgment should be affirmed. The court said in part: "We think there can be no doubt about the proposition that, if these old ties were being thrown over the embankment for the purpose of strengthening or making it safer for use in interstate transportation, Brumfield [the deceased employee], when injured, was engaged in such transportation, or in work so closely related to it as to be practically a part of it. It is not indispensable that the employee should be engaged in interstate transportation in the sense that he was assisting in the operation of a train engaged in such commerce, or in the repair of trains, fixtures, appliances, or tracks, the repair of which was at the time indispensable or necessary in the conduct of the interstate transportation business.* * * Plainly an employee performing service in connection with the track, or the embankment on which the track is laid,

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or injury to the plaintiff, the said doser or dirt spreader was near the west end of the bridge above referred to, or that the gravel, or any gravel, was being brought from a point westerly of said bridge, or from any place.

Further answering paragraph three (III) the defendant denies that the said train was hauling gravel, and denies that said alleged train or train crew thereof were under the supervision or control of the plaintiff, or that the plaintiff had authority or supervision over said employees on said train.

Denies that the plaintiff did advise or direct the said employees as to the points where [he] desired dirt or gravel to be dumped.

Admits that the machine called a doser was constructed upon wheels and ran along the said track, and was so constructed that it could be coupled to one of the gravel cars.

Denies that it was the duty of the employees of the defendant, in charge

is engaged in work so closely related to interstate transportation as to be practically a part of it.'' Ohio Valley Elec. Ry. Co. v. Brumfield's Adm'r, 180 Ky. 743, 203 S. W. 541 (1918).

B. Unloading new ties.

The plaintiff, a section hand, while assisting in unloading a car of railroad ties, severely injured his hand. The ties in question were designed for the repair of the main track of the defendant's interstate railroad, and came from a point without the state. They were billed, however, to an agent of the defendant within the state who had charge of their distribution, and he merely amended the original bill of lading in red ink so that the car would go to the place where the ties were finally unloaded. To assist the work of unloading, one end of a tie was placed on the cross brace underneath the car and the other rested on the ground. When a tie was thrown out of a car, one end of it would fall upon this crosstie. A part of the section crew was in the car, throwing out ties, and the other part was outside, receiving and piling them. The plaintiff stood next to the crosstie and handled that end of the ties. He had his hand on one tie and was just about to move it when another was thrown from the car, fell about 8 feet, and struck his hand. An action under the Federal Employers' Liability Act resulted in a verdict and judgment thereon in favor of the plaintiff in the sum of $2,500, from which the defendant appealed. The court affirmed the judgment and held that the plaintiff was within the federal act, not only because the work of unloading the ties was so closely connected with the repair of an interstate railroad as to be a part of it, but also because the interstate character of the shipment of ties did not end at the time of their reconsignment but continued to the place of unloading. Godby v. Wilson, 203 Ill. App. 612 (1916).

C. Stacking new ties pending use.

The plaintiff was a section hand, and at the time of the injury was helping to stack on the right of way creosoted pine ties which had been unloaded that morning from cars and thrown beside the track. These ties were to be left in their stacked condition until needed at some future time, when they would be loaded on a push car and transported to some place on that branch for repair of the defendant's interstate track. The plaintiff and the assistant foreman picked up one of the ties, but due to the latter suddenly allowing his end of the tie to fall, the plaintiff was seriously and permanently injured. An action for damages resulted in a verdict for the plaintiff, from which the defendant appealed on the ground, partly, that the plaintiff was engaged in interstate commerce. The court affirmed the judgment, however, holding

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of the gravel train, or in charge of any gravel train, or of any train, before dumping the said gravel, or any gravel, to couple the said train on to the doser or to push the said doser back along the rails of the railroad, or that the defendant provided brakemen for that purpose, or that the plaintiff had authority or responsibility in connection with the coupling of the said doser on to the said train or the operation of said train, to advise the employees of the defendant on said train, as to where he desired the gravel to be dumped.

IV.

Answering paragraph four (IV), the defendant denies that about eleven o'clock on the said 16th day of February, 1915, or at any time, or while the plaintiff was in the orderly or regular discharge of his duties, or in the dis-

that the plaintiff's connection with interstate commerce was too remote to bring him within the federal enactment, though the ties which were handled at the time were subsequently used to repair an interstate track. Missouri, K. & T. Ry. Co. of Texas v. Watson, — Tex. —, 195 S. W. 1177 (1917).

D. Removing old and setting new ties.

The plaintiff, employed as a section boss on the defendant's road was ordered by the roadmaster to repair a spur track which was used in both interstate and intrastate business, in order that a freight train, which was then in the block, could pass over it. The repairs consisted in taking out rotten ties and replacing them with large switch ties, weighing approximately 400 pounds. Insufficient help was furnished, and in order to perform his duties the plaintiff had to lift one of the ties himself and carry it to the spur track. In doing so, he stumbled and fell, with the tie upon him. He sued for damages under the Federal Employers' Liability Act, and from a judgment on a verdict in his favor in the sum of $700, the defendant appealed. The court affirmed the judgment, holding that the plaintiff was engaged in interstate commerce, as he was engaged in the repair of a track which was used at least partially in the transportation of goods to other states. Cherry v. Atlantic Coast Line R. Co., 174 N. C. 263, 93 S. E. 783 (1917).

E. Loading rails.

1. Intended use not shown.

Kusturin v. Chicago & A. R. Co., 287 Ill. 306, 122 N. E. 512 (1919), was an action under the Federal Employers' Liability Act for injuries sustained by the plaintiff, a laborer, while helping load onto a flat car steel rails which plaintiff and others had 2 weeks before removed from the track to make place for new ones. At a certain command from the foreman the rails were hoisted overhead, and at another signal were thrown onto the car. One end of the rail causing the injury was thrown too soon, causing it to fall. Plaintiff attempted to jump back but caught his heel on a tie with the result that the rail fell on his instep, crushing it badly. There was no evidence that the rails, as they lay after being removed, in any way interfered with the operation of the trains, nor as to what was to be done with them after being loaded on the car. During the forenoon of the day of the accident, plaintiff was tamping the ties and loading the old rails onto a flat car. During the afternoon, when he was injured, his work was solely that of loading rails. The declaration charged that at the time of the accident in suit both defendant and plaintiff were engaged in interstate commerce, and that the injury was received through the negligence of fellow-servants. A second count charged, in addition, that the injury was received through the negligence of a vice-principal—

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charge of any duties or duty, upon said doser, or engrossed in his duties, or at all, the defendant, or its employees, in charge of said gravel train, carelessly or recklessly or negligently, or at all,. operated the said locomotive engine or gravel train, or any train, over or upon said track, or any track, or at such a high or excessive speed, or at any high or excessive speed, as to run the said train into the said doser upon which the plaintiff was then in the alleged orderly or regular discharge of his duties, or in the discharge of his duties, or any duties, or to strike the said doser with great or unusual force, or any force, or thereby knocking the plaintiff off of said doser or in between the said gravel cars or the doser; or drag the said plaintiff over said rails or ties or dirt alongside thereof, or any rails or ties or dirt; or injured the plaintiff as hereinafter alleged, or in any manner or at all.

to wit, the foreman. A judgment for the plaintiff for $3,321.80 was affirmed by the appellate court. The supreme court, reaffirming the judgment, held that the plaintiff was engaged in interstate commerce, saying: "The work of loading these old rails, while not the actual work of bolting in new rails, was yet a part of the cleaning-up process made necessary by putting in new rails," and so was a part of the general work of repairing the track. "This case is therefore to be distinguished," it was observed, "from those cases where the employment is changed from work which is a part of interstate commerce to that which is a part of intrastate commerce."

2. To place in storage.

In an action by a section hand against his employer, the railroad company, to recover on account of injuries to his leg which was struck by the end of a loose railroad rail negligently dropped by fellow employees, the evidence tended to show that the entire gang with which the plaintiff was working consisted of thirty to forty men under one boss, but that the particular tasks of different groups of the men were various. Some were employed in taking up old rails from the track and replacing them with new ones. The men doing this work laid the old rails at the side of the track as they took them up. The plaintiff, with seven other men under an assistant foreman, was engaged in removing the discarded rails from the point at which they had been laid by the other workmen, and placing them on a push car on which they were moved some thirty yards to the tool house, where they were deposited. The rails were to be conveyed later to another point within the state, and were not to be used again in the road. Plaintiff and his companion went with each load to the tool house and there unloaded the rails. The injury occurred during the unloading of a rail. On appeal by the plaintiff from a judgment in the defendant's favor, the court, considering the facts upon the assumption that the gang of eight men of which the plaintiff was one were all engaged in moving rails already detached, and that none of them had anything to do with detaching rails from the track or putting new ones into the track, said: "The concrete questions at this time are: Was the plaintiff, at the time he was injured, employed in the doing of anything which tended to facilitate the movement of commerce from one state to another? Was the instrumentality upon which he was employed calculated, in any manner, directly to contribute to or be in aid of commerce between two or more states? In the light of the adjudicated cases construing the act of congress, as we read them, these questions must be answered in the negative. If the plaintiff had been engaged in repairing a track admitted or proven to be an interstate track, and what he was doing tended to

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V.

Answering paragraph five (V), defendant denies that at the time of the alleged injury, the engine which was being operated by the defendant was pushing a large number of dump gravel cars, or any dump gravel cars, about twenty-five (25) in number, or any number.

Further answering said paragraph five (V), the defendant admits that in the train crew operating said train there was an engineer, fireman, conductor, and two brakemen.

Denies that it was the duty of the defendant in operating its said train to have one of its employees upon the front of said train, as it was being pushed along said track, in order to keep a proper lookout, or any lookout, or to give proper or adequate signals of warnings, or any signals of warnings.

facilitate transportation from one state to another, in our judgment, he would have been engaged in interstate commerce. But here he was not engaged in repairing the track rendering it more capable of carrying commerce. If he and his fellow workmen carrying the rail had not removed it at all from the side of the track where it had been laid by those repairing the track, transportation on the road, so far as the record discloses, would have been just as effectual and commerce could have been carried on without interruption. The old rails might have lain upon the side of the track for an indefinite length of time without inconvenience to interstate travel or transportation. * * * We feel compelled to find that appellant was not engaged in interstate commerce at the time he received the injury,'' The judgment was affirmed. Subsequently, in disposing of an application for rehearing, the court accepted a modified interpretation of the facts, offered by counsel, to the effect that the eight men composing the gang to which the plaintiff belonged were in fact in charge of the principal foreman and that two of the eight men detached from the track the rail that fell upon the plaintiff, and laid it to one side, afterwards also assisting the other six men in moving it to the place at which it was deposited. The court held, however, that the facts as thus modified remained insufficient to support a finding that the plaintiff when hurt was engaged in interstate commerce, and the petition for rehearing was denied. Perez v. Union Pac. R. Co., — Utah —, 173 Pac. 236 (1918).

The plaintiff was a member of a crew operating for the defendant a work train being used in picking up rails that had been taken from the defendant's tracks and removing them to sidetracks. The particular work of the plaintiff was the operation of the loading machine, or hoisting device, with which the train was equipped. The approach of a passenger train caused the conductor of the work train to switch rather hastily from the main line to a sidetrack. The plaintiff, after fastening the boom of the loader, found that he would not have time to gain the caboose, in which he would have chosen to ride while the switching was being done, and he therefore took a position on one of the flat cars which carried steel rails. It was customary to use on the flat cars standards a few inches high at each side to keep the rails from falling off. On the side of the car at which the plaintiff got upon it no standards had been placed. The motion of the train caused some of the steel rails to fall off, endangering the life of the plaintiff, who, under the impression that it was necessary to jump in order to save his life, jumped from the car. In thus alighting he struck his head against some object and was injured. An appeal by the plaintiff from a judgment on a verdict directed for the defendant raised the question whether the case

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Denies that it was the duty of the defendant to further have a second brakeman between the front brakeman and the engineer, to transmit the signals, or any signals, by the brakeman on the front of the train to the engineer.

Admits that there was a brakeman on the front car, which was being pushed by the said engine, but denies that the remaining employees upon said train were in the cab of the engine, or there was no brakeman between the said front brakeman and the engine.

VI.

Answering paragraph six (VI) of said complaint, the defendant denies that the said train was being pushed or propelled over said track at a high or

was subject to the Federal Employers' Liability Act, together with the additional question whether under the federal act the plaintiff assumed the risk of such an accident as that which caused his injuries. Upon the first question, the court held, against the contention of the plaintiff, that the work being done by the men operating the work train was not subsequent to, and separate from, the work of "repairing the said track," but constituted a part of the repairing, so that, the track being used in interstate commerce, the plaintiff at the time in question was "engaged in interstate commerce, or in aid or furtherance thereof," within the meaning of the Federal Employers' Liability Act. The court expressed itself as relying definitely upon the authority of Pederson v. Delaware, L. & W. R. Co., 229 U. S. 146, 57 L. Ed. 1125, 3 N. C. C. A. 779, Ann. Cas. 1914 C 153, 33 Sup. Ct. 648 (1913), and cases following that decision. In the course of its decision upon the point in question, the court said: "It stands to reason that appellee's [defendant's] railroad could not long be safely and properly operated if the steel rails which had been removed from the track when others were being put down had been permitted to remain on and about appellee's track, and interfere, which they naturally would, with the proper upkeep and repair of such track, and perhaps would render it unsafe, not only for the proper operation of appellee's trains thereover, but also might endanger employees engaged in the necessary and proper upkeep and repair of such track. We believe that what appellant was doing on the occasion in question must be held to be in the nature of repairs to appellee's tracks." The judgment was reversed and the cause was remanded. Hargrove v. Gulf, C. & S. F. Ry. Co., — Tex. Civ. App. —, 202 S. W. 188 (1918). A rehearing was denied.

3. To use in repairing track.

Plaintiff was a member of a gang employed by the defendant in loading steel rails. He was injured by the turning or rolling of a rail against and upon his foot and ankle, while with other members of the gang he was engaged in removing rails from a stack near the track, and loading them onto a car which was to carry them to another point, the identity of which was not clear, although the plaintiff himself testified that he had been informed by the foreman that the rails were to be used in making repairs on the main line. Evidence from certain other employees, taken in connection with the testimony of the plaintiff, tended to show that the rails were intended to be, and in fact afterwards were, distributed along the line, to be used in repairing the tracks, which admittedly were used in interstate commerce. The trial court directed a verdict for the defendant, on the ground that the work the plaintiff was doing at the time of the accident did not constitute interstate commerce, and was not in fur-

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negligent or excessive rate of speed, or any high or negligent or excessive rate of speed, or a speed of 10 miles an hour, or at any such speed whatsoever.

Defendant denies that any speed, or speed in excess of 4 miles an hour, would have been or was unreasonably high or dangerous, or high, or dangerous; and denies that it was the practice or custom of the defendant or its employees to approach said bridge at a slow rate of speed, or speed not to exceed 4 miles an hour.

VII.

Answering paragraph seven (VII) of said complaint, defendant admits that the plaintiff saw the train approaching some distance away, and observed the front brakeman on the front of said train; but denies that said plaintiff

therance of interstate commerce. A judgment on the verdict so directed was reversed by the court of appeals, which held that while the evidence was "not altogether satisfactory" upon the issue as to which branch of commerce the plaintiff was engaged in when hurt, there was sufficient evidence to make upon that issue a question for the jury, so that it was error on the part of the trial court to direct a verdict. Probus v. Illinois Cent. R. Co., 181 Ky. 7, 203 S. W. 862 (1918).

F. Unloading new rails.

Reed v. Dickinson, — Iowa —, 169 N. W. 673 (1918), was an action under the Federal Employers' Liability Act for injuries sustained by the plaintiff while he was helping unload steel rails from a flat car along the main interstate line of the defendant's railroad. The rails when unloaded and distributed were to be placed in the track in substitution for old rails that were being removed. From a judgment for the defendant on a directed verdict the plaintiff appealed, and the supreme court reversed the judgment on the ground that the work of the plaintiff at the time of the injury was so closely related to interstate transportation as to be practically a part of it.

G. Shoveling snow from track.

While plaintiff's decedent, a section man in defendant's service, was shoveling snow between the westbound track and a platform near the intersection of the tracks with a certain street, he was struck and killed by a passenger train proceeding northerly on the westbound track. The tracks at this point were used for transporting both interstate and intrastate commerce. A proceeding was brought for compensation under the New York Compensation Law and an award was affirmed by the appellate division. The court of appeals having denied an appeal, the defendant brought the case by a writ of error to the United States Supreme Court which reversed the judgment, holding that the deceased when killed was employed in interstate commerce and that the state statute did not apply. New York Cent. R. Co. v. Porter, 249 U. S. 168, 63 L. Ed. 536, 39 Sup. Ct. 188 (1919).

Koofos v. Great Northern Ry. Co., — N. D. —, 170 N. W. 859 (1918), was an action under the Federal Employers' Liability Act by a laborer employed by the defendant to shovel snow and fix snow fences along its track. Two toes on one foot were amputated and other permanent injuries sustained as a result of his feet becoming frozen while at work. From a verdict and judgment for $2,295, defendant appealed on several grounds, one of which was that the plaintiff was not at the time of his injury engaged in interstate commerce. This contention, the court held, was without merit, as all pas-

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relied upon said defendant or its employees to proceed cautiously, or with due care or at all, in performing their duties or any duties to the plaintiff; or that the plaintiff was in plain sight, or could be seen upon said doser, or where his duties required him to be.

Denies that plaintiff proceeded with the performance of his duties, or became engrossed therein, or was examining or looking at the said bridge for the purpose, or at all, of ascertaining where the load should be dumped, or was examining to see that the said doser was in proper position; and denies that the said train approached the said doser or ran into it, or bumped the said doser at the alleged unusual or excessive speed, or any unusual or excessive speed, or with such great or unusual force, or any great or unusual force, or any force, as to jar or knock the plaintiff off of said doser, or between the wheels of said doser, or the wheels of said gravel cars, as hereinbefore alleged, or alleged at all, or injured plaintiff.

senger trains on that part of the line were interstate trains and plaintiff was engaged in clearing a track over which an interstate train passed the following morning. The judgment was affirmed.

H. Foreman shot by employee.

The plaintiff's decedent, a foreman of a section crew on the defendant's interstate railroad, had under him a Mexican of troublesome disposition who was regarded as a dangerous man. The deceased dismissed the man in question at one time, but the deceased's superiors had him reinstated, and although they were told of his nature and the possibility of trouble if he was retained, the deceased was told to keep the Mexican at work and that the company would protect the crew and see that no harm came as a result. The Mexican finally stabbed the husband of the plaintiff and so caused his death. An action under the Federal Employers' Liability Act resulted in a judgment for the plaintiff in the sum of $22,460, from which the defendant appealed. The court reversed and remanded the case, holding that the federal act provided a remedy only where an employee was killed or injured from a cause incidental to or arising out of railroad employment, and that under the facts of the present case the assault was not within the scope of the Mexican's employment, nor in furtherance of the defendant's business. Roebuck v. Atchison, T. & S. F. R. Co., 99 Kan. 544, L. R. A. 1917 E 741, 162 Pac. 1153 (1917).

I. Going to or from place of work.

1. On hand car or speeder.

a. Private spur track.

Plaintiff's decedent was employed by the defendant as a common laborer, and he with other laborers was running a hand car upon the spur track which extended from the defendant's station into the grounds of a Catholic mission, when he fell from the car and received injuries from which he died. The track in question was owned by the mission and was being repaired by the railroad company under agreement with the mission as a separate contractor. The tracks of the defendant were situated entirely within the state, but it frequently received and forwarded shipments to points going out of the state, and about once a week interstate shipments were sent over the spur track to the mission. The receipt of freight at the mission, or carrying it to the station, was evidently a matter of private arrangement between the mission and the company. A proceeding under the Workmen's Compensation Act resulted in an award for the plaintiff from which the defendant appealed. In affirming the award, the

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VIII.

Answering paragraph eight (VIII), the defendant denies that it was negligent in not having a tail air hose, or any air hose, on the rear car of said train furthest from the engine, so that the brakeman on the front car of the train, in operating the said air hose by means of a valve, could stop the train in case of necessity, or at all.

Denies that when plaintiff was being thrown from said doser, or thrown at all, his clothing caught on the arch bar bolt, or any bolt, on the front gravel car, or any gravel car.

IX.

Denies that plaintiff was discovered by the said defendant, or its employee, the said brakeman, or any employee, upon the front car or any car, in ample

court held that the spur track was not a part of the interstate line and that those working on it were not governed by the Federal Employers' Liability Act. The court observed: "The company was handling the freight between the mission and its station as domestic freight, under a private arrangement. The remote origin of incoming freight, or the destination of outgoing freight, was immaterial." Liberti v. Staten Island Ry. Co., 180 N. Y. App. Div. 90, 167 N. Y. Supp. 478 (1917).

b. Main interstate track.

The plaintiff's decedent was a member of a section gang engaged in repairing and maintaining the tracks of the defendant, an interstate carrier. On a certain morning he and other members of the crew rode on a hand car to a point where they intended to begin laying rails. Before starting this work, however, they received an order, dropped from a passing train, from their foreman, ordering them to meet him at another point on the line. The gang placed the hand car on the track and started. On the way they were overtaken in a fog by a work train, and in the collision the deceased was killed. The purpose of the foreman in ordering the men to meet him at the second point mentioned was, apparently, to have them work there upon interstate tracks. In a decision reversing a judgment had by the defendant, it was held that the deceased when killed was employed in interstate commerce in such a sense as to bring the case within the operation of the Federal Employers' Liability Act. Williams' Adm'r v. Chesapeake & O. Ry. Co., 181 Ky. 313, 204 S. W. 292 (1918).

A section foreman was employed by the defendant to keep in repair a section of its railroad track which was used in interstate commerce. Having been informed that a washout had occurred on the portion of track in his charge, he immediately set out, as was his duty, on a hand car furnished him for emergencies of this character, to go to the point at which he had been told the trouble had arisen. He took with him several section hands and tools appropriate for the expected work. On the way he was injured through overexertion in assisting to remove the hand car from before a belated train suddenly approaching around a curve. It turned out that the washout was not on the defendant's railroad but on a private connecting spur track owned by a different corporation. No repairs were necessary or made on this occasion on this part of the defendant's line. In disposing of an appeal from a judgment had by the plaintiff at the trial, the court, however, held that the jury were warranted in inferring that at the time the accident and injury occurred the plaintiff was engaged in interstate commerce. What the plaintiff was actually attempting to accomplish at the

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or sufficient time, or any time, to have stopped the said train after the said brakeman discovered the plaintiff in a position of danger, or in any position, or engrossed or doing anything at all in the alleged performance of his duties, and denies that defendant continued to propel said train of cars over said track without reducing the speed, or at any speed, or at all, or attempting to stop the same until after the doser was struck, or at all.

X.

Answering paragraph ten (X), the defendant denies that after the said doser was struck, or at all, or after plaintiff was knocked off the train, or at all, the said engineer in charge of said engine negligently or carelessly failed to apply the automatic air brakes, or any brakes upon said engine or train, or thereby, or in any manner, the plaintiff was pushed or dragged or rolled along

time he was injured, namely, the rendering safe of the track regularly used in interstate commerce by his employer, would, the court said, determine the character of the employment, regardless of whether the plaintiff succeeded in achieving the object attempted and regardless of the actual existence or nonexistence of the emergency, or supposed emergency, which called forth his effort. The judgment was, however, reversed, for error on the part of the trial court in failing to instruct the jury upon the doctrine of assumption of risk, including the provisions in section 4 of the Federal Employers' Liability Act with respect to what risks are assumed. Upon this phase of the case the court pointed out that the doctrine of assumption of risk is not abrogated by the Federal Employers' Liability Act, except in so far as relates to injuries wholly or partly due to negligence of the officers or agents or employees of the railroad, or by reason of any defect or insufficiency due to its negligence with respect to cars, engines, appliances, etc. The plaintiff in this case, the court continued, assumed the ordinary risks of his employment, among which was the danger to be apprehended from encountering upon the track such a train as that which caused the hasty removal of the hand car, with the resulting injuries. Whether, however, the injury in this case resulted solely in consequence of an ordinary risk of the employment or was an obvious one, or whether it resulted in part from a risk arising out of negligence of an employee of the defendant acting within his authority, which would not be assumed by the plaintiff, were questions of fact for determination by the jury. Atlantic Coast Line R. Co. v. Tomlinson, 21 Ga. App. 704, 94 S. E. 909 (1918).

2. Attempting to board moving train.

The deceased, a boy 16 years old, was employed as a section hand upon a line of the defendant's railroad which was used in the hauling of both interstate and intrastate commerce. The crew of which the deceased was a member went to work upon a gasoline speeder under the supervision of a foreman. On their return from work in the afternoon, the speeder was not working well. As a result, it was abandoned and the deceased, with the remainder of the crew, in pursuance of the directions or orders of the foreman, attempted to board a passing freight train. The decedent was unsuccessful, and as a result suffered the injuries from which he died. From a directed verdict for the defendant the plaintiff appealed. The court, reversing the judgment and granting a new trial, held that the deceased was engaged in interstate commerce at the time of the accident. Schantz v. Northern Pac. Ry. Co., — N. D. —, 173 N. W. 556 (1919).

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over the said track, or rails or ties, between the wheels of the said doser or the said gravel cars, or any gravel cars.

Defendant denies that if the said engineer in charge of said train had been keeping a proper or any lookout, he could have seen the said doser upon said track, or the plaintiff thereon, in ample time, or any time, to have stopped the train before striking said doser.

Defendant denies that its employees in charge of said train negligently, or carelessly, or recklessly, or at all, propelled the train at the alleged unusual or high rate of speed against the said doser, without having proper or adequate control thereover, or in any manner.

Defendant denies that it was its duty to either stop the said train before coupling on to the said doser, or at the time of coupling unto said doser, or to make an easy coupling thereof, or that the defendant was negligent or

3. On foot.

a. Timekeeper.

Plaintiff's decedent was the timekeeper of a gang of laborers engaged in repairing the main line track of the defendant interstate railroad. It was his duty to make a record of the number of laborers engaged in work, of the hours worked by each, of the nature of the work done by the gang, of the number of ties laid, the amount of steel put in, and various other details, showing the progress of the work and the material used. It was also a part of his duty to make daily reports upon the matters mentioned. The required daily reports were made both by wire and by mail to the division roadmaster. The deceased customarily made these reports out after the working hours of the gang, since only after the close of the working day for the men would he have the information which he was required to include in his reports. The deceased was killed at about 6:30 p. m., after the gang had quit work. It appeared that he had eaten his supper and made out his daily report for transmission by wire to the roadmaster. A few minutes before he was killed he had left the car in which he kept his desk, with the remark that he was going to send his message. He had subsequently gone to a car occupied by the interpreter of the gang, and after remaining there for a moment had left that car and started across the tracks towards the station in which the telegraph office was maintained. A freight train had stopped at the station. He halted for a moment in the middle of what was called the "passing track," and while he was at this point apparently watching the freight train he was run down and killed by a car attached to one of the company's work trains which was used in hauling the material for the laborers with whom he was connected as timekeeper. The work train at the time was doing certain switching in the yard for the purpose of making up a train. It appeared that after the occurrence of the accident the daily telegraphic report of the deceased was found on his desk, but there was further evidence that he sometimes prepared his report at the telegraph office. There was no proof adduced as to the object of the deceased in crossing the track except that relating to his having made out the report, the arrival of the customary time for his sending it, and his own statement as to his intention when he left his desk car. Upon this showing the court, in the course of a decision reversing, upon other grounds, a decision for the plaintiff, held that the issue as to whether the deceased when killed was engaged in interstate commerce so as to bring the action within the purview of the Interstate Commerce Act was one of fact for the jury, and not of law for the court. Crecelius v. Chicago, M. & St. P. Ry. Co., 274

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careless in bumping into the said doser in the manner alleged, or in any manner whatsoever.

XI.

For answer to paragraph eleven (XI) of said complaint, the defendant states that it has no information or belief upon the subject to enable it to answer the allegations contained in said paragraph eleven, as to whether, prior to the happening of said alleged accident and injury, the plaintiff was in good, sound, strong bodily health, free from physical imperfection or ailment, and by trade and occupation a locomotive engineer, and able to earn and did earn at his said calling the average sum of two hundred ($200) dollars per month; and by reason of the lack of said information and belief, denies that the plaintiff, prior to the alleged happening of said accident or injury, was in

Mo. 671, 205 S. W. 181 (1918). A rehearing of the appeal was denied.

b. Section hand.

The plaintiff's decedent was a section man in the service of the defendant railroad company. A few minutes before time for starting work in the morning he appeared at the tool house, set down his dinner pail, and started to walk slowly along the track towards the place at which the gang of which he was a member had been working on the previous day. He started on the "passing" track, and then stepped over upon the main track, and on the latter track he was killed by a moving work train of the defendant. The accident occurred, apparently, before the precise time for starting work had arrived. In considering an appeal from a judgment entered on a verdict returned by the jury in the plaintiff's favor, the court first disposed of the question whether when injured the deceased was performing duties connected with interstate commerce so as to render applicable the Federal Employers' Liability Act. After observing that it was conceded that the defendant's road was used in interstate commerce and that the deceased was a section hand whose duty it was to assist in repairing the tracks so used, the court ruled that the fact that the accident occurred while the deceased was waiting for the moment to come when actual labor was to begin did not deprive his dependents of the benefits of the Federal Employers' Liability Act; the purpose and effect of decedent presenting himself a few minutes before the precise time for beginning work being in harmony with the employment, which itself was in connection with interstate commerce. Continuing, the court said that while the evidence left the reason of the deceased in walking down the track somewhat in doubt, yet since he was going in the direction of the place where he had worked on the previous day the most reasonable theory would seem to be that he expected to resume his labor at that place on the morning of the accident, and that he was actually on his way to the place at which his services were required. The evidence, therefore, it was held, supported a finding that the deceased when struck was "engaged in an employment so connected with interstate commerce as to bring his dependents within the scope of the [Federal Employers' Liability] Act." In the course of the opinion it was held also that the trial court had committed no error in refusing to give a requested instruction which, although it stated the law correctly "in a general way," contained a statement to the effect that if the deceased was killed by a train run over the track of the railroad company in the usual and ordinary way in which its trains were run, he would be held to have assumed the risk of being struck and injured; the court having in fact

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good, or sound or strong bodily health, or free from physical imperfection or ailment, or by trade or occupation a locomotive engineer, or able to earn or did earn at his calling the average sum of two hundred ($200) dollars per month, or any sum.

Denies that plaintiff's earning capacity has been practically destroyed, or destroyed in any manner or at all, or that the plaintiff was long confined to a hospital or in bed, or that during all of said time, or at any time, the plaintiff suffered excruciating or terrible pain, or any pain, or that plaintiff is forever barred, or barred in any manner, because of said injury, or by reason of said injuries, from holding a position with any railroad company as engineer, or in any other capacity.

Defendant states that it has no information or belief sufficient to enable it to answer the allegation as to whether at the time of the plaintiff's alleged

given on the subject an instruction fully stating the law, and the portion of the requested instruction which has been indicated being "subject to the criticism that, if defendant habitually neglected to give proper warning signals, or otherwise negligently managed its trains, the deceased would be held by such an instruction to have assumed the risk of such habitual negligence, which is not the law, except in those instances where the injured party is shown to have had previous knowledge of such negligent custom." The judgment in the plaintiff's favor was affirmed. Stool v. Southern Pac. Co., — Ore. —, 172 Pac. 101 (1918).

VI. Shopmen.

A. Repairing motor, use not shown.

In a case arising out of injury to a railway employee while he was engaged in repairing an electric motor, counsel for the defendant, in argument on a motion made by the defendant for a new trial, after verdict rendered for the plaintiff by a jury instructed in accordance with state law, used the following words: "'Suppose that testimony could be introduced to show that the motor, after being repaired, would be used in operating a bucket to lift cinders out of a pit and load them on a car to be thence carried and put on the roadbed [which was used in interstate commerce] as ballast.'" The argument was that such a showing would render the action determinable under the Federal Employers' Liability Act, rather than the state law. In overruling this contention the court said: "Take that supposition as a fact. It would not bring the action under the [Federal] Employers' Liability Act. The character of the act is fixed by what the servant was doing at the time of the injury. Repairing a motor which at some time in the past might have been used in interstate commerce, or which at some time in the future might be engaged in interstate commerce, would not bring the act of repairing within the [federal] law." Later in the trial defendant moved for a directed verdict, and the disposition of this motion required a reconsideration of the alleged interstate character of the plaintiff's work. On this point the court said: "I see no connection between the work the plaintiff was engaged in at the time of his injury and interstate commerce. He was working upon an electric motor, which was certainly not peculiarly an instrumentality of interstate commerce in the operation of railroads. There was some evidence about cinders from engines that had come from beyond the state being dropped into the cinder pit, but the evidence all showed that the interstate journey of the engine had ceased long before the cinders were removed to the cinder pit. The crew, bringing the engine in, detach it from the train. It is turned over to a hostler. The hostler carries the engine

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injury he was twenty-nine (29) years of age, and his expectancy of life was over thirty-six (36) years; therefore, by reason of said lack of information, the defendant denies that at the time of plaintiff's alleged injury he was twenty-nine years (29) of age, or his expectancy of life was over thirty-six (36) years.

XII.

For answer to paragraph twelve (XII) of said complaint, the defendant denies that as a result of said alleged injury the plaintiff was crushed or bruised or maimed, or suffered a fracture of the right shoulder blade, or an injury to the right shoulder joint, or a paralysis of the right circumflex nerve, or a deep flesh wound over the left hip or the lower part of the spine, or a deep flesh wound in the region of the rectum, or as a result of said alleged

to some siding or to the roundhouse. Later, as opportunity affords, he places the engine over the cinder pit to be cleaned, and the work of removing the cinders is done by common laborers employed for that purpose. The electric motor is never used in removing the cinders from the engine. Some witness testified that cinders, when removed from the pit, were used for different purposes, amongst others for ballasting the roadbed; but there is no evidence that this particular motor at any particular time, either before or after the injury, was used in lifting cinders from the pit that were used in ballasting a roadbed. * * * It is clear, therefore, that the plaintiff was not engaged in interstate commerce, within the meaning of the [Federal] Employers' Liability Act, and it is therefore proper to apply the North Carolina law." The motion was denied. O'Dell v. Southern Ry. Co., 248 Fed. 345 (1917). For opinion on prior motion, see 248 Fed. 343 (1917).

B. Unloading lumber for grain doors.

The plaintiff was a workman employed by the defendant railway company in its shops. The department in which he worked was known as the "grain door department." The doors made were for use in cars in which grain was shipped. Lumber used in manufacturing the doors was shipped in on the defendant's cars to a point near the shops, and one of the plaintiff's duties was to help unload the lumber and carry it to the shops. He was injured while engaged in unloading lumber from a car that had been loaded in another state with lumber for the defendant's use in its shops in the manufacture of doors for grain cars designed for use in the handling of both interstate and intrastate shipments. It was held that the plaintiff when hurt "was engaged in a duty pertaining to interstate commerce." Gulf, C. & S. F. Ry. Co. v. Drennan, — Tex. Civ. App. —, 204 S. W. 691 (1918). A rehearing was denied.

C. Moving car of lumber for shop use.

The plaintiff's decedent was employed in the car repair shop of the defendant railroad. While he was helping to push a car of lumber through the doorway of one of the large rooms of the shop, he was crushed between the side of the car and the jamb of the door. It was the custom of the employees to push the cars that were to be repaired or unloaded from the transfer table to the place of repair or unloading, and some of the doorways through which the cars were pushed were wide enough to allow the passage of the body of a man pushing at the side, while others were not. The lumber on the car in question had been shipped from a point within the state, and had arrived some time before the injury. The line of the defendant railroad was entirely within the state but about 95 per cent of its business

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injury, or any injury, the plaintiff is or will be forever, or at all, unable to move his right arm more than twenty (20) degrees, or any degrees, from his body, or that the movement of his right arm has been disabled or injured in any manner or at all, or that his right arm has been permanently destroyed or destroyed in any manner or at all for the performance of any manual labor, or is forever disabled, or disabled in any manner or at all. Denies that he suffered a permanent injury, or any injury, to the tendons, or nerves, or ligaments, or muscles, or bones in or about his right shoulder or right arm, and denies that his right arm is paralyzed.

Denies that the injuries to his rectum have permanently affected the control of his bowels, or that as a result of said injury, or any injury, the plaintiff suffered great mental or physical pain, or any mental or physical pain or anguish, or still suffers said severe pain, or any pain from said alleged injury,

was interstate in character. An action was brought under the Workmen's Compensation Law and a verdict directed for the defendant. Upon a denial of the plaintiff's motion to set aside the verdict and for a new trial, a writ of error was sued out. The supreme court, in reversing judgment and remanding the case for a new trial, held that the decedent was not engaged in interstate commerce, observing that the fact "that the lumber might thereafter be used in the manufacture or repair of cars employed in interstate commerce could not make the act of the deceased in moving the car into the shops to be unloaded an act connected with interstate transportation." Barnett v. Coal & Coke Ry. Co., 81 W. Va. 251, 94 S. E. 150 (1917).

D. Using machinery, engine repair job.

1. Emery wheel.

The plaintiff, a minor over 16 years of age, was in the employ of the defendant in its roundhouse and machine shop. He was injured while using an emery wheel in connection with repair work being done on an engine which had lately been used in interstate commerce, which was being repaired in order that it might be put back immediately into interstate commerce and which in fact after the completion of the repairs was used in interstate commerce. Among the defenses interposed to the action, which was based upon the Federal Employers' Liability Act, were contributory negligence, assumption of risk, and that the plaintiff at the time the injury occurred was not engaged in interstate commerce so as to bring his case within the federal act. The issues were submitted to the jury, which found that the parties were both engaged in interstate commerce at the time of the accident, and that the plaintiff was guilty of contributory negligence. The finding on the latter issue did not state whether such negligence related to the doing of the work or to plaintiff's conduct in the treatment of his injured eye. The net amount of the damages allowed was $5,000. In affirming, on appeal, a judgment for that amount, the court, in part, held that the evidence sustained the finding that the plaintiff when injured was working in connection with interstate commerce within the purview of the federal act. Upon the additional contention concerning the defense of assumption of risk, the court said, in part: "Counsel insists that, in order to have found the plaintiff guilty of contributory negligence, the jury necessarily must have found that he knew and appreciated the dangers arising from the use of the emery wheel without protection to the eyes, and that the foregoing are the only essential elements in the defense of assumed risk. He insists, therefore, that we should declare as a matter of law that plaintiff had assumed the risk. * * * The jury * * * may have found that the plaintiff was

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or will continue to suffer from the same through the rest of plaintiff's life, or for any period of time, or at all.

Denies that the result of said injury was to render the plaintiff permanently maimed or crippled, or disfigured, or maimed or crippled or disfigured in any manner or at all.

Denies that the plaintiff is damaged in the sum of fifty thousand ($50,000) dollars, or in any sum at all.

Further answering the said complaint, and as a first affirmative defense thereto, the defendant alleges: That if the plaintiff was injured in the manner as alleged and set forth in his said complaint, it was due to a risk which the said plaintiff assumed in that the said plaintiff, as alleged by him, was an experienced railroad man, fully acquainted with his entire surroundings, able to observe the work and all the things which were being done at the

negligent in his conduct respecting the treatment of his eye, and may have deducted the amount from the whole amount of damages allowed him for that reason. If that were so, counsel's contention last above stated would necessarily have no application here. Assuming, however, for the purposes of this decision, that the jury found that plaintiff's conduct at the time of the injury was negligent, and hence found him guilty of contributory negligence in that regard, yet it does not necessarily follow that counsel's contention that plaintiff assumed the risk should prevail. The defenses of assumed risk and contributory negligence are entirely independent, and in case there is a conflict in the evidence, or where the facts are such that reasonable men may legitimately draw different conclusions from the evidence, or may arrive at different conclusions, it cannot be determined as a matter of law that either the one or the other defense is established, and the jury may, therefore, find that one of the defenses was established and may also find that the other was not. * * * While in a particular case facts may be such as to justify a finding of both contributory negligence and assumption of risk, yet contributory negligence does not necessarily arise from intelligent choice, and therefore is not necessarily included in assumption of risk. * * * It was the province of the jury to say which one of the two defenses was established." Kuchenmeister v. Los Angeles & S. L. R. Co., — Utah —, 172 Pac. 725 (1918).

2. Bolt threader.

The plaintiff, a minor employed in the machine shops of the defendant railroad company, sustained, while he was operating a bolt and thread-cutting machine, certain injuries, including a broken wrist. It appeared that the bolt on which the machine was being used belonged to a particular engine, No. 38, which was regularly employed in hauling interstate passenger trains, and that on the day the accident occurred the engine had been taken out of its regular interstate train in order that the bolt in question might be repaired. It further appeared that the engine was placed in the shop and after the repairing of the bolt was on the same day sent out upon its regular interstate run. It was held that the plaintiff when injured was working in interstate commerce. Atlantic Coast Line R. Co. v. Woods, 164 C. C. A. 352, 252 Fed. 428 (1918).

E. Going to undetermined new work.

The plaintiff was employed by the defendant as night foreman of boiler makers in one of its yards. In passing between the boiler shop and the machine shop, it was necessary for him to cross over an inadequately lighted pit containing a transfer table used in distributing locomotives. In doing so, he slipped and fell, sustain-

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time he claims he was injured. That there was nothing concealed about the alleged proximate cause of injury; that everything was open and above board, and said plaintiff knew, or by the exercise of ordinary care, should have known and appreciated the alleged cause of his said alleged injury.

Further answering said complaint and as a second affirmative defense thereto, the defendant alleges that if the plaintiff was injured as set forth in his said complaint, the proximate and sole cause of his said alleged injury was his own negligence and his own voluntary act or acts, and without any fault whatever on the part of the defendant, and had the said plaintiff observed his surroundings, and used his senses, the said accident would not and could not have happened.

Wherefore, said defendant prays that said action be dismissed, and that

ing an injury to recover damages for which he brought this action. There was no evidence as to what particular work, whether interstate or intrastate, the plaintiff was doing at the time of the accident, but it did appear that the transfer table was used in both kinds of commerce. Following a verdict and judgment for the plaintiff in the sum of $3,500, the defendant appealed from an order denying a new trial. The judgment was affirmed by the district court of appeal, whereupon the defendant applied for a hearing in the supreme court. Denying the application, the court held that the plaintiff was not engaged in interstate commerce at the time of the accident. Terry v. Southern Pac. Co., 176 Cal. 584, 169 Pac. 86 (1917).

VII. Electrical workers.

A. Wiping insulators at power plant.

A railroad company operated a system of electric railway lines, its cars being used in both intrastate and interstate commerce. For the generation of the electric power it maintained a main power house, from which an alternating current was transmitted through a main power line to substations. At the substation the current passed through converters and transformers which changed it to a direct current, also reducing the voltage. The direct current, thus reduced, passed to the trolley wires, and from them to the motors of the cars. An employee, while wiping insulators on the main power line between the main power house and the substation, sustained a fatal electric shock. On application made by his dependents, an award of compensation was made by the Industrial Accident Commission under the Workmen's Compensation Law. The report of the findings of the commission contained the following passage: "While said employee was working as aforesaid between said power house and said substation, the electricity which caused said electric shock had not reached its point of distribution to said electric cars, and he was employed in work preliminary to the running of said electric cars, and * * * therefore he was not employed in interstate commerce." The employer petitioned the court for a writ of review, contending that the employee when killed was engaged in interstate commerce within the purview of the Federal Employers' Liability Act, and that therefore the commission was without jurisdiction. But the court sustained the view of the commission and affirmed the award, saying in part: "It is true, as petitioner claims, that the electric current, once it is generated at the main power house, passes along the main power line, to and through the converters and transformers in the substations, and to the trolley wires, without interruption, and without storage. No doubt, too, a break in that current at any point, however remote from the lines of track, would immediately stop the progress of all

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it go hence, and have judgment against the plaintiff for its costs and disbursements incurred herein.

MR. JUSTICE CLARKE delivered the opinion of the court.

This case comes into this court on writ of certiorari to the Supreme Court of the State of Idaho and all of the facts essential to its decision are admitted or are not controverted, and are as follows:

When the accident complained of in the case occurred, the railway company, respondent, was engaged in filling with earth a wooden

cars then moving. But we think the decisive factor in the case is not to be sought in these characteristics of electric energy. As the Supreme Court of the United States says: 'The federal act speaks of interstate commerce in a practical sense suited to the occasion.' * * * The main power line is not part and parcel of the railroad or its equipment, in the same sense as the roadbed or the trolley line. It is an instrumentality by means of which something necessary for the operation of the cars is brought to a point where it can be usefully applied. Its purpose is simply to get to the road the necessary power to operate cars thereon—the same purpose served by wagons or cars laden with coal to be carried to the road for the operation of its locomotives. Even though the power flows without interruption from the power house to the trolley lines, it still remains that all that the main line does, and all that those engaged in keeping it in order do, is to assist in putting onto the trolley line the necessary power to be used by the operatives of the road as desired.'' Southern Pac. Co. v. Industrial Acc. Commission, — Cal. —, 171 Pac. 1071 (1918). A rehearing was denied.

B. Firing boilers at power plant.

The defendant railroad company owned and operated a motive power electric plant by which it operated a certain railroad wholly intrastate, and also a portion of interstate railroad. At the plant it maintained thirty-six boilers in which it generated the steam necessary for the operation of the machinery that produced the electric power. The power was applied to both railroads through a common channel, a single ''indivisible supply'' being therefore furnished for the operation of the two roads. Not all of the boilers were used at a single time, but it was customary and necessary, after a particular boiler had been in operation for 6 or 8 weeks, to shut it down for the purpose of removing the soot from it, and making repairs as needed. At a particular time twelve of the boilers had been temporarily withdrawn from operation, in order to be freed of soot and repaired. One of the defendant's employees, while he was necessarily within one of the idle boilers, engaged in the regular course of his employment in removing soot from the boiler, was fatally burned by hot soot which fell upon him from a part of the interior of the boiler. In an appeal by the defendant from an award of burial expenses made under the Workmen's Compensation Act by the State Industrial Commission, the question presented was whether at the time of the injury the deceased was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. In a decision which reversed the award the question was answered in the affirmative, the court saying in part: ''The boiler plant was an instrumentality of commerce, along with the dynamos which gen-

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trestle-work bridge, 1,200 feet in length, by which its track was carried across a dry gulch or coulee, the purpose being to continue the track upon the solid embankment when it should be completed.

It was admitted that the railway company was engaged in interstate commerce, and that during the progress of the filling the bridge was used for interstate trains. Pursuant to an order of court, the petitioner, an employee of the respondent, elected to rely on the Federal Employers' Liability Act of April 22, 1908, for his right to recover.

erated the electric current and the engines by means of which the current was made of service. The work of deceased related to the maintenance of an instrumentality permanently devoted to carrying on interstate commerce. * * * The deceased was * * * injured while engaged in restoring to efficiency one of the units of an indispensable instrumentality of interstate commerce. * * * The fact that the appellant [defendant] was also operating intrastate as well as interstate trains has no bearing upon the question at issue.'' Guida v. Pennsylvania R. Co., 183 N. Y. App. Div. 822, 171 N. Y. Supp. 285 (1918).

C. Cleaning rail ends for bonding.

The plaintiff was a member of what was known as the bonding crew of the defendant interurban electric railway. The work of bonding consisted of cleaning the ends of the rails, and then connecting them by wiring; the purpose being to provide an unbroken current through the rails. The plaintiff and another man performed the work of cleaning the rails by means of a small emery wheel. On the day in question, the car which the bonding crew used was run upon a switch during the noon hour, and upon preparing to resume work the others boarded the car, while the plaintiff went over to lock the section house. After doing this, he crossed to the main track and walked towards the car which was standing a short distance away. He either attempted to board the car while it was in motion, or else it was suddenly started while he was attempting to get on, with the result that he was severely hurt. The defendant railroad operated no cars outside of the state, but did receive shipments for interstate transportation under through bills of lading. An action was brought under the Federal Employers' Liability Act, and from a judgment for the plaintiff the defendant brought error. The court affirmed the judgment, and held that the repair work of the plaintiff was sufficiently connected with interstate transportation to bring him within the federal act. Cholerton v. Detroit, J. & C. Ry., 199 Mich. 647, 165 N. W. 606 (1917).

D. Lineman on way to place of work.

In an action to recover damages on account of personal injuries sustained by the plaintiff while in the employ of the defendant railroad company, it was alleged that both the plaintiff and the defendant were, at the time plaintiff sustained the injuries in suit, engaged in interstate commerce. Specifically it was alleged that in furtherance of its interstate commerce and the operation of its interstate train the defendant maintained and operated a line of telegraph poles and wires along its right of way adjoining the main line track and that the plaintiff was employed by the defendant as a lineman, his duties being to

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Several weeks prior to the accident to the petitioner Kinzell, the work of filling the bridge had progressed to such a stage that when earth was dumped from cars it would be heaped up beside the track higher than the tops of the ties and rails so that it became necessary to spread it by pushing it away from the track toward the edge of the fill, in order to prevent its falling back upon the rails and to widen the embankment. To thus spread the earth an appliance called in the record a "dozer," and sometimes a "bull dozer," was used. It consisted substantially of a flat car body with adjustable wings

assist in the repair of these lines under the direction of a foreman, and that he was so employed at the time he received his injuries. It was further charged that at the time of the accident in suit plaintiff was upon his way to assist in straightening some telegraph poles along the right of way, being transported to the place where his work was to be done in a gasoline motor car operated by the defendant and furnished for the use in question; that this car so furnished and used was defective, so that the car ran with a jumping motion; that on the occasion in question the car was operated at a high and dangerous rate of speed, was overloaded in that it carried four men when it was constructed to carry but three, and that because of the defect in the car and the high speed and the overloading of the car the same was derailed, resulting in an injury to the plaintiff described as follows: Fracture of one of the lower bones of the left leg, fracture of several ribs, injury to the back and impairment of the nervous system. The result of all of these injuries, the plaintiff alleged, was that he was rendered unable to perform manual labor and was caused to suffer and would continue to suffer great pain and anguish. In support of these allegations plaintiff introduced testimony tending to show that at the time of the accident he was riding upon a motor car pursuant to the orders of his foreman, who had been directed by the defendant to take men to a place where the poles of the telegraph line above mentioned needed to be straightened. The court held, in affirming a judgment for the plaintiff for $5,900, subject to a remittitur of $900 as excessive, that the defendant was engaged, and the plaintiff was by it employed at the time of the accident in suit, in interstate commerce. On this point the court said: "Preparation had been made to go to the place where the interstate work was to be accomplished, and plaintiff was on his way with tools necessary for the work. The repairing of the poles upon which the wires were strung which were used by the defendant company in controlling and regulating the movement of its cars, both in intrastate and interstate commerce, was so closely related to interstate transportation and so necessary to the proper regulation of interstate business that it is, in the words heretofore quoted, practically a part of interstate business. He was on his way to do work closely related to interstate traffic. He was carrying tools and instruments necessary to be used in doing the work assigned. He was injured while on his way to perform duties relating to interstate traffic. * * * His rights are regulated by the Federal Employers' Liability Act." Brier v. Chicago, R. I. & P. Ry. Co., — Iowa —, 168 N. W. 339 (1918).

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or scrapers, so designed as to remove any earth which might fall upon the rails and also to press or push that heaped up at the side of the track out to the edge of the embankment.

When a train-load of earth would arrive at the bridge the practice was to couple the "dozer" to the forward end of the cars and then they and the "dozer" would be pushed to the place at which it was desired to unload the earth. After the cars were dumped the pulling of the "dozer" back with them would scrape the earth from the tops of the rails and would push it away from the track, thus contributing to keep the track clear and to widen the embankment.

E. Signal maintainer on return trip.

A signal maintainer in the employ of the defendant railroad company was furnished a tricycle for use in getting over his route. The last signal at the southerly end of his territory was about one hundred yards from the M station. The employee, after he had inspected, as it seems, this last signal, and when he was approaching a tunnel as he was starting home on the tricycle, was struck and killed by a train. In a decision affirming a judgment entered on a jury verdict for $5,000 in favor of the administratrix, for the benefit of the widow and children, the court said: "The point is made that the case is not governed by the Federal Employers' Liability Act, because the petition alleges that the decedent was en route to his home at the time of the accident, and there was no evidence tending to show that he was authorized to use the tricycle for that purpose. We are not, however, disposed to take such a narrow view of the question. The tricycle was furnished decedent for the purpose of performing his duties. To this end it was necessary for the tricycle to be conveniently near so that it could be used. It is not, therefore, to be presumed that his right to use it ended when he had inspected the signals. If this were the case, then the decedent, though several miles from home, would have had to remove the tricycle from the track, leave it unprotected, and either walk to his home or take the chance of catching a train. Not only so, but the next morning it would have been necessary for him to consume the time which he should have devoted to the performance of his duties in returning to the place where the tricycle was left. Hence we conclude that deceased's right to use the tricycle in returning to his home was fairly inferable from the fact that it was furnished him for the purpose of facilitating the performance of his work. We further conclude that his homeward journey was a necessary incident of his day's work, and that at the time of his death he was discharging a duty of his employment. And since the defendant was an interstate carrier, and deceased was engaged in work necessary to facilitate the movement of interstate trains, there can be no doubt that the company was engaged, and he was employed, in interstate commerce at the time of his death within the meaning of the Federal Employers' Liability Act." Louisville & N. R. Co. v. Mullins' Adm'x, 181 Ky. 148, 203 S. W. 1058 (1918).

VIII. Coal chute employees.

A. Coaling interstate engine.

A railroad employee seeking recovery under the Federal Employers'

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For several weeks prior to the accident complained of, Kinzell, with an assistant, had been in charge of this "dozer," using it as described, and in addition to this they were required to remove, with shovels, earth or stones which fell upon the track, so, the superintendent of the railway testified, as to make it safe for the operation of trains. The rails and ties had not been transferred to the embankment, but were still sustained by the bridge substructure when the accident occurred.

Kinzell was injured by what he claimed was negligence of the company in the manner of coupling a train of cars to the "dozer"

Liability Act on account of injuries including the loss of his left hand and arm and of his right hand, alleged and adduced substantial evidence to prove the following facts: That his duties consisted in helping to coal engines hauling cars between the states of Michigan and Ohio, placing water in the tanks of such engines and assisting in cleaning the ash pans thereof, as well as keeping up the fires in engines that stopped at the point over night on their way from points in Michigan to points in Ohio; that his employment further included the oiling of engines so stopping over night, and the operating of a switch which allowed those engines to pass from the main track onto sidetracks, and from the sidetracks back to the main line, when the engines were sidetracked for the purpose of taking on water to be used in interstate movements; and that the injuries were caused by a negligent starting of certain machinery having cogwheels, as the plaintiff in obedience to orders was climbing a ladder on his way to the top of coal in a hopper in a tower, in order that he might spread the coal, apparently to facilitate its descent through a chute into the tenders of engines used in interstate commerce. Affirming a judgment entered on a verdict in the plaintiff's favor for $3,500, the supreme court held that at the time of the accident the plaintiff clearly was engaged in interstate commerce so as to render the case determinable under the Federal Employers' Liability Act. Guy v. Cincinnati Northern R. Co., 198 Mich. 140, 166 N. W. 667 (1917). A rehearing was denied.

B. Unloading coal at chute.

In the case of Squire v. Southern Ry. Co., 109 S. C. 400, 96 S. E. 152 (1918), in which the action was by the administratrix of an employee of the defendant who had been killed by falling from a coal chute, recovery was allowed by the trial court under a state law. On appeal, one of the contentions of the defendant was that its liability, if any, "was fixed by act of congress, and not by statute of the legislature." The court in a decision reversing the judgment stated and decided this phase of the case as follows: "Squire [the deceased employee] at the instant of his fall was unloading coal from a Tennessee car onto a platform in South Carolina for the future use by the engines of the defendant, some state and some interstate. The appellant contends: (1) That in the act of unloading Squire was engaged in interstate commerce; and (2) that, furthermore, Squire's purpose was next and within a few hours to load the coal so felled on the platform onto interstate engines, and that such act of Squire in unloading was so closely related to his purpose to subsequently

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as an immediate preliminary to such an unloading and cleaning movement as we have described.

Much is made in argument of the contention that the fill in progress was not the repairing of, nor the furnishing of support to, the bridge, which, by the testimony of the engineer in charge of bridges, had about a year "of life" remaining when the accident occurred. For this reason it is contended that the principles of Pedersen v. Delaware, Lackawanna & Western R. R. Co., 229 U. S. 146, 57 L. Ed. 1125, 3 N. C. C. A. 779, Ann. Cas. 1914 C 153, do not apply. But in the view we take of the case this is not important.

reload as to constitute his act done as a part of his act purposed to be done thereafter. On the second issue it is admitted by respondent's counsel that: 'Some time during the night of the 16th, if he had not been killed that afternoon, Squire would have used this coal to coal the many locomotives of the defendant which pass through Branchville. Two of these locomotives were engaged in interstate commerce.' We are of the opinion that the court was not warranted to instruct the jury that the transaction was to be governed exclusively by the laws of the state. The rights of the parties are fixed by the laws of the state or by the laws of congress, as depends upon which service Squire was in at the instant of his killing; and that issue of fact ought to have at least been submitted to the jury, and the jury ought then to have been charged about the differing duties and liabilities arising under the two laws."

IX. Water tank employees.

A. Attending pump.

Plaintiff was in charge of a signaling tower and water tank, the tower being used in connection with the operation of interstate and intrastate trains of the defendant, and the tank being used to supply water to the engines of such trains. It was plaintiff's duty to report the trains, as they went by the tower, to the dispatcher in B, and also upon orders from the dispatcher to put trains on a siding. About 25 trains a day took water at the tank, which had to be refilled several times each day from a well 1,000 feet distant. The pump was operated by a gasoline engine which plaintiff ran. While engaged in this last-named work, plaintiff was severely burned by the explosion of the gasoline engine, disfiguring his face for life. Defendant contended that the action could not be maintained because the plaintiff was not employed in interstate commerce within the meaning of the Federal Employers' Liability Act, under which the action was brought. Affirming judgment for the plaintiff for $15,045.66, the court held that this contention could not be maintained, saying: "In filling the water tank for the immediate use of locomotives engaged in interstate commerce, the plaintiff was engaged in work so closely related to interstate commerce as to be practically a part of it, and that is sufficient to bring the case within the terms of the Federal Employers' Liability Act." Erie R. Co. v. Collins, — C. C. A. —, 259 Fed. 172 (1919).

B. Repairing pump.

The defendant maintained a pumping station where water was pumped by a gasoline engine into an elevated

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With these facts before it, the Supreme Court of Idaho, in its judgment which we are reviewing, reversed the judgment of the lower court in Kinzell's favor, solely upon the ground that he was not employed in interstate commerce at the time he was injured, and gave this as the reason for its conclusion:

"We are of the opinion that constructing a fill to take the place of a trestle which is being used in interstate commerce is new construction, and that the fill does not become a part of the railroad until it is completed and the track is placed upon it instead of upon the trestle."

tank which held enough to supply three or four engines. The pump needed repairing and the guard around the cogs connecting the engine and the pump had been removed. The plaintiff was directed by the station master to start the engines, and was then told by the man in charge of the repairing to oil certain parts of the machine. While doing this his clothes became caught in the gearing and the injury in question resulted. The tank was empty, and it appeared to be necessary that the pump should be started as soon as possible. Suit having been instituted under the Federal Employers' Liability Act, a judgment resulted in favor of the defendant. On appeal by the plaintiff the court, in reversing judgment and granting a new trial, held that the plaintiff was engaged in interstate commerce at the time of the accident. Kelly v. Erie R. Co., — N. Y. App. Div. —, 177 N. Y. Supp. 278 (1919).

C. Measuring water in tank.

The plaintiff was employed to assist in the operation of a pumping station which was used to supply with water trains carrying both interstate and intrastate commerce. In the performance of his duties it became necessary for him to ascertain the depth of water in a cistern (which was a part of the pumping station), and on removing its covering and while attempting to make an inspection of the water therein, he was injured by an explosion of gas which had accumulated in the cistern. A law action in the county court having been instituted, the same was removed to the United States District Court on the ground of diversity of citizenship. The plaintiff moved to remand the cause on the ground that it arose under the Federal Employers' Liability Act and was consequently not subject to removal. The court, in allowing the motion, laid down the rule that an employee engaged in operating a pumping station, which furnishes water to be used indiscriminately and contemporaneously for interstate and intrastate business, was within the federal enactment. As the court pointed out: "When the efforts of the employee at the time he was injured may relate to either class of transportation, then he is within the act, and his right of action is controlled by it." Roush v. Baltimore & O. R. Co., 243 Fed. 712 (1917).

X. Watchmen.

A. Crossings.

The plaintiff was employed by the defendant as a flagman at a street crossing to warn persons of its approaching trains. He was required

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Such conclusion, of course, is not derived from any construction of the act of congress, but rests wholly upon the interpretation which the court placed upon the undisputed facts, as we have stated them.

The Federal Employers' Liability Act provides that:

"Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce." (35 Stat. 65, c. 149.)

It being admitted that the railway company was engaged in inter-

to stand on the side of the train where the engineer sat in his cab; and it was while performing his usual duties, and after he had flagged the engineer of an interstate train and was passing over the platform of a car to the other side of the track to perform other duties that he was thrown from the lowest step of the platform by a sudden and violent jerk of the train. The bottom step struck his back, he rolled under the car, and one of his legs was cut off by the train. An action having been brought under the Federal Employers' Liability Act, judgment was entered on a verdict in favor of the plaintiff in the sum of $7,500, from which the defendant prosecuted this appeal. The judgment was affirmed. The court held that since the plaintiff was co-operating with the engineer of the interstate train in facilitating its movement through the town where the accident occurred, performing to a certain extent the task of a flagman on the train, he was engaged in interstate commerce. West v. Atlantic Coast Line R. Co., 174 N. C. 125, 93 S. E. 479 (1917).

The husband of the plaintiff, a flagman employed by the defendant and another railroad, was stationed at a street intersection, where the gates were temporarily out of order, to warn persons of the approach of a train. While attempting to stop a horse and vehicle that was being driven across the tracks, he was struck by a car carrying an interstate shipment which was being "shunted" on a sidetrack for the purpose of being unloaded by the consignee. A common-law action resulted in a verdict and judgment for the plaintiff in the sum of $3,150, from which the defendant appealed. The court reversed the judgment and remanded the case, holding that the deceased was engaged in interstate commerce at the time of the accident. Dunlavy v. Chicago, B. & Q. R. Co., 200 Ill. App. 75 (1915).

D was employed by the defendant A railroad company, as flagman. He was stationed at a point where six tracks crossed an avenue. A operated over three of these tracks, and the B and the C railroads over the other three, and all were engaged in both interstate and intrastate commerce. By contract between the roads the defendant A road employed the flagman and paid his wages and the B railroad company reimbursed defendant for one-third. D's duty was to prevent collisions between pedestrians or vehicles using S avenue and trains using the railroad tracks; also to keep the tracks clear so that nothing would interfere with the movement of trains. While D was on duty, a train of the B railroad approached the crossing on the tracks while an automobile approached it on S avenue. D moved from the shanty to the track of the B

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state commerce, the only question for decision is whether the petitioner was employed in such commerce, within the meaning of the act as construed by this court.

In Pedersen v. Delaware, Lackawanna & Western R. R. Co., 229 U. S. 146, 57 L. Ed. 1125, 3 N. C. C. A. 779, Ann. Cas. 1914 C 153, it is stated that a guide to a decision of such a case as we have here may be found in the questions: Was the work being done independently of the interstate commerce in which the company was engaged or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that

railroad, signaling to the automobile with his flag, and while standing on the rail of said track he was struck in the back by the train and killed. The train was carrying interstate freight. Reversing the judgment affirming the award of the State Industrial Commission in favor of the administrator, the court held that D was engaged in interstate commerce, he having been employed to protect the instrumentalities of interstate commerce, and that therefore the case was within the scope of the Federal Employers' Liability Act. Answering the contention that because D was not killed by a train of the A railroad he was not engaged in the interstate commerce of his employer, the court said: "If an employee is engaged in protecting the instrumentalities of the interstate commerce of his master and is killed in the course of this employment, his injuries arise out of his employment, and the cause is one within the scope of the Federal Employers' Liability Act, regardless of who inflicts the injury causing the death." Chicago & A. R. Co. v. Industrial Commission, 288 Ill. 603, 124 N. E. 344 (1919).

B. Shops.

Plaintiff was employed as a night watchman to care for the storeroom of the defendant's shops. Another watchman was regularly employed to care for the blacksmith shop, but on the night when the accident in suit occurred he was not on duty and the plaintiff, in the performance of his duties, was required to go from the storeroom to the blacksmith shop. On his return he stumbled over a pile of scrap iron, fell, and injured his knee. It became so painful that he was compelled to quit work, but returned some 4 months later, only to have the disability recur a short time afterwards. Tuberculosis of the bone set in as a result of the injury, and the plaintiff's leg was finally amputated about 6 inches below the hip joint. Dead engines used in both interstate and intrastate commerce were frequently brought into the shops where the plaintiff worked, and it was upon that ground that the defendant sought to bring the case within the Federal Employers' Liability Act. A proceeding under the state Workmen's Compensation Act having been instituted, an award was rendered for the plaintiff which was subsequently modified by the circuit court on a writ of certiorari and the amount raised to $2,400, payable at the rate of $6 a week, at the expiration of which time a pension was to be allowed of $16 a month during the remainder of his lifetime. The defendant sued out a writ of error, but the supreme court affirmed the judgment of the circuit court, holding that while the dead engines had been used in both interstate and intrastate traf-

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commerce was concerned or was it in the nature of a duty resting upon the carrier? And in other cases it is said, in substance, that in such inquiries may be found the true test of employment in such commerce in the sense intended by the act. Shanks v. Delaware, Lackawanna & Western R. R. Co., 239 U. S. 556, 558, 60 L. Ed. 436; New York Central R. R. Co. v. White, 243 U. S. 188, 192, 61 L. Ed. 667, 13 N. C. C. A. 943, Ann. Cas. 1917 D 629. It is also settled that the doing of work which has for its immediate purpose the furthering of the conduct of interstate commerce constitutes an employment in such commerce within the meaning of the act. New York Central, etc., R. R. Co. v. Carr, 238 U. S. 260, 59 L. Ed. 1298,

fic, their repair had no direct connection with such traffic, and the plaintiff in performing the duties of a watchman in those shops was not engaged in interstate commerce. Wabash Ry. Co. v. Industrial Commission, 286 Ill. 194, 121 N. E. 569 (1918).

C. Tools and materials for building.

The plaintiff's decedent was a night watchman, charged with the duty of guarding tools and material intended to be used in the construction of a new station and new tracks upon a line of interstate railroad. A proceeding under the Workmen's Compensation Act resulted in an award for the plaintiff, which was affirmed, without opinion, by the appellate division, whose order was affirmed by the court of appeals, without opinion. The case was then brought, on writ of error, to the United States Supreme Court, which affirmed the judgment, holding that the decedent's work had to do solely with construction, and therefore bore no direct relation to interstate transportation. New York Cent. & H. River R. Co. v. White, 243 U. S. 188, 61 L. Ed. 667, 13 N. C. C. A. 943, 37 Sup. Ct. 247 (1916). For decisions in the state court in this case, see 216 N. Y. 653, 110 N. E. 1051 (1915), aff'g 169 N. Y. App. Div. 903, 152 N. Y. Supp. 1149 (1915).

D. Goods awaiting consignee.

The deceased was employed as a watchman by the defendant railroad at a pier on the river in New York City to which cars were ferried upon floats from points in the state of New Jersey. In the rear of the pier was an open space commonly known as the "farm," upon which overflow produce arriving at the pier was placed, to await removal by consignees. The deceased was acting as watchman for a shipment of potatoes in barrels from Florida, which had been placed upon the "farm," when he was run down by a motor truck and killed. The accident happened before the consignee had taken possession of the shipment or paid freight charges, and before the lapse of the forty-eight hours after notice of the consignment during which time the consignee could leave the goods at the place in question. A proceeding under the Workmen's Compensation Law having been instituted, an award was made from which the employer appealed. The court, in reversing the decision and dismissing the claim, held that the deceased was engaged in guarding an interstate shipment at the time of the accident, the transportation of which had not ceased, and consequently liability for his death was determinable only under the Federal Employers' Liability

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9 N. C. C. A. 1; Louisville & Nashville R. R. Co. v. Parker, 242 U. S. 13, 61 L. Ed. 119; Pecos & Northern Texas Ry. Co. v. Rosenbloom, 240 U. S. 439, 60 L. Ed. 730; Southern Ry. Co. v. Puckett, 244 U. S. 571, 573, 61 L. Ed. 1321, Ann. Cas. 1918 B 69.

It is in evidence in this case, indeed, it is obvious, that the "dozer" was not called into use until the fill had reached the level of the tops of the ties and had become of such width that the earth when dumped would pile up near the track so as to fall back upon it, if not removed, and that it was used for the double purpose of keeping the rails clear for the interstate commerce passing over them and for pushing the material to the edge of the embankment

Act. O'Brien v. Pennsylvania R. Co., 187 N. Y. App. Div. 839, 176 N. Y. Supp. 390 (1919).

E. Switch engine.

The husband of the plaintiff was employed by the defendant to watch a switch engine during the night, his duties being confined to throwing coal into the tender, turning the water from the tank into the engine, and keeping up steam on the engine so that it might be ready for use in the morning. During the day the engine was employed in switching cars containing both interstate and intrastate freight, about 90 per cent of that moved being interstate. While the engine was in the custody of the deceased, however, it remained stationary, no duty being imposed upon him to either run, operate, mend, or repair it. At the time when the accident occurred, the deceased was at his post of duty, on his engine, when he saw a pedestrian fall upon the main line of the defendant company a short distance away. He ran to the rescue of the pedestrian, slipped and fell, and was killed by an interstate passenger train of the defendant. An action at common law having been instituted, a verdict was directed for the defendant, and from judgment thereon the plaintiff brought error. The court, in reversing the judgment, held that the deceased was not engaged in interstate commerce at the time of his death; that the engine in question was not engaged in commerce of any kind at this particular time; and that the fact that it had previously been used in interstate transportation and was intended to be and in fact was subsequently so used, was not significant. Hardy v. Atlanta & W. P. R. Co., 20 Ga. App. 303, 93 S. E. 18 (1917).

XI. Boat employees.

A. Tug captain.

The captain of a lighter plying in New York harbor was struck on the head and fatally injured by a flying cap wrenched from its fastenings to the log rail of the vessel by the taking up of the slack of a rope with which the lighter was attached to a tug. The administrator of his estate sued in a state court under the Federal Employers' Liability Act, whereupon the railroad company owning the lighter, defendant in the death action, petitioned in admiralty for a limitation of its liability according to admiralty rules and for an injunction against the prosecution of the action at law. The federal court, having determined that the railroad company was entitled to a limitation of its liability to the value of the lighter and its pending freight, totaling $2,535, found that the proximate

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to widen it. When to this it is added that a part of Kinzell's duty was, with a shovel, to keep the track between the rails clear of earth and stones, which might fall upon it in the progress of the work, clearly it cannot be soundly said that when he was in the act of preparing to make the required use of the "dozer" he was acting independently of the interstate commerce in which the railway company was engaged, or that the performance of his duties was a matter of indifference to the conduct of that commerce. He was "employed" in keeping the interstate track, which was in daily use, clear and safe for interstate trains, or, as the superintendent of

cause of the accident and injury was the negligent manner in which the railroad company, at some time prior to the accident, had repaired the log rail of the lighter, rotten wood having been used for that purpose. This was a violation, the court held, of the petitioner's duty to exercise reasonable care to provide the decedent with a reasonably safe place in which to work. Continuing, the court said: "The decedent did not assume the risk of the petitioner's negligence in that respect, and, as there is nothing to show that he knew or should have known of the defective condition of the rail and cap, it follows that the claimant is not barred from recovery on the doctrine of assumption of risk." Having determined that the pecuniary loss sustained by the dependent beneficiaries of the decedent at least equalled the value of the lighter, as above stated, the court entered a decree accordingly, and enjoined the prosecution of any action in the state courts on account of the death. Appeal was taken by the railroad company from this decree, but there was no cross-appeal from the ruling of the court that the petitioner was entitled to a limitation of its liability. On this appeal it was held that the evidence did not warrant a finding that negligence on the part of the railroad company had been proved. The decree was accordingly reversed. Erie R. Co. v. Hansen, — C. C. A. —, 260 Fed. 100 (1919), rev'g The Erie Lighter 108, 250 Fed. 490 (1918).

B. Towboat cook.

The deceased was employed by the defendant towboat company as a cook on a towboat, licensed to tow between points in two different states. At the time of the accident, however, the boat was moored to a wharf in a harbor and not engaged on any towing job. The deceased left the boat shortly after the midday meal to purchase supplies at a neighboring store. He was last observed alive while passing along the dock with several purchases under his arm. Somehow, he fell from the dock into the water and was drowned. A proceeding under the Workmen's Compensation Act resulted in an award which was affirmed by the supreme court. The defendant employer appealed. In affirming the award, the court held that the deceased was not a seaman in interstate commerce at the time of the accident; that while the boat on which he worked might at times be employed in interstate commerce, such could not be said of it at the time of the injury, as it was tied to the wharf and not performing any work whatever. In re Westman, — Me. —, 106 Atl. 532 (1919).

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the railway company stated it, he was engaged with the "dozer" and shovel in making the track safe for the operation of trains and in avoiding delay to the commerce passing over it. Thus the case falls plainly within the scope of the decisions which we have cited, supra, and, regardless of what might have been said of the fill before, it had clearly become a part of the interstate railway when the petitioner was injured, for it had reached the stage where it required the work of men and machinery to keep the interstate tracks clear during further construction, and the work of such men was thereafter not only concerned with, it was an intimate and

XII. Miscellaneous.

A. Baggage handler.

Plaintiff was a baggage handler employed by the defendant railroad company at a city station. In an action to recover on account of injuries sustained as the result of a blow from a trunk falling from the top of a loaded truck, he alleged that the defendant owned and operated a railroad throughout the states of Nebraska, Wyoming, Utah and other states; that he was employed by the defendant in the capacity of a baggage handler; and that while engaged in this work in accordance with the directions of his foreman he met with the accident. The evidence disclosed that the employment of the plaintiff was regularly in work that was "practically all interstate in character," but it did not appear whether or not the trunk that fell on the plaintiff was interstate baggage. In the course of a decision affirming a judgment in the plaintiff's favor for a net amount of $2,000, it was held in part that the allegations above stated were sufficient to state a case within the Federal Employers' Liability Act, so that a subsequent amendment more specifically setting out the interstate nature of the defendant's business and the plaintiff's employment did not, with reference to the Federal Employers' Liability Act, state a new cause of action. With respect to the sufficiency of the evidence to sustain the recovery under the Federal Employers' Liability Act, the court held that the evidence was not insufficient to sustain the recovery, saying in part: "It appears clearly to us that plaintiff was regularly employed by defendant in work that was practically all interstate in character. In view of the record we are of the opinion it would be unreasonable to hold that it was incumbent on plaintiff to allege and to prove that it was an interstate trunk that fell upon him. It is obvious that to announce a rule so narrow would amount in many instances to a denial of a right of recovery. In the apparent confusion that ordinarily attends the transfer and loading of large quantities of baggage at transcontinental stations, it is obvious that an injured employee, whose injuries were incurred as in the case at bar, might not be able to identify the article of baggage that fell on him. The rule seems to be that if the employee at the time of the injury is engaged in interstate work, or in work so closely related thereto as to be practically a part thereof, he comes within the statute." Eskelsen v. Union Pac. R. Co., 102 Neb. 423, 167 N. W. 408 (1918). The decision was adhered to upon rehearing, 102 Neb. 423, 168 N. W. 366 (1918).

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integral part of, the conducting of interstate transportation over the bridge.

We cannot doubt that the Supreme Court of Idaho fell into error in regarding the fill as new construction so unrelated to the conduct of interstate commerce over the bridge at the time the accident to the petitioner occurred that the work being done by him should be regarded as not related to or necessary to the safe conduct of that commerce, and the judgment of that court is, therefore, reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

B. Agent lighting fire in depot.

Benson v. Bush, — Kan. —, 178 Pac. 747 (1919), was an action under the Workmen's Compensation Act for injuries received by the plaintiff, a station agent on an interstate line of the defendant railroad. The injury resulted from burns received in attempting to start a fire in the depot where the plaintiff was employed. On the evening before the accident he had been working on some statements, comparing the company's state and interstate business with that of the year before, but he was not thus engaged on the following morning when starting the fire. From a judgment for the plaintiff the defendant appealed, and the court, in affirming the judgment, found that the only work the plaintiff had done on the day in question was intrastate in character, and that he was not engaged in interstate commerce at the time of the accident. "The mere fact," the court observed, "that the station was on an interstate road did not render plaintiff at the time a person engaged in interstate commerce."

C. Janitor in shops.

Heed v. Industrial Commission, 287 Ill. 505, 122 N. E. 801 (1919), was a proceeding under the Workmen's Compensation Act by the plaintiff, a janitor in the shops of the defendant railroad company, for injuries to his left hand. The plaintiff performed the ordinary duties of a janitor, but also helped to load scrap iron and did other work of like character. On the morning in question, he came to the shops and was breaking up kindling wood for the purpose of building fires in the stoves when a splinter flew from a board and struck the middle of his left hand. It appeared that at the shop where the plaintiff worked slight repairs were made to engines which were used in both interstate and intrastate commerce. From a judgment of the circuit court confirming an award of the Industrial Board, the defendant brought error. The supreme court, however, affirmed the judgment, holding that the plaintiff was not engaged in interstate commerce.

J. H. M.

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LANG v. MARSHALLTOWN LIGHT, POWER & RAILWAY CO.

[Supreme Court of Iowa, January 17, 1919.]

— Iowa —, 170 N. W. 463.

1. **Trial—Conduct of judge—Lack of suavity.**
Defendant, in a hotly-contested personal injury action, held to have had a fair trial and to have no ground for complaint notwithstanding the fact that the trial judge was not, at all times, as suave as he would have been under other circumstances.

CASE NOTE.

Admissibility in evidence of X-ray photographs, and testimony as to physical conditions shown thereby.

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Cross-reference. Power to require plaintiff in action for personal injuries to submit to X-ray examination, see 10 N. C. C. A. 812-819.

I. Radiographs, etc., unexplained.

A. Purporting to show injury.

1. In general.

a. Original plates only.

The plaintiff, a brakeman, while riding in the cab of the engine, as he was authorized to do when not actively engaged in his duties, was injured by an explosion of the boiler of the engine. The explosion was caused by a lack of water in the boiler, due to negligence of the engineer. At the trial, X-ray pictures showing the plaintiff's injuries were introduced in evidence, and in appealing from a judgment for plaintiff, the defendant assigned this as error. The court, however, affirmed the judgment, saying: "It is further objected that the court

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2. Trial—Refusal of requested instruction—Subject-matter covered by other instructions.

Refusal of the trial court, in a personal injury action, to give defendant's requested instruction withdrawing from the jury injuries, alleged but not proven, held not error in view of instructions given.

3. Evidence—Best and secondary—X-ray photographs—Expert opinions.

Skiagraphs or X-ray photographs are the best evidence of what appears thereby, and physicians should not be permitted, in a personal injury action in which such evidence is introduced, to interpret and explain the same.

admitted in evidence X-ray plates taken, showing the extent and character of plaintiff's injury. Their correctness had been verified by competent evidence, and were, we think, properly admitted. * * * But it is said that, while prints taken from the plates may be admitted, the plates themselves are inadmissible. The contrary was held in De Force v. N. Y., N. H. & H. R. Co., 178 Mass. 59, 59 N. E. 669, 86 Am. St. Rep. 464." Chicago, B. & Q. R. Co. v. Upton, 115 C. C. A. 379, 194 Fed. 371 (1912).

b. Plates and prints.

The plaintiff, while standing on a railroad station platform waiting to take passage on a train, was hit in the back and knocked down by a heavy truck operated by an employee of the defendant. While he was down, the wheels of the truck passed over one of his feet. X-ray photographs of plaintiff's foot, taken after this accident, were admitted in evidence and shown to the jury. The physician who took them testified that the photographs showed that one bone of one of the toes had been broken and a callus formed at the point of fracture. The court, in affirming a judgment for the plaintiff, held that it was proper to admit the plates in evidence and permit the jury to see them, saying: "It has been held in several cases in our reports that the ordinary photograph, when shown to be a true representation and taken under proper safeguards, is admissible in evidence * * * and the same rule prevails as to photographs taken by the X-ray process. * * * There was also no error in permitting the jury to see the plate. * * * It is true that the witness who made the X-ray photographs does not say in so many words that the photograph is an accurate and true representation of the condition of the foot, but this is a reasonable inference from his evidence. He had sworn that he would tell the truth; he was an expert and experienced in the manipulation of the X-ray, and his whole evidence shows that he believed the photographs to be a true representation of the condition of the foot." Lupton v. Southern Exp. Co., 169 N. C. 671, 86 S. E. 614 (1915).

The plaintiff, while a passenger on a car of the defendant street railway company, was seriously injured in a collision between that car and a train of the defendant railroad company. At the trial of a suit for damages, X-ray photographs showing the plaintiff's injuries were admitted in evidence. Preliminary to the introduction of these photographs, the physician testified he was a post-graduate physician and surgeon, had twelve years' experience in the practice, and was experienced in making X-ray photographs; that he made the original negatives and the prints therefrom, and that the same were a correct representation of what they purported to be. On appeal from a judgment of $20,000 for the plaintiff, the defendants assigned as error the admission of these photographs. The court af-

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4. Appeal and error—Right to allege error—Evidence—Withdrawal of objections after witness discharged.

Defendant, in a personal injury action, cannot complain of its being deprived of the benefit of certain testimony by plaintiff's withdrawal of her objections to such testimony only after the witness had been discharged and was not readily available when it made no request for a postponement nor for an opportunity to get the witness back.

5. Witnesses—Cross-examination—Question bearing on credibility of witness.

Defendant, in an action for personal injuries to a married woman, may, on the cross-examination of her husband, ask the latter, as bearing on his credi-

firmed the judgment, saying: "This preliminary proof was sufficient to authorize the reception of the photographs in evidence. What they proved or tended to prove, or whether they were impeached by the expert testimony introduced by appellants, were questions for the jury. The evidence of Dr. Dennison made a prima facie showing sufficient to justify the court in admitting them in evidence, and this is the only question involved before us." Chicago City R. Co. v. Smith, 226 Ill. 178, 80 N. E. 716 (1907), aff'g 124 Ill. App. 627 (1906).

2. Leg fractures.

While the plaintiff was a passenger on a street car of the defendant, a collision occurred between the car and a wagon, as a result of which bones in both of the plaintiff's legs were broken. At the trial of a suit for damages, X-ray photographs of the plaintiff's legs were admitted in evidence. This the defendant assigned as error, on appeal from a verdict of $6,000. The court, in affirming the judgment thereon, said: "All photographs, whether of the surface or of matters under the surface, are, to a certain extent, liable to represent things in a distorted or exaggerated manner and not exactly as they appear to the eye, but when, as in this case, a photograph is sworn by a competent and unimpeached witness to be a correct and accurate reproduction of the condition of things as he has seen them, especially when, as in the present case also, they are taken in the personal presence and under the personal direction of the witness, although 'he did not handle the apparatus,' courts allow their introduction as valuable aids to investigation." Eckels v. Boylan, 136 Ill. App. 258 (1907).

The plaintiff, having suffered a transverse fracture of the upper third of the femur of his left leg employed the defendant, a physician, to reset it. The limb was placed in a plaster cast and the plaintiff remained in bed five weeks. No examinations were made by X-ray to discover if the bones had been properly set, nor was the limb measured from day to day to ascertain that apposition was being maintained. Neither was the foot of the bed elevated in order to have the plaintiff's body serve as a counterweight, and thus keep the muscles relaxed in order to maintain apposition. As a result, the bones were not kept in their proper position and a fibrous union occurred, causing a shortening of the leg of two inches. During the trial of plaintiff's suit for malpractice, X-ray plates were allowed to be introduced showing the condition of the bone in the plaintiff's leg at time of trial. From a judgment for the plaintiff, the defendant appealed alleging as error among other things the introduction of such photographs because their correctness had not been shown. The court affirmed the judgment, saying: "There is no merit in the contention. It cannot be questioned that a photograph is competent

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bility, whether he has an action pending in the same court against the defendant, based upon the same alleged accident, for injuries to his wife.

6. **Appeal and error—Harmless error—Cross-examination of witness.**

Refusal of the trial court, in an action for personal injuries to a married woman, to permit the defendant to ask plaintiff's husband, on cross-examination, whether he had an action against the defendant, pending in the same court and based on the same alleged accident, for injuries to his wife, held, under the record, not reversible error.

Action by a married woman for personal injuries claimed to have

evidence to prove a condition which can be shown by a representation of that sort. * * * It stands upon the same footing as a map, plan, or model, and, when shown by a competent witness to be correct, * * * furnishes evidence of a high order of accuracy. * * * A plate or photograph taken by the X-ray process must be assigned to the same category. If, for illustration, it appears from the testimony of the person who took the picture that he possesses the knowledge, skill, and experience necessary to enable him to take such pictures accurately, and that the one in question is a fair representation of the situation or condition which is the subject of inquiry, it becomes competent to show that condition. In this case, the witnesses who took the plates were both practicing physicians. Upon being questioned, they showed that they understood, and were accustomed to the use of, the process in their practice and possessed the required skill and knowledge to enable them to use it with accurate results." Stokes v. Long, 52 Mont. 470, 159 Pac. 28 (1916).

The plaintiff, while climbing down from the top of a car, placed his foot upon a grab iron on the side of the car, which broke and caused him to fall to the ground, fracturing his leg above the ankle. From a judgment on a verdict of $7,000, the defendant appealed, contending that the admission of X-ray photographs in evidence, without proof that they were correct portrayals of the injuries, was error. The court reversing judgment, upheld this contention, saying: "Such matters as maps, plats, and photographs should always be accompanied by proof or admission that they are correct before admitted in evidence." Kansas City, M. & O. Ry. Co. v. Swift, — Tex. Civ. App. —, 204 S. W. 135 (1918).

The plaintiff was struck and injured by the automobile of the defendant, while crossing a street to take a street car. Both of the bones in his left leg were broken between the ankle and the knee, and his head was badly bruised. To procure a union of the bones, metal plates fastened by metal screws to the bones above and below the break were used. At the trial X-ray pictures were exhibited to the jury. The defendant, on appeal from a judgment for $9,500, contended there was insufficient evidence to permit the introduction of such pictures. The court reversed judgment and remanded the case, but held that under the circumstances there was no error in the introduction of the X-ray pictures. "It is true," said the court, "that some, and perhaps all, of these X-ray pictures were calculated to shock a layman, and together with the fact that steel was used in getting a union of the bone, as before mentioned, might create an impression of a much graver injury than a surgeon would understand existed from a consideration of the same facts, and it is quite likely that the exhibition of these pictures resulted in much increasing the size of the verdict, not because of

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been received in alighting from one of defendant's street cars on which she had been riding as a passenger. Appeal by defendant from a judgment for plaintiff. Affirmed.

For appellant—Hasner & Hasner, Binford & Farber, and Edwards, Longley, Ransier & Smith.

any correct information they furnished the jury, but because of the shock produced on their sensibilities. Still, we are not inclined to hold that there was error in permitting that testimony." Berg v. Michell, 196 Ill. App. 509 (1915).

The plaintiff was a brakeman on a work train engaged in unloading steel rails along the right of way. It was plaintiff's duty as brakeman to watch the work and give signals to the engineer as to the movements of the train. He stationed himself near the end of the third car from the engine in a clear space of about eight feet between the ends of the rails and the end of the car, and gave signals from this position. One end of a certain rail was pushed over the edge of the car too soon with the result that it stuck in the ground and through the motion of the train caught on an iron socket on the side of the car; the north end was raised in the air, and struck the plaintiff, breaking both bones of his leg between the knee and the ankle. Several operations intended to unite the bones had failed to accomplish their purpose up to the time of trial. The trial resulted in a verdict of $11,916 for the plaintiff, which was reduced to $8,000, and on appeal from the denial of its motion for a new trial, the defendant contended it was error to admit in evidence X-ray photographs showing the condition of the plaintiff's bones, and to permit the jury to take them into the jury room. The court affirmed the judgment, saying: "These photographs were properly received, and we see no merit in the contention." Brookman v. Chicago Great Western R. Co., 116 Minn. 409, 133 N. W. 969 (1912).

The team which the plaintiff was driving across the railroad of the defendant, became frightened at the approach of a train which gave no warning of its approach, and which the plaintiff, because of obstructions, was unable to see until upon the track. The team whirled and started to run. The plaintiff, seeing that his wagon was about to turn over, jumped from it. Most of his weight, as he struck the ground, was on one leg, and his hip was dislocated and fractured. At the trial of his suit for damages, an X-ray photograph was admitted in evidence. The attending physician testified that he had been practicing medicine for 15 years; that he had had no experience in taking X-ray photographs, but was present when this photograph was taken; that he saw the plate before it was delivered to the photographer to be developed; and that the radiograph exhibited to the jury was the same as the impression on the plate which he saw just after it was taken. It appeared the injury was permanent and that the limb in question would always be about an inch and a half shorter than the other. From a verdict of $2,000 for the plaintiff, the defendant appealed. The court, in affirming the judgment entered on the verdict, said: "X-ray photographs are admissible in evidence when proper proof of their accuracy and correctness is produced.

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For appellee—Bradford & Johnson, and U. S. Alderman.

PRESTON, J. This case has been here before. Lang v. Light, Power & Ry. Co., 166 Iowa 548, 147 N. W. 917. The opinion there states the nature of the case, and we shall not repeat. Twenty-three errors are assigned. They relate, for the most part, to rulings of the court in admitting and excluding evidence, and the alleged

* * * [The attending physician], although he was not a graduate of any medical school, was a practicing physician and surgeon, and had been for fifteen years. His testimony, detailed above, shows that he was present when the picture was taken, and was familiar with the anatomy of the human body. Therefore we think there was sufficient proof of the accuracy and correctness of the photograph, and that the court did not err in admitting it in evidence. * * * Here the testimony of Dr. G showed that the X-ray photograph was a true representation of the object which was the subject of inquiry.'' Prescott & N. W. R. Co. v. Franks, 111 Ark. 83, Ann. Cas. 1916 A 773, 163 S. W. 180 (1914).

3. Arm fractures.

The plaintiff, a boy 9 years old, fell from a box to the floor of his father's store, fracturing the humerus about 2 inches above the elbow. The defendant, a physician, set the arm, binding it in splints. The plaintiff suffered greatly and a few days later, when the splints were removed, it appeared there was a defective circulation. Blisters formed and these developed into running sores. Another physician who next treated the arm said it would come out all right by proper massaging. The muscles, however, became hard and rendered the arm practically useless. The plaintiff was then taken to another physician, who took X-ray photographs of the arm, and later performed an operation, taking off about an inch of the protruding bone, and then wiring the two ends together. At the trial of a suit for damages, for malpractice, X-ray photographs of the plaintiff's arm, taken before and after the operation, were presented in evidence. The physician, however, merely stated that he took the photographs. He did not state that they correctly represented the arm, or how they were taken, or that he had ever taken an X-ray photograph before, or knew anything about how they ought to be taken. No assurance was given as to the character or accuracy of his X-ray machine, or its condition or working order. From a judgment for $2,105 for the plaintiff, the defendant appealed, contending the X-ray pictures were improperly admitted. The court reversed the judgment and remanded the case, holding that since the accuracy of the X-ray pictures was not established they were not competent evidence. ''Where the witness fails to make an X-ray photograph admissible by testifying to its accuracy,'' said the court, ''it is not admissible and should be rejected. This rule is recognized by all the authorities.'' Ligon v. Allen, 157 Ky. 101, 51 L. R. A. (N. S.) 842, 162 S. W. 536 (1914).

On a subsequent appeal of the above case, it appeared that properly accredited X-ray photographs were introduced in evidence showing the condition of the plaintiff's arm. There was evidence

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restriction of cross-examination of plaintiff's witnesses by defendant. It is also claimed that the trial judge made improper remarks, and that counsel for appellee, during the trial, were guilty of improper conduct in their remarks concerning counsel for defendant, and in improper argument to the jury concerning inefficiency of defendant's employee, the seventeen-year-old conductor in charge of the car; improper questions asked witnesses and the like. Complaint is also

introduced for the plaintiff that the arm was in the same condition when photographed as when treated by appellant. This the defendant denied and sought to show that there had been an intervening injury to the arm, and that the photograph did not properly show the condition of the plaintiff's arm at the time he treated it. From a judgment for plaintiff for $2,605 the defendant appealed, contending that the photographs were improperly admitted. The court, in affirming the judgment, said: "While it may be admitted that this evidence was not conclusive since there was evidence for appellant to the effect that there had been an intervening injury to the arm, this evidence did not affect the admissibility of the photographs as evidence. They were admitted properly, we think, as showing the true condition of the arm at the time the photographs were taken, and there being some evidence that the condition then was the same as when the arm was treated by appellant, it was properly left to the jury to decide whether or not the arm was at that time in the same condition as when treated by appellant." The court further pointed out that while there must be positive proof that the photographs represented the exact condition at the time of the acts complained of, such proof need not be conclusive, and the photographs were properly admitted since there was some positive proof to that effect. Ligon v. Allen, 168 Ky. 19, 181 S. W. 656 (1916).

Plaintiff, while working for defendant in its coal mine, was injured by a shot of dynamite or powder fired for the purpose of loosening the coal. His arm was broken in four places, and on the trial of the suit filed to recover for these injuries, he recovered a verdict and judgment for $10,000. The court, in reversing the judgment, held that the X-ray photographs introduced in evidence were improperly admitted because not properly accredited, and that such an error was ground for reversal, where the verdict, as here, was not in accord with the weight of the evidence. Indian Creek Coal Co. v. Walcott, 168 Ky. 534, 182 S. W. 631 (1916).

In a suit for malpractice for alleged negligence in the treatment of a fracture of the plaintiff's arm, X-ray pictures made two years after the treatment, were admitted in evidence. The person who took the pictures testified that she was not a physician, but that, as superintendent of the dispensary of a medical school, her work included the taking of X-ray pictures; that she had had one year of such experience, and had taken 500 or 600 X-ray pictures. She further testified that the picture was a correct representation of the negative. It appeared on cross-examination, however, that not being a physician, she had no means of knowing whether the picture was a correct representation of the bones of the hand. The defendant on appeal from a judgment for $2,250 contended that the negative and picture were improperly ad-

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made of the refusal of the trial court to give an instruction requested by appellant, in which the court was asked to withdraw from the consideration of the jury certain alleged injuries to plaintiff, which were alleged in the petition, for the reason that it is contended by appellant there was no evidence in the case to show that such injuries existed. These have reference to injuries to the spinal cord, and the nerves radiating therefrom; the alleged injuries to the

mitted. The court affirmed the judgment, holding that (1) the person taking the pictures properly qualified as an expert; (2) that there was a prima facie showing that the pictures were a correct representation; and (3) that X-ray pictures were not objectionable on the ground that there was nothing to prove that the condition shown by the photograph resulted from the treatment in question, since testimony of the plaintiff was to the effect that no accident had altered the condition of the arm from the time of treatment to the time of taking the picture. Krauss v. Ballinger, 171 Ill. App. 534 (1912).

See also, Davis v. Dunn, I, B, 3, *post*.

4. Ilium crushed.

The plaintiff was employed by the defendant to make certain repairs to one of its turntables, with the understanding that during such time the same was not to be moved. It was necessary for the plaintiff to occupy a stooping position in doing the work, and while he was thus situated, and using a tool, the turntable was moved in such a manner that it drove the bar through the plaintiff's abdominal cavity. At the trial of his action to recover damages, an X-ray picture was introduced in evidence showing the condition of the ilium bone, through which the bar passed in making its exit, after the bone had knitted, and the condition in which it would remain. To develop more perfectly the picture, it was placed in an illuminator without objection by the court. From a verdict for $12,500, the defendant appealed, contending, among other things, that the introduction of the X-ray pictures in the manner described was error. The court affirmed the judgment, saying: "The purpose of all testimony is to place before the court and the jury the facts. They are entitled to know and consider any fact which will throw light upon the matter being investigated. The condition in which any part of the body of plaintiff was made by the injury, they were entitled to know. * * * Things which are external and can be seen with the naked eye, such as scars, etc., are always admissible, and if science has come to the rescue of the deficiencies of the naked eye and enabled it to discern with substantial accuracy, that which before was a matter largely of conjecture even with the expert, we can discover no reason why the jury should be deprived of the assistance which the invention affords." Chesapeake & O. R. Co. v. Kornhoff, 167 Ky. 353, 180 S. W. 523 (1915).

5. Spine injured.

The plaintiff, while a passenger upon a car of the defendant, received serious injuries by reason of the car becoming derailed and leaving the track. At the trial, an X-ray skiagraph or radiograph, marked P. H., was admitted in evidence. From a judgment for $9,750 the defendant appealed. The

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ligaments of the neck, muscles of the left side, ribs, or the articulation and connection with the spinal column, and the like. It would not be practicable to discuss all the assignments in detail. Counsel for appellant say in argument that the questions asked and the objections are so numerous that it is practically impossible to set them out at length and in each particular.

1. We shall attempt to cover those which seem to be of minor

court reversed the judgment and remanded the case, holding it was error to admit the X-ray picture in evidence, since it was not sufficiently identified as a skiagraph of the spine of the plaintiff. Lake Shore Elec. Ry. v. Hobart, 32 Ohio Cir. Ct. 154 (1909).

6. Head injured.

An agent of the defendant sewing machine company while repairing the machine of the plaintiff's mother opened the cover of the machine while the plaintiff was stooping close by, with the result that on arising she struck her head between the eyes and bridge of the nose. The next day her face was black across the eyes and nose, and her eyes were bloodshot. Thereafter, there was a depression in the right frontal sinus and a small opening running from the right frontal sinus forward through the bones. At the trial of a suit for damages, a radiograph of the plaintiff's head was admitted in evidence. The doctor taking it was shown to have had considerable experience in X-ray work. He testified that he took four negatives of the plaintiff's head and that they were correct representations of the condition of the bones in the front of the plaintiff's face. The defendant excepted from a verdict for the plaintiff, alleging that the evidence of the negatives was wrongly admitted. The court overruled the exceptions, holding that the evidence was properly admitted. Doyle v. Singer Sew. Mach. Co., 220 Mass. 327, 107 N. E. 949 (1915).

The plaintiff was struck on the head by a quantity of fire plate and his nervous system permanently injured. On trial of a suit to recover damages, X-ray plates, tending to prove the existence of certain physical defects in and about the bony structure of the plaintiff's head, were admitted in evidence. The regular physician of the plaintiff testified that from an examination of the plaintiff, based upon symptoms related to him, he was unable to find the cause of the plaintiff's trouble and sent him to another physician that the X-ray plate might be made. This doctor did not testify, nor did any one who was present at the time the plates were made. The regular physician of the plaintiff, it appeared, was not present when such picture was taken and so could not vouch for its authenticity. The defendant appealed from a judgment for the plaintiff, contending that the plates were not properly identified as true representations of the object they purported to represent and as such were improperly admitted in evidence. The court upheld this contention and remanded the case for a new trial, saying: "The admission of X-ray plates in evidence rests fundamentally on the theory that they are the pictorial communication of a qualified witness who uses this method of conveying to the jury a reproduction of the object of which he is testifying, this being true, the X-ray plates must be made a part of some qualified witness's testimony and the witness should qualify himself by showing that

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importance as briefly as may be, and in a general way, and notice more particularly those which seem to be more important. As said, this was the second trial of the case, and after reversal in this court, and the record shows, and it is so stated in argument, that this last trial was hotly contested by the several attorneys of ability and determination. There was naturally more or less sparring between counsel on both sides, and it may be that the trial court, under such

the process is known to himself to give correct representations, and that it is a true representation of such object. * * * The plates were not admissible in evidence, nor could they be, until they were properly identified or shown to have been made by trustworthy instruments properly used by a person skilled in making, reading, and interpreting such plates and further shown to be correct representations of the bony structure of the plaintiff's head." Bartlesville Zinc Co. v. Fisher, — Okla. —, 159 Pac. 476 (1916).

7. Hand crushed.

The plaintiff while pushing a peddler's cart along the street turned to go around a wagon at the curb, and as he was doing so the defendant's wagon came behind him, struck the cart, causing it to swerve so that his right hand was brought in contact with and crushed by the wagon. The plaintiff's medical witness testified that he examined the plaintiff one year and eight months after the accident; that he consulted the hospital records and brought with him an X-ray blueprint which was produced in court. Plaintiff's counsel then asked whether the blueprint correctly showed the position of the fingers in the palm of the plaintiff's hand at the time of the trial, but instead of answering the question the witness replied: "That X-ray photograph explains the reason of the deformities I found." The court refused to strike out the answer. The photograph was then offered and admitted in evidence "to show the jury in what part of the hand the injury occurred," as stated by the court. The defendant appealed from a verdict and judgment of $1,500 for the plaintiff. The court reversed judgment and granted a new trial, saying: "Further than the testimony of the doctor that he consulted the records of * * * [the hospital] in regard to the case, there is no evidence either that an X-ray picture was taken of the plaintiff's hand or that the blueprint produced was a picture of the hand; and while perhaps it would have been proper for the witness to testify that the picture represented the position and condition of the bones at the time he made his examination, if as an expert and without the aid of the photograph he could so testify, the witness did not state that it was such representation, but that it 'explains the reason of the deformities I found.'" Kossoff v. Kupfgerberg, 91 N. Y. Misc. 1, 154 N. Y. Supp. 149 (1915).

B. Representing normal conditions.

1. Foot.

Plaintiff sued the defendant railway company for damages on account of personal injuries sustained in a fall from a bridge upon which he was working as an employee of the defendant. Trial before a jury resulted in a verdict and judgment for $10,000 in favor of the plaintiff, from which the

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circumstances, was not, at all times, as suave as he would have been under other circumstances. After an examination of the record, it is our conclusion that, as to these claims, the defendant had a fair trial, and has no just cause of complaint.

2. As to the appellant's offered instruction before referred to, the argument is very brief. By the court's instruction No. 3, the trial court did say to the jury, as to some of the alleged injuries,

defendant appealed. One of its assignments of error was the introduction in evidence, in connection with the testimony of a certain physician, of X-ray pictures of the bones of the normal foot found in a standard medical work. The objection was that the photographs were immaterial and irrelevant, not sufficiently identified, and their introduction not sufficiently predicated, it not having been shown what the condition of the plaintiff's arch was, whether normal or otherwise, prior to the injury. On cross-examination the doctor stated that the photographs were, to his knowledge, correct pictures of normal arches of the feet. He further testified that the book containing the plates was a standard work, accepted by the medical profession generally. It further appeared that the condition of the plaintiff's feet both before and after the injury was shown by the evidence. The court affirmed the judgment, holding that upon this state of the record the plates were certainly not immaterial or irrelevant. As the court said: "Their correctness was established by the evidence of * * * [the doctor], and, while the predicate was not laid prior to their introduction, this objection was removed by proper subsequent proof." Chicago, R. I. & G. Ry. Co. v. Smith, — Tex. Civ. App. —, 197 S. W. 614 (1917).

While the plaintiff, a coal miner, was walking through the mine to his place of work, loose rock and slate in the roof of the entry fell upon and injured him. At the trial of the suit for damages, X-ray photographs were introduced in evidence which the defendant, on appeal from a judgment for $2,500, contended was error. The court reversed the judgment and remanded the case, but said on this particular question: "The court did not err in admitting in evidence the X-ray photographs of the bones of appellee's foot after his injury and of the foot of a person showing the normal position of similar bones. The proper foundation was laid for the admission of such evidence within the rule announced in Chicago City Ry. Co. v. Smith, 226 Ill. 178 [80 N. E. 716 (1907), aff'g 124 Ill. App. 627 (1906)]." Haywood v. Dering Coal Co., 145 Ill. App. 506 (1908).

The plaintiff, while working for the defendant in putting a wooden roof on a circular tank 22 feet high, was compelled, in the course of the work, to lay a board across two rafters extending over the top of the tank and to stand on the board, thus supported. While he was so standing, one of the rafters supporting the board broke, with the result that the plaintiff fell to the ground and was severely injured. At the trial of a suit for damages, an X-ray picture of a normal foot was admitted in evidence to enable the jury to compare the same with the condition of the plaintiff's foot after the injury. The defendant appealed from a judgment for the plaintiff assigning as error, among other things, the admission of this evidence. The court affirmed the judgment, saying: "The fact that the

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there was no evidence, and such were withdrawn from the consideration of the jury. As to others, there was evidence. Furthermore, by instructions No. 10 and No. 11, the court left it to the jury to say from the evidence what injuries plaintiff proximately suffered by reason of the negligence of the defendant, as the natural result thereof, and the extent of her injuries, and the damages resulting therefrom. We think there was no error at this point.

X-ray was taken in the absence of the defendant, or without his knowledge, does not of necessity affect the propriety of this evidence. It is not claimed that the picture of the normal foot was inaccurate.'' Bruce v. Western Pipe & Steel Co., 177 Cal. 25, 169 Pac. 660 (1918).

2. Ribs.

The plaintiff, while driving a horse and wagon loaded with various tools and building material, was compelled to drive out of his regular course to pass certain lumber and building material piled at one side of the street. After passing, he looked back to see if anything had jostled off while driving past the material. As he did so, his horse stepped into a hole in the street, causing the front of the wagon to drop into it, thereby throwing the plaintiff out and injuring him. To show the nature of the plaintiff's injury an X-ray photograph was admitted in evidence at the trial of his suit to recover damages therefor, which purported to show a fractured rib and an injury to the shoulder. To elucidate the criticism of this picture, a witness for the defendant offered an X-ray photograph of a 5-year-old child's breast to show the location of the ribs. From a judgment for defendant, the plaintiff appealed, contending the introduction of this second photograph was error. The court affirmed the judgment, saying: ''Its significance was for the jury, who were advised that it was the picture of a child, and not of a man of plaintiff's age, and, like an ordinary map, diagram, or model, it might be properly used by way of illustration.'' Boddington v. Kansas City, 95 Kan. 189, 148 Pac. 252 (1915).

3. Wrists.

The plaintiff slipped on the ice, fell, and sustained a Colle's fracture of the right arm at the wrist. The defendant treated the injury as a sprain for some time before the fracture was finally reduced by other physicians. A radiograph of the arm was taken, but the physician who took it was abroad at the time of the trial and could not be produced to verify the radiograph. The plaintiff's regular physician, however, testified that he saw the plaintiff go into the X-ray room and that on the same day he received the radiograph in question from the physician alleged to have taken it. The plaintiff further sought to show that this radiograph, which clearly showed a fracture, was a radiograph of her arm, by offering in evidence other X-ray pictures taken later and proved to be of the plaintiff's arm, which had certain indentations not found in the normal hand, and by asking physicians if they could not verify the picture showing the fracture by the presence upon it of the same indentations. This offer was excluded by the court. The plaintiff was also refused the right to question the defendant as to conditions shown by the radiograph showing the fracture,

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3. As to the alleged restriction of cross-examination, we think there was no error. With one or two exceptions, which will be noted later, the objections interposed by appellee, that the questions asked were not cross-examination, were properly sustained or the ruling was within the discretion of the court. The cross-examination was quite extended.

4. Both plaintiff and defendant introduced witnesses who had

since no evidence was introduced to show whose hand it was. The plaintiff was also refused the privilege of introducing radiograph plates of the wrists of other people presumed to be normal, in order that it might be more clearly demonstrated that one of the radiographs of the plaintiff's wrists showed an injury. From a judgment for the defendant, the plaintiff excepted, contending that these rulings were erroneous. The court reversed the judgment and remanded the case, holding (1), that common photographs may be verified by the testimony of the person taking them or by the testimony of others who can state that the object sought to be shown is fairly represented thereby; (2), that the plaintiff was properly denied the right to examine witnesses respecting the contents of the radiograph until it was properly identified by some evidence other than the radiograph itself; (3), that the evidence identifying the radiograph showing the fracture by reference to other radiographs of the plaintiff's hand was admissible; and (4), that the radiographs of wrists other than those of the plaintiff were properly excluded as raising collateral issues. Davis v. Dunn, 90 Vt. 253, Ann. Cas. 1918 D 994, 98 Atl. 81 (1916).

C. Pulse tracings.

A case presenting a question closely allied to that considered in this annotation, arose out of the following situation: The plaintiff, a brakeman on the defendant's railroad, leaped from a coal car while it was in motion and about to collide with another train, to avoid the greater hazard. A suit for damages for the injuries he thus sustained, resulted in a verdict and judgment for $7,000, from which the defendant appealed, contending that the admission in evidence of certain tracings and photographs was error. To show the existence of a weak heart, occasioned by the leap, a tracing of the plaintiff's pulse was admitted. In making this tracing, an instrument like a clock was placed upon the wrist of the patient to which was attached a needle and slip of paper. As the instrument moved the paper over the needle, the needle was elevated and lowered by the pulse beat and the pulse wave produced. The stronger the pulse, the higher the waves in what would be a straight line across the paper but for the pulsation. The tracing was made in the usual scientific manner, was correct, and exhibited a very weak heart. A microscopic photograph of the plaintiff's urine was also admitted, showing tube casts or crystals in the urine, indicating an inflamed condition of the kidneys, also claimed to have resulted from the leap. A tracing was also introduced showing how the eyesight was seriously affected by reason of the condition of the kidneys. The tracing was made by the perimeter, and showed an irregular line traced over a circular piece of pasteboard representing the surface of the eye, showing that portion of the sight affected and that which was not. All

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taken X-ray photographs of portions of plaintiff's person, and the photographs were received in evidence. Plaintiff's witnesses testified, without objection, as to plaintiff's condition as revealed by the photographs, or in connection therewith. Complaint is made by appellant that the court erred in refusing to allow doctors called by defendant to testify as to what appeared in the skiagraphs. An

of the tracings were shown to be in general use by scientific men and to have been correctly made by the witness introducing them. The court affirmed the judgment, quoting the rule from Bruce v. Beall, 99 Tenn. 303, 41 S. W. 445 (1897), stating: "It is not to be understood, however, that every photograph offered as taken by the cathode or X-ray process would be admissible. Its competence, to be first determined by the trial judge, depends upon the science, skill, experience, and intelligence of the party taking the picture and testifying with regard to it, and, lacking these important qualifications, it should not be admitted; and even then it is not conclusive upon the triers of fact, but is to be weighed like other competent evidence." The court, after citing this rule, said: "We are unable to add anything to the excerpt quoted, other than to say that in the instant case the preliminary proof of accuracy and knowledge on the part of the witness was shown in such manner as to bring both the photograph and the two tracings clearly within the rule stated." Missouri, K. & T. Ry. Co. of Texas v. Heacker, — Tex Civ. App. —, 168 S. W. 26 (1914).

II. In connection with expert testimony.

A. Purporting to show injury.

1. In general.

While the plaintiff was alighting from a train, an agent of the defendant held out his hand to assist her, but as she reached out to take hold of it, he withdrew it, and she fell, sustaining certain injuries. On request of the plaintiff, the judge allowed the jury to be taken to the office of a certain physician, who was an expert witness for the plaintiff, that he might explain and illustrate his testimony by exhibiting X-ray plates. The defendant appealed from a judgment for the plaintiff, contending, among other things, that it was error to allow the jury to be taken to such physician's office for the purpose in question; that the jury were there surrounded by conditions in which the influences were wholly to the advantage of the plaintiff. The court affirmed the judgment, holding that the judge did not under the circumstances erroneously exercise the discretion vested in him as to the granting of the plaintiff's request to take the jury to the physician's office. Clayton v. Southern Ry. Co., — S. C. —, 96 S. E. 479 (1918).

The plaintiff, a boy under 14, was employed as a trapper in the defendant's coal mine. He was struck by a certain door in the mine and as a result sustained certain internal injuries in the pelvic region, for which he sought damages. An X-ray radiograph was admitted in evidence and the physician who took it was allowed to testify as to what the radiograph showed, and give his opinion as to the extent of the plaintiff's injuries. It appeared that the witness in question was not only a skilled physician, but

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illustrative question asked by defendant of its witnesses is a question asked Dr. Cheshire:

"Q. State whether or not, Doctor, Exhibit B does, or does not, show a curvature of the spine, as appears in the negative?"

Upon proper objection, the court sustained the objection to this question, whereupon counsel for defendant claimed that, in view of

was also an expert in the use of X-ray machines and in making and interpreting X-ray pictures; that he had one of the best machines made; and that when he took this radiograph the machine was working satisfactorily. The witness testified positively that the picture represented correctly that portion of the plaintiff's body claimed to have been injured. The plaintiff brought error from a judgment for defendant, contending, *inter alia*, that it was error to admit the X-ray picture, and that the testimony of the physician, being based entirely on what he could read from the radiographs, was also inadmissible. The court affirmed the judgment, holding that such pictures, when made with trustworthy instruments and properly taken, as in this case, were properly admitted in evidence in connection with the evidence of expert witnesses skilled in making, reading, and interpreting them. Griffith v. American Coal Co., 75 W. Va. 686, L. R. A. 1915 F 803, 84 S. E. 621 (1915).

The plaintiff, while a passenger on one of the defendant's street cars, was injured by the sudden starting of the car while attempting to alight from the same. On appeal from a judgment for $2,000, it was urged by the defendant, that the court improperly permitted certain witnesses called as experts, to state their opinions, based upon their knowledge and observation, as to the character of the injury disclosed by an X-ray picture of the plaintiff's hip, which was apparently in evidence. The court held, in affirming the judgment, that the objection was untenable within the principle stated in Judejko v. Chicago City Ry. Co., 166 Ill. App. 140 (1911). Dooley v. Chicago City Ry. Co., 166 Ill. App. 312 (1911).

2. Stone in kidneys.

Gas in the mine in which the plaintiff worked became ignited by a lamp on another miner's head and as a result an explosion occurred in which the plaintiff was seriously injured. On trial of his suit for damages the plaintiff sought to show blood and pus present in the urine as a result of the accident. Expert witnesses testified that this might be due to a stone in the kidney, and that as this condition was present so soon after the accident, it could not have been due to the accident. A physician took X-ray plates of plaintiff's body from the chest down to and including the pelvis. He qualified as an expert in the use and operation of X-ray machines and testified that the pictures of the plaintiff's body so taken showed the presence of no stones in the kidneys. It appeared, however, that without the assistance of the illuminating box, no one could determine what conditions were shown by the radiographs. The witness testified also that no one but an expert could take the plate and tell what it represented. The plates were then admitted in evidence, over objection by the defendant. From a judgment of the appellate court affirming a judgment of the cir-

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the fact that plaintiff's witnesses gave similar testimony, he was entitled to it, but the court stated, had there been an objection at that time, the court would have ruled, and counsel for defendant stated that he thought plaintiff was entitled to such evidence, but the court stated he did not agree with counsel. Defendant's three doctors on this subject, Dr. Cheshire, Dr. McGready, and Dr. Johnson, testified at great length in regard to the X-ray photographs.

cuit court for $10,000, the defendant brought the case by certiorari to the supreme court, contending it was error to admit in evidence either the plates or the testimony of the doctor that there was no stone present in the plaintiff's kidney. The court affirmed the judgment, saying: "Having qualified as an expert it was proper for him to state what he found as a result of his examination and to state whether or not there was a stone present in the kidney of * * * [plaintiff]. Under the state of the record the two X-ray photographic plates ought not to have been admitted in evidence, as from the evidence of this witness they would be unintelligible to the jury. This error, however, was harmless, as the witness testified that the plates disclosed nothing whatever except when examined by the use of the illuminating box. We do not regard this error of such a prejudicial character as to warrant a reversal of the case." Colesar v. Star Coal Co., 255 Ill. 532, 99 N. E. 709 (1912), aff'g 160 Ill. App. 251 (1911).

3. Fractures.

The plaintiff, while a passenger, was injured in a collision between two of defendant's trains, sustaining a fracture of both bones of his left limb between the knee and ankle. The bones were imperfectly set by the surgeons of the defendant and finally an X-ray picture was taken, disclosing that there was an overriding of the fibula to the extent of three-fourths of an inch. Two operations were necessary to get the bones in perfect apposition, and even at the time of the trial the plaintiff had not fully recovered. The defendant contended that one of such operations was unnecessary and that when performed the bones were knitting in as good a condition as could be expected. The surgeon, testifying as to the necessity of the operation, was allowed to show the X-ray pictures which he had taken of the plaintiff and explain the conditions which those pictures represented. He testified that when operating he found the conditions to be just as the pictures represented. The defendant, appealing from a judgment for plaintiff, contended that the pictures were not admissible, and in any event were not properly identified. The court, in affirming the judgment, held that the surgeon was properly allowed to show by the radiograph what directed his judgment in arriving at the decision that an operation was necessary and that in view of his testimony, that on operating he found the conditions to be just as the pictures represented, the objection that they were not taken by a professional amounted to nothing. Wallace v. Pennsylvania R. Co., 222 Pa. 556, 128 Am. St. Rep. 817, 71 Atl. 1086 (1909).

Plaintiff, while a passenger on one of the defendant's trains, was injured when the coach in which he was riding left the track and rolled down an embankment. At the trial of his suit for damages, the plaintiff was allowed

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Dr. Cheshire's testimony takes up 25 pages of the abstract. He also testified that he made a personal examination of the plaintiff at a time prior to the taking of the X-ray photographs, and testified as to the condition of plaintiff's neck and muscles, and so on. These three doctors gave testimony interpreting the X-ray pictures. Appellant cites a number of cases to the proposition that X-ray negatives and photographs, properly verified, are admissible in evidence, and

to introduce in evidence certain X-ray photographs of his injuries. The doctor who took them, testified that he owned an X-ray machine and was familiar with its use and operation; that he had examined the plaintiff; that he had the negatives developed by a photographer under his supervision, and that the pictures were correct photographs. The witness also pointed out certain parts of one of the pictures which showed an enlargement of the upper part of the right thigh bone, and testified that this indicated a fracture near the base of the great trochanter of the femur. From a judgment for $12,500, the defendant appealed, contending that the photographs were inadmissible and could be made use of only as memoranda by the witness. The court, in affirming the judgment to the extent of $7,000, held, as to this contention: "Even on the theory of the defendant that such a picture is, in itself, not evidence, but only serves as a memorandum to assist the expert witness in his explanation, these pictures were properly admitted in evidence." Dean v. Wabash R. Co., 229 Mo. 425, 129 S. W. 953 (1910).

The plaintiff, a fireman, was injured as the result of a collision between the engine on which he worked and another engine on defendant's line standing on a sidetrack. Both of the bones of the plaintiff's leg were broken between the knee and the ankle. X-ray photographs of the bones in the plaintiff's leg were admitted in evidence in connection with the testimony of Dr. B. It was shown that the instrument used was one of the proper type, and had been frequently used by the witness. The defendant, on appeal from a judgment for plaintiff, contended that without cutting away the intervening flesh, skin, etc., it was impossible to tell whether these pictures correctly represented the condition of the injured bones. The court in affirming the judgment to the extent of $17,500, held that X-ray photographs were properly admitted. As the court said: "It would be strange if in the trial of cases in courts, use could not be made of facts elicited by means of a process, the usefulness and absolute accuracy of which has been so completely demonstrated as have been photographic views of the bones of a living body by means of the X-ray. When properly taken, as these views were shown to have been, it is a matter of such common knowledge that they accurately represent what they purport to show that even courts may take cognizance of the fact. There was no error in the admission of the photographic views, and the testimony of the expert medical witnesses in connection therewith." Houston & T. C. R. Co. v. Shapard, 54 Tex. Civ. App. 596, 118 S. W. 596 (1909).

The plaintiff was severely injured in falling upon a stairway in the defendant's tenement as a result of catching his feet in a loose tin nosing on one of the stairs. An X-ray photograph was admitted in evidence

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this proposition is not disputed by appellee. Cases are also cited by appellant, holding that it is proper for experts to interpret and explain X-ray plates to the jury. Among these is the case of State v. Matheson, 142 Iowa 414-419, 120 N. W. 1036, 134 Am. St. Rep. 426. They claim, too, that some of the cases hold that a witness may testify as to what the photograph shows. We think the questions asked in the instant case, and as before indicated, and the

but not exhibited to the jury. A medical witness for plaintiff testified that although he had been unable to determine the existence of more than one fracture, the X-ray picture showed a double fracture. No proof of the genuineness of the photograph, or that it was a correct representation of plaintiff's injured arm, was introduced. It was subsequently conceded that the exhibit was incompetent and it was withdrawn, with an instruction to the jury to disregard it. The plaintiff's physician testified to the condition resulting from the two fractures and to its permanency. At the close of the cross-examination, his entire testimony relating to one of the fractures was stricken out. From a judgment for the plaintiff, the defendant appealed. The court, in reversing judgment and ordering a new trial, held that the cause of the defendant was prejudiced by the introduction in evidence of the X-ray photograph without proof of its genuineness, although it was later stricken from the record, followed up, as it was, by other incompetent evidence. Walsh v. Frankenthaler, — N. Y. App. Div. —, 173 N. Y. Supp. 764 (1919).

The plaintiff suffered, while in the course of his employment, an oblique fracture of the tibia of his right leg. The family physician was first in charge of the case. Later, however, the defendant, who was the regular physician of the employer of the plaintiff, was placed in charge. The present action was for malpractice against the defendant for injuries alleged to have been sustained as the result of his negligence in setting the limb. At the trial an X-ray picture of the plaintiff's leg was admitted in evidence without objection. This was shown to one of the defendant's medical experts, and, under objection and exception, he was allowed, in substance to state that the bearing of the two fragments of the broken bone as shown by the pictures was not exactly in line. Defendant, on appeal from a judgment for the plaintiff, contended this testimony was erroneously received because the jury could tell about that matter as well as any expert. The court affirmed the judgment, holding the testimony was properly admitted. As the court said: "The doctor was using the picture for the purpose of demonstration, and could rightly point out the things which his practiced eye discovered so far as they were of significance. It was as though the expert had used the leg itself for the purpose of explaining its condition to the jury. The picture is referred to, and an examination of it is quite convincing of the propriety of medical testimony as to what it really shows." Sheldon v. Wright, 80 Vt. 298, 67 Atl. 807 (1907).

The plaintiff, a passenger on one of the defendant's street cars, was injured by the sudden starting of the car while he was attempting to alight therefrom. At the trial of a suit for damages, two skiagraphs of the plaintiff's hip, taken a year and 5 months after the accident, were admitted in evidence. It was shown that the plain-

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ruling thereon, are within the ruling of Elzig v. Bales, 135 Iowa 208-210, 112 N. W. 540, 541, where it was said:

"As demonstrative evidence, they serve to explain or illustrate and apply the testimony, and are aids to the jury in comprehending the questions in dispute. No argument is required to show that when taken for either purpose they are the best evidence of what appears on them. * * * The rule exacting the best evidence applies to the testimony of experts, as well as to that of other witnesses, and we are of the opinion that the court erred in permitting the doctor to testify to what appeared in the skiagraph."

tiff had sustained no intervening injury or illness, and the integrity of the skiagraphs was clearly established. Two physicians called as expert witnesses by plaintiff were asked to state if they knew what the skiagraph of the plaintiff's left hip indicated with reference to a fracture. The witnesses replied, in substance, that the fractures showed a shortening of the neck of the femur and a thickening in the more dense part of the picture, which indicated a deposit of bone substance, and that the cause of the condition would be a fracture. The defendant, on appeal from a judgment of $4,000 for plaintiff, contended the evidence was improperly admitted because it permitted the witnesses to state their individual ideas of what the picture represented, thus invading the province of the jury. The court affirmed the judgment, holding that it was proper to permit a duly qualified expert to state his individual conclusions or ideas of what an X-ray picture showed, since all things pertaining to X-ray machines and their pictures are unfamiliar to the ordinary laymen and within the sphere of expert knowledge and opinion. Judejko v. Chicago City Ry. Co., 166 Ill. App. 140 (1911).

4. Neck injuries.

The plaintiff, a brakeman in the service of the defendant railroad, attempted to open a defective coupling of a car by hand, and in so doing stepped between the tracks. His foot slipped and he slid into a hole just outside the rail with the result that he was severely injured by the moving car. From a verdict and judgment of $6,000 for the plaintiff the defendant appealed, assigning as error the introduction of X-ray photographs of the plaintiff's neck. The physician who had made the photographs testified fully as to his experience in such work, and the testimony tended to show that the photograph correctly represented the condition of the plaintiff's neck. The court reversed judgment for errors not material here, but as to this point said: "We believe a sufficient predicate was laid for the introduction of the photographs, and there was no error in admitting them. We see no objection to the testimony of * * * [another physician] in explaining the photographs and showing the bones which were exhibited thereby and in explaining what bones were named in the testimony. We believe it would be an aid to the jury in understanding the testimony of the witnesses as to the bones which were claimed to have been injured by appellee and denied by appellants. We see no error in the action of the court in this particular. All that is required for the introduction of photographs of this kind is that preliminary evidence should be given of its correctness. This was done in this case." Pecos & N. T. Ry. Co. v. Winkler, — Tex. Civ. App. —, 179 S. W. 691 (1915).

5. Hip injuries.

While the plaintiff was assisting in setting in place a machine which had been moved from the old factory into

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It should have been said that at one stage of the trial, and after the court had ruled that it was not competent to show what the skiagraph or X-ray photograph showed, counsel for appellee then withdrew their objection, and the court said that he in no wise recedes from his interpretation of the law, and that the record made by counsel for plaintiff that all objections of that kind are withdrawn, there may be the fullest and extreme illustration made by

an addition, he sustained severe injuries to the bones of his hip and hip joint, which caused atrophy to one of his legs and some injury to the sciatic nerve. In the course of the trial of an action to recover damages for these injuries certain radiographs were admitted in evidence, as showing the condition of the plaintiff's hip and hip joint. The defendant, in appealing from a judgment for the plaintiff, insisted that the admission of radiographs was error because they had a tendency to mislead the jurors, who were merely laymen, possessed of no knowledge respecting injuries to the bones. The court affirmed the judgment, saying: "If the radiographs had been introduced for the purpose indicated by counsel, there would be much force to their contention. A jury of laymen possessing no knowledge nor experience respecting the bones and injuries thereto might easily be misled by a mere X-ray photograph or radiograph by which at the best merely the outline of the bone can be shown. The radiographs were, however, not introduced for the purpose indicated by counsel. They were used by the doctors in illustrating their evidence, and were fully explained, and were introduced in evidence only as affording a full and clearer understanding by the jury of the doctors' testimony respecting the condition of plaintiff's injured hip and hip joint. The court committed no error in receiving the radiographs for the purpose for which they were received and used." Russell v. Borden's Condensed Milk Co. of Utah, — Utah —, 174 Pac. 633 (1918).

6. Knee injuries.

The plaintiff, while riding on an electric car of the defendant, sustained an injury to his knee in a collision between a freight train and such car. Certain X-ray photographs of the plaintiff's knee were admitted in evidence after two of the medical witnesses had been examined with reference to them. The defendant, on appeal from a judgment of $4,000 for the plaintiff, contended that no proof was introduced to show that the photographs were genuine or that either of the doctors was an expert in such matters. The court affirmed the judgment, saying: "While, perhaps, the examination was not as minute upon this subject as one might wish, it does sufficiently appear that Dr. P, Dr. B and others were present in Dr. B's office * * * when X-ray plates were made of plaintiff's knee, and that the photographs introduced in evidence were printed from these plates. While it would have been better, no doubt, to have introduced evidence of the familiarity of the physicians with the process of X-ray photography and the methods employed in preparing these particular exhibits, we cannot see that the omission so to do amounted to error necessitating the reversal of the cause. * * * The surgeons had testified without objection that they had examined the injuries themselves by the use of the X-ray appa-

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the experts of these skiagraphs or pictures. This was when the witness Dr. McGready was on the stand, and thereafter he was further interrogated. The principal objection made by counsel for defendant at that time was that he had discharged his witness Dr. Cheshire, and he had no way he could get him back at any particular time, and that it would put him to inconvenience. But no request

ratus, and this testimony in itself was an indication that they were familiar with the uses of Roentgen rays. When, therefore, they testified to the taking of certain X-ray pictures, * * * the court doubtless assumed that the ordinary methods of those familiar with such matters had been followed. * * * The surgeons put initials on the plates at the time they were made, and testified that these initials appeared on the prints introduced in evidence. But, even if an error were committed in the admission of testimony relating to the photographs, it was harmless, for it is evident that the condition shown by the photographs did not differ from the circumstances disclosed by the testimony of the physicians based upon their own observations." Kimball v. Northern Elec. Co., 159 Cal. 225, 113 Pac. 156 (1911).

B. Representing normal conditions.

The plaintiff, a railway mail clerk, was struck and injured by a sliding door of the car in which he was at work. The transverse process of the third cervical vertebra was fractured. The plaintiff introduced in evidence two X-ray plates of his neck taken by a physician with but limited experience as an X-ray operator. As explained by this physician, the plates were supposed to show a fracture. An eminent X-ray specialist for the defendant then testified that the pictures did not show such a fracture and stated that he could demonstrate that fact from the pictures themselves, by showing to the jury a picture which he had taken of a man's neck in a normal condition. The court refused to allow such an X-ray picture to be admitted, upholding the plaintiff's contention that to permit a comparison of the plaintiff's neck with other necks would lead to confusion and irrelevancy. From a judgment for the plaintiff, the defendant appealed. The court reversed judgment and remanded the case for a new trial, saying: "We are of opinion that the defendant was entitled to have * * * [its expert] interpret the pictures to the jury in the light of the one which he himself had made of a normal neck, especially in view of his statement that with his picture he could, and without it he could not, demonstrate that the pictures already introduced showed no fracture. The plaintiff was properly given a free hand in developing the proof of his alleged injuries by means of the X-ray pictures and an expert explanation of them; and similar freedom should have been accorded the defendant in testing before the jury the correctness of that explanation." Virginian R. Co. v. Bell, 118 Va. 492, 87 S. E. 570 (1916).

See also, Davis v. Dunn, I, B, 3, *ante*.

III. Testimony based upon radiographs.

A. In general.

1. As to angle of taking view.

The plaintiff, a brakeman, was instructed or requested by his superior to get a drinking cup for the use of

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was made for a postponement, or for an opportunity to get the witness back. We think there was no error at this point.

5. It is assigned as error that the court erred in refusing appellant the right to question August Lang (the husband of plaintiff) on cross-examination, as to his having a suit pending in the same court against appellant, based upon the same alleged accident, for injuries to his wife. An objection to such question was sustained as not

the crew. While on this errand he fell in an ash pit and across an iron bar. He climbed out, however, and performed his duties during the remainder of the night. The following day, however, on examination by a physician, it was found that he had suffered a rupture. Later there developed what was claimed to be a fracture of the bone of the thigh containing the socket, with which the head of the femur articulated. At the trial of the suit for damages, an X-ray photograph of the hip bone was admitted in evidence. Physicians were examined as to whether the angles at which the picture was taken would tend to disclose or conceal any such fracture. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, said: "The use of photography in cases of this character is now so universally recognized that it is properly regarded as evidence of the strongest sort in any such case, and yet, as is well known, the lights or shadows produced by the angle of light may make a material difference in the appearance. It was, therefore, entirely proper that the witness should be fully examined upon this point." Baltimore & O. R. Co. v. Whitacre, 124 Md. 411, 92 Atl. 1060 (1915).

2. As to scope of skiagraph.

The plaintiff while a passenger on the defendant's railroad was injured in a wreck due to the collision of an engine and the train upon which he was riding. Soon after the occurrence he became unconscious and remained so for a number of hours. Thereafter he was confined to his bed for a period of forty days. In his suit for damages X-ray photographs showing certain injuries he had sustained were admitted in evidence. On appeal from a judgment for the plaintiff this was assigned as error. The court, however, affirmed the judgment, saying: "Nor do we think there was any error in permitting Dr. T to testify that the bone can be distinguished from the flesh in an X-ray photograph, and that the bone would make a heavier shade than the muscles, etc., because it appeared that this witness had sufficient knowledge relative to the theory of taking such photographs as to permit him to make the statement complained of." Missouri, K. & T. Ry. Co. of Texas v. Coker, — Tex. Civ. App. —, 143 S. W. 218 (1911).

B. Confirmation of diagnosis.

As the plaintiff was driving along a highway, his team became frightened at a piece of paper and ran to the side of the road, where one of the horses fell into a ditch. The plaintiff in some manner caught his foot in a wheel and his leg and back were strained. At the trial of plaintiff's suit for damages against the defendant, whom it was charged had negligently allowed the ditch to be left unfilled, a physician was allowed to testify as to the condition of the plaintiff's leg as shown by a radio-

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cross-examination, the court so stating. The court also said that he was not determining the question of whether or not the defendant might not prove that fact when it comes to putting in defendant's evidence. We think that, even though it was not cross-examination, it is proper to show the interest of a witness, as bearing upon his credibility. We should have been better satisfied had the court permitted an answer to this question; but under the record we are

graph without the same being introduced in evidence. This was assigned as error, on an appeal by the defendant from a judgment for the plaintiff. The court reversed judgment, holding that while a radiograph, when properly verified, was admissible in evidence, it was error to allow testimony to be admitted regarding what it showed without introducing the radiograph itself, since it was the best evidence. As the court said: "The rule exacting the best evidence applies to the testimony of experts, as well as to that of other witnesses, and we are of the opinion that the court erred in permitting the doctor to testify to what appeared in the skiagraph." Elzig v. Bales, 135 Iowa 208, 112 N. W. 540 (1907).

While plaintiff was walking along the outer edge of a sidewalk in the defendant city, he inadvertently stepped into a hole which extended to the very edge of the sidewalk. This hole was about 20 feet deep, and as a result of the fall plaintiff suffered a dislocation of the ilio-sacral joint. At the trial of his suit for damages, his attending physicians testified as to the extent of the injuries sustained, as determined by an examination of the plaintiff without the help of an X-ray instrument. It appeared also that some time subsequent to this examination an X-ray photograph was taken by some one else. On cross-examination each of the plaintiff's attending physicians testified in substance that he was confirmed in his diagnosis by the X-ray photograph referred to. On the strength of this cross-examination, the defendant moved to strike the physicians' testimony, but the motion was denied. From judgment on a verdict for $2,500 the defendant appealed. The court, affirming the judgment, held that while the defendant was entitled to have the opinion of the physicians confined to the results of their own examination, merely because the cross-examination should have been stricken gave no right to have the remainder of the evidence stricken on the ground indicated. In any event, the court pointed out that the amount of the verdict was so reasonable that the jury could not have been unduly influenced by the evidence complained of, and the error did not harm defendant. Hearn v. City of Waterloo, — Iowa —, 169 N. W. 392 (1918).

C. Original diagnosis.

The plaintiff, a car repairer, was directed by his foreman to go under a car and remove the taps and nuts holding a certain sill in the floor, while the foreman himself obtained a bar to prize the sill from the flooring after the taps and nuts had been removed. It was supposed there were nails holding the sill to the floor, in addition to the taps and nuts. This was not true, however, and after the plaintiff had performed his duty the sill fell on his right shoulder and back, seriously injuring his spine. A physician who had examined the plaintiff frequently testified as to the ex-

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of the opinion that it was without prejudice, and that we should not be justified in reversing the case on this alone. It was shown that this man was the husband of plaintiff, and that, of course, showed his interest to that extent. There was no offer by counsel to show that the husband did have such a suit pending. On the other hand, we infer from a statement to be set out in a moment, that counsel did not really claim there was such a suit pending,

tent of the injury and its probable permanency in a deposition, saying in part: "My opinion is based upon both a personal examination and the report made to me by Dr. H over an X-ray picture." At another place his deposition read: "This opinion is based upon my personal examination independent of the X-ray, simply confirmed by the X-ray examination." On appeal by the defendant from a judgment for the plaintiff, the defendant contended that it was error to admit the deposition in evidence without the report of Dr. H and the X-ray picture. The court affirmed the judgment, saying: "It is clear that the evidence of this physician was based primarily upon his own examination, and that his opinion thus formed was merely confirmed by a report and a skiagraph given to him by another doctor. In his direct evidence he did not refer to this report and skiagraph at all, but testified in regard to his own examination and its results. These matters were brought out on cross-examination. Plainly much of his evidence was not based on them. There was no error in refusing to exclude his opinion as to the extent and permanency of the plaintiff's injuries." Seaboard Air Line Ry. v. Maddox, 131 Ga. 799, 63 S. E. 344 (1909).

The defendant was a contractor, building a dam across a certain creek. The plaintiff was injured by the falling upon him of the boom of a derrick which was being used to raise and lower materials. It appeared that the derrick was negligently constructed in that there was no pin fastening the boom to the derrick and in that there were not enough wraps of the cable around the drum to keep it from slipping, and that such negligence was the cause of the accident. X-ray plates of the plaintiff's injuries were taken and a physician, testifying that he was present when they were taken, that he saw them developed and that he looked at the plates immediately after they were developed, explained what the plates showed. The defendant made no demand during the trial for the production of the plates upon which this witness' testimony was based, but upon appeal from a judgment for plaintiff contended that the plates, and not the witness' interpretation of them, was the best evidence of their contents, and that the plates themselves should have been put in evidence. Respecting this point, the court, in affirming the judgment, said: "I can see no error at all in this X-ray incident. The evidence shows that nobody but an X-ray expert could tell anything from the plates, and that if they had been produced they would have done the court, jury, or the defendant's ordinary physicians no good. I do not think that the doctrine that an ordinary photograph is the best evidence of what it contains should be applied to X-ray pictures. They constitute an exception to the rule concerning ordinary documents and photographs, for the X-ray pictures are not, in fact, the best evidence to laymen of what they contain. * * *

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but that he simply wanted to ask whether or not the husband did, or did not, have such a case. We ought not to reverse the case and send it back for an answer to this question, and then have him say that he did not have such a suit pending. We feel justified in so holding, in view of a statement by counsel for the defendant, which appears in the record as follows:

"If I was able to show by him that he was also claiming damages in a suit of his own, growing out of this particular incident and accident, it was

The opinion of the expert is the best evidence of what they contain—the only evidence. If there had been a demand for these pictures in court, or a request that they be submitted to the inspection of the opposing experts, and these rights had been denied the defendant, such an error would be serious. But whatever harm befell the defendant, if there was any harm at all, came to it by reason of its own failure to demand what it was entitled to, and what it would unquestionably have received by the mere asking." Marion v. B. G. Coon Const. Co., 157 N. Y. App. Div. 95, 141 N. Y. Supp. 647 (1913).

The plaintiff, while a passenger on a street car of the defendant, motioned to the conductor to stop the car at the next crossing. On arriving there, however, he discovered he had mistaken the street. This made the conductor angry and he pushed the plaintiff off the car as he was standing on the steps. The car was traveling at ordinary speed, and as the plaintiff struck the street his left side was severely injured. He went on crutches for over two years. A physician who had then examined him with an X-ray machine testified that he found a shortening of an inch and a half in the left leg; that he looked at plaintiff's hip bones through the X-ray and fluoroscope and saw the outline shadow of both bones; that the great trochanter on the left side appeared to be an inch and a half higher than the one on the right side, and appeared to be a little higher than the head of the femur in the socket; that the neck of the femur appeared to be almost at right angles with the shaft of the bone, so that it was touching only the upper portion of the acetabulum; that there appeared to be a thickening of the neck of the femur from above downward on the left side; that plaintiff's condition was caused by a fracture of the neck of the femur, and that such condition was permanent and incurable. From a verdict and judgment for $6,500, the defendant appealed, contending that the testimony as to observations of plaintiff's injury by means of the X-ray and fluoroscope was improperly admitted. The court affirmed the judgment, saying: "The witness qualified as an expert in the use of the X-ray and fluoroscope, and the mere fact that observation by such means discloses the shadow of the object in question, and not the object itself, does not make the statement as to what was observed incompetent. X-ray photographs, skiagraphs or radiographs which are no less representations of the shadow and not the substance, are properly admissible in evidence. * * * The objection that no connection was shown between the accident in question and the conditions the witness claimed to have observed is met by the testimony of appellee that he sustained no injury other than upon the occasion in question." McCauley v. Chicago City Ry. Co., 163 Ill. App. 176 (1911).

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proper. That was my belief, simply, and I didn't mean to transgress any well-known rule of law. It is possible that I am badly in error upon that point. I say that he had an interest of that kind; it was more or less dependent upon the success of this suit; and I have thought, under the circumstances, that the witness ought to state if he had any such interest."

We conclude that there was no reversible error at this point.

We have noticed the points which seem to require attention, and, under the whole record, we think the judgment should be, and it is, affirmed.

D. Testimony by deposition.

The plaintiff sustained injuries to her hand through a fall caused by defects in a sidewalk in the defendant city. In taking the deposition of a physician for use in the trial of plaintiff's suit to recover damages, three X-ray photographs of the plaintiff's hand were given to him, and his opinion asked as to what condition was shown thereby. The witness then answered numerous questions as to what the three exhibits disclosed. The deposition was admitted in evidence, but only two of the three photographs were introduced at the trial. The deposition was received in evidence by the judge on the theory that the photographs would later be introduced in evidence. The defendant, however, upon failure of the plaintiff to introduce all of the photographs, did not move to strike the evidence based thereon. On appeal from a judgment for the plaintiff, however, defendant contended that the entire deposition should have been rejected. The court, affirming the judgment, held that it was proper for the trial court to admit the deposition in evidence, although it contained an opinion based on the X-ray plates, before requiring them to be introduced, since the order of introducing evidence was for the determination of the trial judge; that as there was nothing to show that the missing plate had any bearing on the nature of the injury, there was no ground for reversal because of the failure to introduce it in evidence; and that since the defendant failed to move to strike the evidence based on the missing plate it waived the defect in foundation. Stevens v. City of Chariton, — Iowa —, 168 N. W. 310 (1918).

O. L. C.

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LINDLEY et ux. v. KNOWLTON.

[Supreme Court of California, November 19, 1918.]

179 Cal. 298, 176 Pac. 440.

1. **Animals—Escape of chimpanzee—Attack on plaintiff's children—Fright occasioning bodily illness—Applicability of instructions.**

In an action against the owner of a chimpanzee for negligence in permitting the escape of the animal, which entered plaintiff's dwelling and attacked plaintiff's children, with the result that plaintiff, who fought the animal and rescued her children, was greatly frightened and shocked and made sick in body and

CASE NOTE.

Recovery for sickness or permanent injury to health proximately caused by fright or shock.

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I. Fright, etc., due to personal peril.

A. Boy trapped by crossing gates.

The plaintiff, who was about 19 years old, on approaching the defendant's track in a delivery wagon drawn by a horse, found the gates on each side of the track up and the watchman in his shanty near the gates. He proceeded to start across the tracks, but while he was doing so the gates were closed on each side. While he was thus hemmed in, an engine of the defendant struck the wagon, killed the horse, and threw the plaintiff

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mind, it was not error for the court to refuse to instruct the jury, as requested by defendant, that no recovery could be had unless her fright was accompanied by some personal and bodily injury, and that the injury must be a physiological one, since plaintiff pleaded physical detriment, and the rule which defendant invoked by the refused instructions is applicable only in a case in which fright alone is made the gravamen of the action.

2. Animals—Escape of chimpanzee—Attack on plaintiff's children—Fright occasioning bodily illness—Applicability of instruction.

In an action against the owner of a chimpanzee for negligence in permitting the escape of the animal, which entered plaintiff's dwelling and attacked plaintiff's children, with the result that plaintiff, who fought the animal and rescued her children, was greatly frightened and shocked and made sick in body and mind, it was not error for the court to refuse to instruct the jury, as requested by defendant, that no recovery could be had on account of fright produced by

some distance away. Testimony for the plaintiff tended to show a permanent impairment of his health, a general nervous condition, manifested by stammering speech, impaired ability to sleep and a loss of flesh. Defendant's testimony tended to show that the plaintiff received not even a temporary physical injury, and that at least before the trial he had entirely recovered from the results of the accident. The court instructed that for the plaintiff to recover, he must show some real and actual injury, aside from fright. From a verdict and judgment for the plaintiff, the defendant appealed. The court affirmed the judgment, holding that the jury could have found on the evidence that the plaintiff received some physical injury from the accident, and that the rule permitting recovery for fright did not require that the direct physical injuries be permanent or severe. The court also said: "There is not wanting respectable authority that recovery may be had for injuries proximately occasioned by fright or shock due to defendant's actionable negligence, although not attended by direct physical invasion of the person. * * * But the rule is well established that when a defendant's negligence causes physical injury to the plaintiff's person, damages resulting from incidental fright may be recovered." Pennsylvania Co. v. White, 242 Fed. 437 (1917).

B. Women.

1. Injuries in general.

a. In general.

The plaintiff alleged that through a tort of the defendant she suffered a severe fright and that such fright caused her certain physical and mental injuries, for which she sought damages. The plaintiff recovered a verdict and judgment thereon, and appealed from an order granting the defendant a new trial. The court affirmed the order, saying: "Without determining whether one could recover for fright alone, such fright not accompanying physical injury either as its result or cause, we are of the opinion that: When physical injury accompanies a fright as its effect, the injured party may recover for the fright, for the physical injury, and for any mental injury accompanying such fright and physical injury, exactly as one can recover where the fright is the result of a physical injury. Of course, under our statute, * * * the detriment suffered must be the proximate result of the wrong done." Sternhagen v. Kozel, — S. D. —, 167 N. W. 398 (1918).

b. Blasting.

The plaintiff was frightened as a result of rocks falling around her home from the blasting operations of the defendant. The trial court in-

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apprehended danger or peril to a third person, where, although plaintiff was greatly and perhaps chiefly concerned for her children, there was nothing in the testimony to indicate that she was not concerned for her own safety, and all of the circumstances connected with the unexpected appearance of the animal, its attacks upon her children, and her own conflict with it, make it impossible that she should have been devoid of fear for herself.

Action for personal injuries sustained because of fright. Judgment for plaintiffs affirmed.

For appellant—Frank H. Snyder, Whitney E. Smith, and Arthur E. Hadley.

structed that mere fright, unaccompanied by physical injury, was not actionable, but that if the plaintiff was frightened to such an extent that she suffered physical pain and was made sick, the defendant was liable in damages provided the fright was brought about by the negligence of the defendant and was its proximate cause. From a judgment for the plaintiff, the defendant appealed. The court affirmed the judgment, holding that the instruction was proper and without error. Arthur v. Henry, 157 N. C. 438, 73 S. E. 211 (1911).

The defendant company, while doing certain blasting near the plaintiff's house, caused rocks to fall upon it, breaking the roof and porches, cracking the walls and ceiling, and breaking the windows and china. This continued over a period of several months, so frightening the plaintiff, it was charged, as to cause physical injury to result. Judgment was given for the defendant and the plaintiff appealed. The court reversed judgment and awarded a new trial, holding that where physical injury was the natural and proximate result of fright caused by the defendant's negligence, there should be a recovery. The court said: "It must be conceded that the numerical weight of authority supports the general rule that there can be no recovery for nervous affections unaccompanied by contemporaneous physical injury, but the sounder view in our opinion is that there are exceptions to this rule, and that where the wrongful act complained of is the proximate cause of the injury * * * and where the injury ought * * * to have been contemplated as a natural and probable consequence thereof, the case falls within the exception and should be left to the jury." Green v. T. A. Shoemaker & Co., 111 Md. 69, 23 L. R. A. (N. S.) 667, 73 Atl. 688 (1909).

The plaintiff was thrown down and suffered a complete nervous breakdown from the shock of having a rock thrown from a blast some 600 feet away into the house where she was standing. The attending physician testified that no mark of physical violence could be found upon the plaintiff's person and attributed her physical ailments solely to the mental shock. From a verdict for the plaintiff, the defendant excepted. The court, in overruling the exceptions, said: "'There can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and if this rule is to stand, we think it should also be held that there can be no recovery for such physical injury as may be caused solely by such mental disturbance where there is no injury to the person from without.' * * * Where, however, the fright * * * is accompanied as a result of the same accident by physical in-

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For respondents—Gordon Boller, W. N. Goodwin, and Hunsaker & Britt.

MELVIN, J. O. P. Lindley and his wife, Lillian S. Lindley, sued defendant for damages on account of personal injuries, alleged to have been sustained by Mrs. Lindley because of fright occasioned by the appearance and acts of a chimpanzee owned by Knowlton. The complaint contained allegations that the animal was so negligently kept by defendant that it escaped from restraint and entered

jury 'from without,' then in the damages to be assessed there should be included not only those directly due to the injury from without, but also those attributable to the mental shock or disturbance. And it is not necessary that the physical injury from without should be indicated upon the surface of the body by a bruise or otherwise.'' The court concluded with the opinion that the jury were authorized in finding that the plaintiff might somehow have sustained a slight injury ''from without'' so as to come within the above rule. Driscoll v. Gaffey, 207 Mass. 102, 92 N. E. 1010 (1910).

The plaintiff was injured by the explosion of a cylindrical tank in the basement of the building owned by the defendant, the first floor of which was occupied by the company employing the plaintiff. The flooring near the place where the plaintiff stood was ripped up, bottles were thrown about the room, and great excitement caused in the attempt of the other employees to escape. The plaintiff was thrown down, but did not recall being struck by anything at the time. The attending physician testified that his examination on the following day disclosed ''tenderness of the plaintiff's right side, shoulder, and hip,'' and that some days later a slight discoloration developed on the shoulder and side and a mark over her right shoulder and another near her hip. From a judgment for the plaintiff in the sum of $600, the defendant appealed. The court ordered judgment entered for the defendant, as not being guilty of negligence, but upon the question of damages in case negligence had been proved, the court said: ''In view of the effect of the explosion upon the plaintiff and the fear and fright caused thereby, a jury might find, notwithstanding the absence of such testimony, that she was thrown to the floor or against some object and so received the physical injuries described. * * * We think that if the effect of the * * * fright under which the plaintiff labored was to cause her to faint and fall to the floor and thereby sustain physical injuries, she would not be barred from recovery. The distinction between the case at bar and the Spade case [Spade v. Lynn & B. R. R., 169 Mass. 255, 47 N. E. 880], lies in the fact that in that case, unlike the present case, there was no evidence of physical injury, and for that reason it was held 'that there can be no recovery for fright, terror, alarm, anxiety or distress of mind, if these are unaccompanied by some physical injury.''' Conley v. United Drug Co., 218 Mass. 238, Ann. Cas. 1916 B 98, 105 N. E. 975 (1914).

c. Elevator accident.

The plaintiff was in the hall on the ground floor of an apartment house owned by the defendant, standing on the lower steps of the stairs, with one

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the dwelling house of plaintiffs, where Mrs. Lindley and her two little children were at the time; that it attacked the two children successively, choking one of them severely; that the mother successfully, though with great effort, contended with the chimpanzee, rescuing her children from it, although the beast weighed about 165 pounds; and that in consequence of the said animal entering the house and seizing the children Mrs. Lindley was greatly frightened, shocked, and made sick in body and mind. It was averred that as a consequence her nervous system was disordered; she was rendered

hand resting on the elevator shaft, waiting for the elevator, when a door to the shaft, weighing about 150 pounds, fell from the fifth floor to the bottom of the shaft. The fall of the door with the resulting noise, vibration and jar, caused the plaintiff to lose her balance and fall, receiving the injuries complained of. The trial judge instructed that if the plaintiff's fall and consequent injuries were the result of fright she could not recover, but if her fall was caused by the shaking of the stairs, due to the negligence of the defendant, she could. From an order setting aside a verdict for the plaintiff of $2,500 and judgment dismissing the complaint, plaintiff appealed. The court directed judgment on the verdict for a reduced amount, holding that as the fall and injuries of the plaintiff were the immediate result of the fright caused by the defendant's negligence, recovery was to be allowed. The court pointed out that: "The chain of cause and effect is not broken because one link in the chain is the present effect upon the mind and nerves of the plaintiff, without trespass on her person. * * * The claim of the plaintiff is not to recover damages for fright or physical ailments due to fright, but for physical injuries to her person, which were the natural immediate result of defendant's negligence. No case is presented for a charge to the jury that if fright caused the plaintiff to fall, she cannot recover." Mundy v. Levy Bros. Realty Co., 184 N. Y. App. Div. 467, 170 N. Y. Supp. 994 (1918).

As the plaintiff was about to leave an elevator, at the suggestion of the operator, who preceded her, the elevator started to ascend. When it was about four feet above the landing, the operator seized the plaintiff by the arm, and dragged her to the landing. The plaintiff fell in a heap upon the marble floor, striking her knees which afterwards became discolored. Plaintiff's shoulder and the back of her neck were injured by the ascending elevator, and buttons were ripped off the sleeves of her dress. The jury found the plaintiff's neurotic condition and impaired physical health were due to a nervous shock caused not by fright alone, but by the concurrent physical injury as well. From a judgment for plaintiff, the defendant appealed. The court affirmed the judgment, saying: "The rule of law is that while there may be no recovery for mere fright, or for injuries that are the direct consequence of it, there may be a recovery where bodily injury and fright concur in producing shock, giving rise to damage. * * * The cases in which no recovery is allowed are cases where there is no concurrent bodily injury." Tracy v. Hotel Wellington Corporation, — N. Y. Misc. —, 175 N. Y. Supp. 100 (1919).

d. Street car collision.

The street car in which the plaintiff's 12-year-old daughter was a pas-

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hysterical and caused to suffer pain and mental anguish; and that she was confined to her bed for many months as a result of the permanent injuries to her physical health and mind and nervous system. The proof offered tended to sustain these allegations. A verdict was given in favor of plaintiffs for $2,000, judgment was entered accordingly, and defendant appeals from said judgment.

Appellant contends that the court erred in refusing to give certain instructions involving the following propositions: (1) No recovery may be had unless the fright occasioned by defendant was accom-

senger collided with another car when the rear wheels of the first car left the main track and swerved upon a switch track upon which the other car was standing. The plaintiff's daughter fainted immediately after the collision, and was taken to a nearby store, where she recovered. Upon her return home, however, she suffered vomiting, insomnia, headache, pains in her side, left leg and back, causing her to remain in bed for nearly three months. It did not appear that she suffered any actual external injury at the time of the collision, but it was fairly to be inferred that the physical suffering and disorders which resulted were due to nervous shock brought on by fright. The court instructed: "The plaintiff cannot recover for the effects upon her daughter of fright at the time of the accident, not accompanied by physical injury. * * * If the fright * * * was followed by a series of physical ills as its natural consequence; if that fright as a cause gave rise to nervous disturbances, and those in turn to physical troubles; and that fright itself was caused by the negligence of the defendant—then the defendant would be liable for the physical results of its own negligence." The jury returned a verdict of $4,000 for the plaintiff from which the defendant took exceptions. The court affirmed the judgment, holding that the instruction given was correct and that damages were to be given for bodily injury and physical ills arising as a natural consequence of the fright caused by the defendant's negligence, though there was no actual physical injury at the time of the accident. Simone v. Rhode Island Co., 28 R. I. 186, 9 L. R. A. (N. S.) 740, 66 Atl. 202 (1907).

The plaintiffs were passengers in a jitney bus which collided with a street car of the defendant, and sustained therein the injuries for which this suit was instituted. The trial court instructed the jury to consider as an element of compensatory damages "the fright of the plaintiffs from the experience that they went through." The court reversed a judgment for the plaintiffs, holding that the instruction was erroneous, saying: "The cases are not in harmony as to the right of a plaintiff to recover for physical pain and suffering resulting from fright. Many decisions deny this right. We think, however, the better reasoned cases hold that there may be a recovery for bodily pain and suffering proximately following fright occasioned by the negligence of a defendant. * * * For the bodily pain and suffering produced by such fright and thereby proximately resulting from the accident, a recovery was permissible." Memphis St. R. Co. v. Bernstein, 137 Tenn. 637, 194 S. W. 902 (1917).

Certain cars of the defendant railroad were pushed off the end of the switch track across a public street and into the dwelling house of the

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panied by some personal and bodily injury; (2) the injury must be a physiological one; and (3) no recovery may be had on account of fright produced by apprehended danger or peril to a third person.

The court did tell the jurors that no verdict might be given for plaintiffs unless Mrs. Lindley received injuries which were the natural consequences of fright caused as alleged in the complaint. They were told that unless the evidence showed, by a preponderance thereof, that the occurrence recited in the complaint had taken place and was "the efficient, proximate, and producing cause of the in-

plaintiff. As a result the plaintiff, who was standing nearby, witnessing the accident, suffered, according to the complaint, "a severe nervous shock that shattered her nervous system and caused her great bodily pain and mental anguish and permanent injury to her person and health." No complaint was made that the negligence of the defendant was wilful or wanton, or that the plaintiff suffered actual bodily injury. From a judgment sustaining a demurrer to the complaint, the plaintiff brought error. The court, in affirming the judgment, said: "There is a line of cases found in the reports in which it is held by the courts that the rule requiring actual physical injury or bodily hurt, in order to warrant a recovery in negligence cases for mental distress or nervous shock, does not apply where the negligent act complained of is committed by the defendant wilfully, wantonly, or maliciously. And there is yet another class in which it is held that if the physical injury is the natural, probable, and proximate result of a nervous condition, which itself is the natural and proximate consequence of the defendant's negligence, that then there may be a recovery in damages, irrespective of any bodily injury to plaintiff at the time of his fright or mental shock. Many of, if not all, the cases cited by counsel for the plaintiff * * * fall within one or the other of these two classes, and in consequence they are clearly distinguishable from the case at bar and need not here be discussed. In the present case the plaintiff * * * does not allege intentional and wilful negligence on the part of the defendant, nor does she claim that defendant knew, or could reasonably have anticipated, that its negligent act of which she complains would cause her 'severe nervous shock.' * * * In a case like the present no liability can be predicated upon injury resulting from mere fright or nervous shock." Miller v. Baltimore & O. S. W. R. Co., 78 Ohio 309, 18 L. R. A. (N. S.) 949, 125 Am. St. Rep. 699, 85 N. E. 499 (1908).

e. Negligence of carrier.

A conductor of the defendant's road allowed the plaintiff and her child to alight at about a fourth of a mile from the crossing where she had requested to be left and where she was to meet her husband. The plaintiff alighted in ignorance of this mistake and, it being dark, wandered about in the adjoining woods for over 2 hours before the cries of her baby attracted the attention of persons who came to their rescue and carried them home. It appeared that the conductor knew he was not letting the plaintiff off at the right place, and that he could easily have backed the train a few hundred yards and so permitted her to alight at the proper crossing. For the fright thus received, the plaintiff sought damages, and excepted from an

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juries complained of or of the conditions of ill health, if any, on the part of the plaintiff, Lillian S. Lindley, or some of said conditions or injuries," their verdict must be for the defendant. Another instruction was to the effect that they might consider Mrs. Lindley's previous physical condition in determining whether the results of which she complained were or were not the consequences of general ill health. The instructions were full and fair, and the refusal to give those offered by defendant was not error.

order sustaining a demurrer of the defendant to the declaration. The supreme court, while reversing the judgment on the ground that at least nominal damages should have been given for the invasion of plaintiff's rights, said: "No special damages are alleged, except such as may flow from mere fright. As a general rule, damages for mere fright are not recoverable. * * * There, of course, may be instances where fright may be considered as an element of damages, but they should be restricted to where there is some physical injury attending the cause of the fright, or, in the absence of physical injury, where the fright is of such a character as to produce some physical or mental impairment directly and naturally resulting from the wrongful act. Under any other conditions, fright should be regarded as a mere emotion, and not sufficiently substantive to be the basis of a recovery for damages. The declaration does not allege any facts which, in this case, would authorize a recovery for fright." Williamson v. Central of Georgia R. Co., 127 Ga. 125, 56 S. E. 119 (1906).

The plaintiff's husband was incorrectly informed by the information bureau of the defendant that a quarantine in a certain state had been removed. As a result, the plaintiff and her child started on an intended trip into the latter state. A transfer to another road was made en route, after which the conductor of the second railroad informed plaintiff that she and the child would have to leave the train, the quarantine not having been lifted, and it being unlawful to take children into the quarantined state. Plaintiff therefore left the train, and after spending the night and the next morning in the station, returned home. She then sued, alleging that the distress and mortification of her expulsion so affected her that she became sick to such an extent that she was confined to her bed for 2 weeks thereafter and was unable to leave the house for 2 months. After a verdict for the plaintiff, the defendant filed a rule to show cause which was made absolute by the court. The court pointed out that the illness was produced by the improper removal from the train by the agent of a road other than the defendant, and said further: "In the second place, although physical sickness may result from mental worry produced by the wrongful act of another, it is not the necessary or natural consequence of the mental condition, and so cannot be said to be the proximate consequence of the wrong done." Justesen v. Pennsylvania R. Co., — N. J. L. —, 106 Atl. 137 (1919).

2. Miscarriage and the like.

a. Blasting.

The agents of the defendant, in blasting rock near the plaintiff's house, failed to "smother" a blast. As a result, a rock, weighing about 20 pounds, crashed through the roof of

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Conceding the full force of appellant's first contention that no damages may be given for mere fright, we are of the opinion that the court sufficiently covered this matter in the instructions to which we have alluded. The complaint was not drawn upon the theory that the lady had merely suffered the mental discomfort of fear, but was based upon a claim of damages for permanent, physical disorders proximately arising from the occurrences set forth in the pleading; and the court carefully instructed the jury that no ver-

the plaintiff's house. She was at the time lying in her bed heavy with child, and although the rock did not strike her, its fall so shocked her nervous system that a miscarriage resulted, from the effects of which she never recovered. From a judgment for the plaintiff, the defendant appealed. The court affirmed the judgment, saying: "All the courts agree that mere fright, unaccompanied or followed by physical injury cannot be considered as an element of damage. * * * But, where the fright occasions physical injury, not contemporaneous with it, but directly traceable to it, the courts are hopelessly divided. * * * We think the able judge who tried this case in the court below clearly stated the law, as we administer it, when he said: 'While fright and nervousness alone do not constitute an injury within the meaning of this issue, if this fright and nervousness is the natural and direct result of the negligent act of the defendant, and if this fright and nervousness naturally and directly causes an impairment of health or loss of bodily power, then this would constitute an injury within the meaning of this issue.'" Kimberly v. Howland, 143 N. C. 398, 7 L. R. A. (N. S.) 545, 55 S. E. 778 (1906).

b. Explosion of lead pot.

While the plaintiff with her two young children was passing along a city street where the defendant, in laying mains, had a pot of melting lead standing in the street near the curb, there was an explosion, with the result that some of the drops of molten lead were cast upon her clothes and upon her left hand. The result and physical injuries were admittedly slight, but it was further charged that in consequence of the attendant fright and shock the plaintiff had suffered a general debility of the body, and a disarrangement of her generative organs, manifested by a miscarriage, 3½ weeks after the accident and two other miscarriages in the 9 months following. From a judgment of $2,000 for the plaintiff, the defendant appealed. The court reversed judgment and ordered a new trial, holding (1) that the verdict was excessive as to the injuries other than those due to fright and shock; (2) that as damages could not be recovered for mere fright from another's negligence, damages could not be recovered for the physical consequences of the fright. The court added: "I think that such damages outside of the direct physical injury to her hand * * * are not proximate to the accident. Such radical impairment of the nervous system, general health, and bodily organs are not the ordinary and natural results of the spattering of molten lead out of an iron pot into the open air, so that a few drops thereof fell upon the hand and the clothing of a passer-by with but little injury." Hack v. Dady, 134 N. Y. App. Div. 253, 118 N. Y. Supp. 906 (1909).

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dict for plaintiffs should be returned unless under the issues of the case both the fright and the alleged physical consequences thereof were proven by a preponderance of the evidence. The law upon the subject of fright and its consequences has been long settled in California, and settled in a way which disposes of appellant's contention that the physical injury for which damages may be given must accompany the fright. In Sloane v. Southern California Ry. Co., 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320, in the opinion pre-

c. Derailment of street car.

The plaintiff, while riding in an electric car of the defendant, suffered a severe nervous shock as a result of the car running off an open switch and bumping over the ties thereafter. As a result of the nervous shock, the plaintiff suffered a miscarriage and other bodily and mental injuries. At the trial of her suit for damages, a verdict was directed for the defendant. On appeal the court affirmed the judgment, saying: "The learned court below followed the rule of our Pennsylvania cases in holding that there can be no recovery of damages for bodily or mental suffering resulting from fright unconnected with physical injury. While, it is true, this rule has been relaxed more or less in some jurisdictions, it has been uniformly upheld and applied in our state. * * * There was no evidence, sufficient to be submitted to the jury, to warrant a finding that the miscarriage was caused by any physical injury. Under these circumstances, the learned trial judge was clearly right in applying the rule of our cases and in directing a verdict for the defendant." Morris v. Lackawanna & W. V. R. Co., 228 Pa. 198, 77 Atl. 445 (1910).

d. Auto and carriage collision.

While the plaintiff was riding in a hired carriage upon a public highway with several other people, an automobile driven by the defendant came up from behind. The driver of the carriage turned out to the extreme right side of the road and stopped, in order that the automobile might pass by. Although there was ample room to pass, the defendant negligently steered the auto directly into the horses with the result that they were pushed off the road, pulling the carriage after them. The plaintiff received a "severe fright and shock," and being pregnant, suffered a miscarriage, and as an incident thereto, pain, suffering, and a permanent injury to her health. The complaint charged that the shock was directly caused by defendant's negligent act and that the miscarriage was directly caused by the shock. The defendant appealed from an order overruling his demurrer to the complaint. The court affirmed the order, saying: "The principle here decided is that when physical injury flows directly from extreme fright or shock, caused by the ordinary negligence of one who owes the duty of care to the injured person, such fright or shock is a link in the chain of proximate causation as efficient as physical impact from which like results flow." Pankopf v. Hinkley, 141 Wis. 146, 25 L. R. A. (N. S.) 1159, 123 N. W. 625 (1909).

e. Railroad crossing accident.

The defendant's employees opened a train which blocked a crossing in order that the plaintiff and his wife might pass through in the wagon in which they were driving. The cars

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pared by Mr. Justice Harrison, quotation is made (page 681, 44 Pac. 320, 32 L. R. A. 193), from Bell v. Great Northern Ry. Co., L. R. 26 Ir. 428, a case in which the contention was made that the jury should be told that unless fright was accompanied by physical injury, even though there might be nervous shock occasioned by the fright, such damages would be too remote. The quotation adopted by this court from the opinion in the Bell case was as follows:

were separated about ten feet, and the plaintiff and his wife were directed by the brakeman to pass through. While they were in the act of so doing, the cars were negligently backed together and the plaintiff, with his wife, narrowly escaped being crushed to death. Almost immediately thereafter the wife, who was pregnant, experienced severe pains in the back, and was confined to her bed about a month. No miscarriage resulted, but her health was permanently impaired and a continuation of the physical pain suffered as a result of the fright was very probable. From a judgment for the plaintiff, the defendant appealed, contending some part of the body must be actually injured for recovery to be allowed for physical injury resulting from fright. The court, however, affirmed the judgment, holding a recovery was to be allowed for physical injury resulting from fright or mental shock caused by negligence though there be no actual rupture or change in substance of any organ of the body, where the negligent act, as here, was to be regarded as the proximate cause of the injury and should have been foreseen as its natural consequence. St. Louis Southwestern Ry. of Texas v. Murdock, 54 Tex. Civ. App. 249, 116 S. W. 139 (1909).

f. Personal attack or abuse.

The defendant, holding a mortgage on some hogs belonging to the plaintiff's husband went with an officer to take possession of the animals. The plaintiff's husband was away from home and plaintiff refused to surrender possession to the constable. The defendant on learning of the plaintiff's refusal, jumped out of the buggy in which he had been sitting, ran towards the plaintiff in an angry, threatening manner, swearing and shaking his fist and saying: "You are fooling with the wrong person this time." The plaintiff was greatly frightened, turned and ran into the house, and then collapsed. The husband, on his return, found her in an unconscious state, and when she became conscious she was suffering intense pain and within a few hours a miscarriage took place, followed by a long illness. The plaintiff sought recovery for the personal injuries directly resulting from the fright caused by the alleged wilful tort of the defendant. The court, in affirming a judgment for the plaintiff, said: "The great weight of authority is that if the bodily injury is the direct and reasonable consequence of the fright caused by the negligence, a recovery may be had, although the negligence may have been unintentional. * * * Although the authorities are in conflict as to injuries resulting from fright where fright is caused by a merely negligent act, there is general agreement in the cases that a recovery may be had where the injury results from fright caused by a wilful wrong or an act so grossly negligent as to show utter indifference to consequences.

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"It is admitted that as the negligence caused fright, if the fright contemporaneously caused physical injury, the damage would not be too remote. The distinction insisted upon is one of time only. The proposition is that, although, if an act of negligence produces such an effect upon particular structures of the body as at the moment to afford palpable evidence of physical injury, the relation of proximate cause and effect exists between such negligence and the injury, yet such relation cannot in law exist in the case of a similar act producing upon the same structures an effect which, at a subsequent time—say a week, a fortnight, or a month—must result without any intervening cause in the same physical injury. As well might it be said that a death caused by poison is not to be attributed to the person who administered it, because the mortal effect is not produced contemporaneously with its administration."

* * * The testimony produced by the plaintiff tended to establish that the fright of the plaintiff was caused by the intentional wrong of the defendant, and the finding of the jury is that he acted wantonly and with the intention of injuring the plaintiff. It follows that he is liable for the injuries which resulted from his wrong." Whitsel v. Watts, 98 Kan. 508, L. R. A. 1917 A 708, 159 Pac. 401 (1916).

The plaintiff, mistakenly directed by the brakeman of a train, was allowed to board a train going to her proper destination, but over a railroad other than that which had issued her ticket. After the train had started and run a short distance the conductor, discovering the mistake, threatened to put her off the train unless she paid her fare again. She suffered no delay in her journey, and eventually received a refund of the sum paid for the original ticket. The plaintiff claimed, however, that the threat of the conductor and his language and attitude so frightened her that she sustained a severe nervous shock resulting in a menstrual hemorrhage, followed by a train of nervous disorders. From a judgment for the plaintiff the defendant appealed. The court reversed judgment, holding that as the wrongful act was not accompanied by any malicious or wilful conduct, the plaintiff, in the absence of direct physical injury, could not recover for an injury to her health resulting from nervousness caused by the mistake. The court said: "There being no elements of this character * * * [malicious, wilful, or inhuman conduct] it must follow that plaintiff should not be permitted to recover on account of physical injuries wholly caused by nervous excitement." Crutcher v. The Big Four, 132 Mo. App. 311, 111 S. W. 891 (1908).

Employees of the defendant entered upon the land of the plaintiff to remove certain telegraph poles. While engaged in such work, they indulged in profane and boisterous language, and sang vulgar songs. They even entered the house, seized a guitar which was there and played on it, and sang ribald songs. The defendant's principal foreman, while facing the open door of the plaintiff's bedroom, yelled at her and sang lewd songs in her immediate presence. The wife of the plaintiff was at the time pregnant, and as a result of the fright caused by this performance she became unconscious, endured great suffering and her health was permanently impaired. From a judgment for the plaintiff the defendant appealed. The court, in affirming the judgment, held that although the plaintiff suffered no direct physical injury, a recovery was possible for the sickness and physical illness resulting from the fright occasioned by the defendant's negligence. May v. Western Union Tel. Co., 157 N. C. 416, 37 L. R. A. (N. S.) 912, 72 S. E. 1059 (1911).

Plaintiff and her husband resided as tenants upon a farm owned by de-

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And the whole matter is admirably epitomized in the language of Mr. Justice Harrison in the Sloane case:

"Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves or the entire nervous system is thus affected, there is a physical injury thereby produced, and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect through some action upon the mind."

fendant, who was engaged in erecting a barn thereon at the time of the transaction complained of. The defendant on the occasion in question approached the plaintiff with a club, as if to strike her, claiming she was creating trouble between his children. It appeared that he offered to strike the plaintiff. After her return to the house she experienced severe pain, and a short time thereafter suffered a miscarriage, accompanied by painful lacerations. The trial court directed a verdict for the defendant and the plaintiff appealed. The court reversed judgment, holding the motion for a directed verdict should have been overruled, and saying: "It has often been held that no recovery will be permitted for damages resulting solely from fright caused by the negligence of another, in the absence of some physical injury. * * * The rule, however, denying liability for injuries resulting from fright caused by negligence, where no physical injury is shown, cannot be invoked where it is shown that the fright was due to a wilful act. * * * If the testimony of plaintiff is to be believed, defendant made a wilful assault upon her at a time and under circumstances from which he might reasonably have anticipated the very consequences which it is charged followed. * * * The jury could have found that the act of the defendant was wilful, if not malicious." Holdorf v. Holdorf, — Iowa —, 169 N. W. 737 (1918).

II. Peril or injury to another.

A. Child.

1. Killed by train.

The plaintiff while crossing a railroad track in the exercise of due care, attended by her two small children, discovered that she was about to be run down by an engine approaching the crossing in a grossly negligent manner. She leaped from the track and fell to the ground, according to her statement, sustaining injuries. One of the children was run down and mangled by the engine in her presence. The plaintiff, in a suit for damages, recovered a verdict and judgment from which the defendant brought error. The court reversed the judgment, holding that the verdict for the plaintiff was unauthorized, and saying that if the plaintiff sustained no "personal injury, the fact that she witnessed the mangling of the child and became frightened and suffered a severe nervous shock therefrom did not entitle her to recovery," but if she had shown that in attempting to leap from the track to avoid the train she fell and sustained shock and endured pain and suffering therefrom, she then would have had a right of action therefor. Southern R. Co. v. Jackson, 146 Ga. 243, 91 S. E. 28 (1916).

2. In buggy behind runaway.

The plaintiff and her husband had just alighted from a buggy drawn by

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The rule which appellant seeks to invoke is only applicable in cases in which fright alone is made the gravamen of action. Easton v. United Trade School Contracting Co., 173 Cal. 199, 159 Pac. 597, L. R. A. 1917 A 394. In the case at bar physical detriment was pleaded and there was evidence tending strongly to sustain the allegations of the complaint.

The above quoted and cited authorities fully uphold the action of the court in refusing to give the proffered instructions in two

a mule, in which they were traveling with their four children, when the defendant's negligent operation of his automobile caused the mule to run away. Two of the plaintiff's small children were still in the buggy. Because of fear for their safety, the plaintiff became so frightened that she fainted and swooned, was made sick and subjected to physical suffering, as well as to mental distress and annoyance. From a judgment for the plaintiff, the defendant appealed, contending that as the plaintiff received no direct physical injury, any illness resulting from the fright was not the basis of recovery. The court affirmed the judgment, holding that if substantial physical injury could be traced to fright or shock occasioned by the wrongful act of another, a recovery should be allowed, though no physical injury was received other than as a consequence of the fright. Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912).

3. Alone in moving elevator.

Plaintiff, a young married woman with three children, lived in an apartment on the ground floor of a house owned by the defendant. The elevator shaft was directly opposite the door to her apartment and distant three or four feet. She left her apartment with the children and the two elder ones ran ahead into the elevator car, while the plaintiff turned to lock the door. When she faced about again, she saw the car ascending with her two children unaccompanied by an operator. She was so overcome by fright that she fainted and fell into the elevator shaft. The operator employed by defendant admitted he had left the elevator unattended and with the door either open or unlatched while he had gone for some purpose to a rear room. The jury found the defendant guilty of negligence and gave a verdict for the plaintiff upon which judgment was entered. The court affirmed the judgment. As the court said: "It is urged that it was plaintiff's fright which was the proximate cause of her injuries, and that defendant is not responsible in damages for the consequences of a fright caused by negligence. For fright alone, unconnected with physical injury, it is true that no recovery can be had, but, when the fright results in an actual physical injury, a different rule prevails." Cohn v. Ansonia Realty Co., 162 N. Y. App. Div. 791, 148 N. Y. Supp. 39 (1914).

B. Husband.

1. Assaulted by third person.

The plaintiff's husband was called out of the church in which they were sitting, and he was then assaulted by the defendant M. The plaintiff, observing the disturbance, left the church and with other bystanders separated the two. During this encounter

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of the classes indicated by defendant. It remains for us to examine the contention that the court should have informed the jury that no recovery may be had on account of fright produced by apprehended danger or peril to a third person. Appellant insists that the authorities are uniform in upholding this rule. But there is excellent authority to the contrary. Hill v. Kimball, 76 Tex. 210, 13 S. W. 59, L. R. A. 618; Wilkison v. Downton, L. R. 1897, 2 Q. B. 57; Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N. Y. Supp.

the plaintiff sustained no physical injury at the hands of the defendant M. On leaving the churchyard for home, however, the defendant E, a relative of the defendant M, assaulted the husband, and in so doing pushed and shoved the plaintiff about. As a result of the affair the plaintiff experienced a severe nervous shock, eventuating, in the course of 3 weeks, in the premature birth of a child. From a judgment for the plaintiff, the defendant appealed. The court affirmed the judgment as to the defendant E, but reversed the judgment and remanded the case as to the defendant M, holding that where no immediate personal injury was received, no recovery was possible for injuries resulting from mere fright caused by the negligence of M. McGee v. Vanover, 148 Ky. 737, Ann. Cas. 1913 E 500, 147 S. W. 742 (1912).

The defendant came to the house of the plaintiff, called her husband outside, and addressed him in loud tones and abusive language. This attracted plaintiff's attention and drew her to the door where she saw the defendant in the act of assaulting her husband "by drawing a revolver on him with intent to injure him." She was then pregnant, and as a result of the nervous shock, due to the defendant's act, she suffered a miscarriage which left her permanently impaired physically. The declaration alleged that the defendant's assault upon the plaintiff's husband was wilful and malicious, but did not allege that it was made with intent to maliciously injure the plaintiff. The court dismissed the action and the plaintiff excepted. The court affirmed the judgment, holding that as the defendant's assault on the plaintiff's husband was not alleged to have been made with the deliberate and wilful purpose of exciting her and causing the consequences which followed, there could be no recovery. The court said: "It appears that no recovery can be had on account of the fright alone, caused by less than such gross negligence on the part of one acquainted with the condition of the plaintiff, or with the facts and circumstances surrounding the plaintiff, as would authorize the conclusion that the defendant must have known that certain definite physical injuries would naturally flow from or follow the fright or nervous excitement brought about by him, or unless the fright, resulting in physical injuries or impairment of health, should have been brought about deliberately, maliciously or wantonly by the defendant, through an utter disregard of the natural and probable consequences to the injured party, or from a wilful intent to so injure the party." Goddard v. Watters, 14 Ga. App. 722, 7 N. C. C. A. 1, 82 S. E. 304 (1914).

2. Suspected of theft.

The defendant employed a detective to investigate the loss by theft of certain lumber. Suspicion had attached to plaintiff, and one night about mid-

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39. It is not necessary, however, to discuss any conflict of authority on this subject, because in this case, as in Easton v. United Trade School Contracting Co., *supra,* fear for another was not the only cause of injury. While, of course, Mrs. Lindley was greatly and perhaps chiefly concerned for her children, for whom she fought so valiantly and successfully, there is nothing in the testimony to indicate that she was not concerned for her own safety. All of the circumstances connected with the unexpected appearance of the

night, while he was away, a detective entered his yard to inspect certain lumber stored there which was thought to be the stolen property. The plaintiff's wife saw him engaged in so doing, and being alone, became very much alarmed, as she said that she knew they were seeking evidence against her husband upon the charge of having stolen the lumber. As a result, she fell to the floor and lay there for an indefinite time, unconscious. She suffered severe nervous trouble thereafter. It proved the suspicion against the plaintiff was unfounded. From a judgment of $3,000 for the plaintiff, the defendant appealed. The court affirmed the judgment, saying: "Liability for the direct consequences cannot be denied, and the only question for this court is: Can plaintiff recover for the mental suffering and physical injury that was suffered by the wife, arising from the fright produced by the unlawful acts of the detective and agent of the railroad company? * * * The decisions of other states are in decided conflict; but this court has fully settled the rule to be that, in case of such injury, the wrongdoer is liable for all mental and physical injuries which naturally result from such tort. * * * It has been definitely settled for this state that damages may be awarded for injuries, mental and physical, when caused by fright." St. Louis Southwestern R. Co. of Texas v. Alexander, 106 Tex. 518, 172 S. W. 709 (1915).

C. Stranger in adjoining room attacked.

The defendant, while in a drunken condition, assaulted a third party in a room adjoining that where the plaintiff and her husband lived, and threatened to take the life of the third party. The plaintiff was pregnant at the time, and suffered such a severe shock from the conduct of the defendant that she was made ill for 10 days following, suffered great physical and mental suffering, nearly sustained a miscarriage, and perhaps permanently impaired health. It appeared that the defendant made no assault upon the plaintiff, and in fact was unaware of her presence and condition. On appeal by the plaintiff from a judgment dismissing the petition the court affirmed the judgment, saying: "The pain and suffering alleged resulted solely from fright, and were unaccompanied by any physical injury. The damages sought to be recovered are too remote and speculative. * * * It seems to be well settled that no recovery can be had for injuries resulting from mere fright, caused by the negligence of another, when no immediate personal injury is received. * * * Moreover, under the facts alleged, negligence can in no event be imputed to appellee in this case, or regarded as the proximate cause of appellant's injuries; for, not seeing appellant, being unseen by her, and not knowing of her presence in the adjacent room, it cannot be claimed

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animal, its attacks upon her children, and her own conflict with the chimpanzee, make it impossible that she should have been devoid of fear for herself. Therefore, under the authority last cited, the court was fully justified in refusing to give the requested instruction on the subject of fears for another person.

No other questions are discussed in the brief of appellant, and we find no others in the record meriting analysis.

The judgment is affirmed.

that he could have foreseen or reasonably anticipated that any injury would probably result to her from his assault upon or abuse of * * * [the third party]." Reed v. Ford, 129 Ky. 471, 19 L. R. A. (N. S.) 225, 112 S. W. 600 (1908).

O. L. C.

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CITY OF SHREVEPORT v. SOUTHWESTERN GAS & ELECTRIC CO.

[Supreme Court of Louisiana, January 6, 1919.]

145 La. 680, 82 So. 785.

On Rehearing, June 30, 1919.

1. **Electricity—Death of city fireman by electrocution—Liability of electric company—Defense.**

It is no defense to an action against an electric company for death by electrocution, resulting when the deceased came in contact with one of the company's wires, that the insulation of wires soon deteriorates under the action

CASE NOTE.

Liability of third person under compensation acts to injured workman or his employer for injuries negligently caused.

I. Action by workman or his dependents, 113-128.
  A. Against third person alone, 113-126.
    1. Right in general, 113-115.
    2. Award as bar to action, 115-121.
    3. Action as bar to claim for award, 121-123.
    4. Action as ground for suspending award, 123.
    5. Right of insurer or employer to share in recovery, 124-126.
  B. Against employer and third person, 126-128.
    1. Employer refusing to sue, 126-127.
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II. Action by employer or his insurance carrier, 129-141.
  A. Right to sue, 129-135.
    1. In general, 129-131.
    2. Effect of employee's negligence, 131-132.
    3. Effect of employer's negligence, 132.
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  C. Basis of recovery where third person also under act, 136-138.
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  D. Subrogation as to rights of dependents, 138-141.
    1. Right of insurer to maintain action, 138-141.
    2. Right of insurer to share in recovery, 141.

Cross-references. Liability of third person under compensation act to injured workman or his employer for injuries negligently caused, see 16 N. C. C. A. 390-414; right of injured workman to sue third person whose negligence caused injury as affected by compensation acts and effect of recovery, see 14 N. C. C. A. 901-916, 10 N. C. C. A. 939-945; enforcement of liability of third person by employer, insurance carrier or assignee of claim where employee elects to take compensation under act, see 14 N. C. C. A. 1013-1021; recovery of indemnity by employer from third persons under English Workmen's Compensation Act, see 5 N. C. C. A.

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of sun and rain, and that therefore it is not commercially possible to keep wires safely insulated.

2. **Electricity—Death of city fireman by electrocution—Liability of electric company—Defense.**

In an action against an electric company for death by electrocution, resulting when the deceased came in contact with one of the company's wires, wherein there was evidence to the effect that the insulation of wires is not for protection but only for preventing a wasteful escape of the fluid, held, that such view of the matter did not recommend itself to the humanity, not to say the common sense, of the court.

3. **Electricity—Death of city fireman by electrocution—Deceased was not mere licensee.**

In an action against an electric company for the death of a city fireman by electrocution, resulting from the deceased's coming in contact, while fire fighting, with one of the company's wires strung several feet away from the burn-

524-528; provisions of workmen's compensation acts as to recovery of indemnity by employer from third person causing injury, see 5 N. C. C. A. 803-806.

I. Action by workman or his dependents.

A. Against third person alone.

1. Right in general.

In Carlson v. Mock, 102 Wash. 557, 173 Pac. 637 (1918), it appeared that plaintiff was employed by a street railway company as a track oiler, and while so engaged upon a public street was struck and injured by defendant's automobile, alleged to have been driven by defendant around a corner at such a recklessly high speed that it was carried over to the wrong side of the street, where plaintiff was injured. The answer admitted that defendant's automobile struck plaintiff, denied all other allegations of the complaint, affirmatively pleaded contributory negligence and for a second affirmative plea alleged that plaintiff was in the employ of the traction company as oiler; that he was engaged in such duties when injured; that the tracks of the company are a part of its plant, and are upon its premises; that the occupation was inherently dangerous and extrahazardous as defined by the Workmen's Compensation Act; and therefore the court had no jurisdiction of the action. Trial was had before the court sitting with a jury and at the close of plaintiff's case a judgment of nonsuit was entered upon motion of defendant and plaintiff appealed. Plaintiff relied, for his right to maintain an action for damages against defendant, upon a proviso of the compensation act that if an injury to a workman occurring away from the plant of his employer was due to the negligence or wrong of another, not in the same employ, the injured workman or, if death resulted, his widow, children or dependents should elect whether to take under the act or to seek a remedy against such third person, such election to be made in advance of any suit under the section. It was held that the term "plant," as used in the proviso was not intended to include more than that part of the employer's fixed property over which he has exclusive control and could not be applied to a public street or highway, though occupied by the employer for certain purposes, over which the general traveling public had at least equal rights with the employer, and over which the employer had no oversight or method of protecting the employee from negligent or wrongful acts of third persons. The judgment of the trial court was reversed with directions to proceed in accordance with

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ing building and above a sheet-iron awning extending from such building, held that, as to such company, such fireman was not a mere licensee who was required to take the premises as he found them.

4. **Electricity—Death of city fireman—Liability of electric company—Contributory negligence of deceased.**

In an action against an electric company for the death of a city fireman by electrocution, resulting from the deceased's coming in contact, while fire fighting in the nighttime, with one of the company's wires strung several feet away from the burning building and above a sheet-iron awning extending from such building, held, that the deceased was guilty of no negligence, and that the fact that the two firemen who preceded him onto the awning saw the wire and avoided it did not argue against him.

5. **Workmen's compensation—Death of city fireman—Subrogation of city—Defenses to action by city.**

In an action by a city against an electric company for the death of a city

the views of the court. Upon a rehearing *en banc*, 104 Wash. 691, 176 Pac. 2 (1918), a majority of the court adhered to and reaffirmed the views as expressed in the original opinion, four of the nine judges dissenting from the holding that the tracks of a street railway company were not a part of its plant within the meaning of the compensation act.

In Hansen v. Northwestern Fuel Co., — Minn. —, 174 N. W. 726 (1919), plaintiff sued to recover for personal injuries. The case was dismissed as a common-law action and retained for an award under the compensation act. Plaintiff appealed from an order denying his motion for a new trial. Plaintiff, who was in the employ of a laundry company, his duties being to collect and deliver laundry on a downtown route, forgot to collect from a hotel a bundle which should have been at the laundry by noon. After lunch he was about town when, upon remembering the bundle, he went immediately to the hotel, took the bundle on his back and started to the laundry, several blocks distant. On his way he was injured by defendant's auto-truck. It was held that the injury arose out of his employment, it being a street risk to which his work subjected him and that it arose in the course of his employment for, though he was not using his delivery wagon and it was not customary to carry laundry as he was doing at the time, he was working in furtherance of his employer's interest and the laundry was received and laundered by the laundry company after the accident; he had not stepped aside for some purpose of his own; he had never been told to do or not to do as he did, as such an occasion had not before arisen; and there would have been no thought of criticism if the injury had not intervened. The court pointed out that an injured employee might proceed under the compensation act against his employer or against the third party causing the injury by a common-law action for negligence, in which case he would be obliged to prove his common-law cause of action. If he recovered in a common-law action he could have no greater amount than that fixed by the compensation act. If he took under the compensation act his employer would be subrogated to his common-law action against the third party and his recovery limited to the amount payable under the compensation act, but the statute gave no right to proceed against the third party under the compensation act. At the close of the testimony defendant moved that the case be dismissed as a common-law action and that the court either grant or deny an award under the compensation act. This motion had been granted. It was held that after doing

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fireman by electrocution, resulting from the deceased's coming in contact, while fire fighting, with one of the company's wires strung several feet away from the burning building and above a sheet-iron awning extending from such building, where the city sued not in its own right but as the subrogee of the deceased's widow and children, to whom it had paid compensation under the Employers' Liability Law, held, that the electric company could not defend on the ground of contributory negligence on the part of the city, and estoppel because the city's electrician had not condemned the location of the wire, but, on the contrary, by not objecting to such location, had impliedly approved it.

On Rehearing.

6. Workmen's compensation—Subrogation of employer—Persons bound by subrogation agreement—Widow and child of deceased employee.

Where a city fireman was electrocuted, while fire fighting, by coming in contact with an electric company's wire which was strung several feet away from the burning building and above a sheet-iron awning which extended from

this defendant could not contest the question of its liability to the extent to which the laundry company was liable and there was nothing left to do but fix compensation. The order denying plaintiff's motion for a new trial was affirmed and the case remanded with directions to the court to entertain such further proceedings as were appropriate.

2. Award as bar to action.

B was injured by collision with defendant's street car. At the time of the accident he was an employee of a corporation which carried compensation insurance. The compensation having been adjusted and paid, this action was commenced in the names of B and the employing company. Defendant's demurrer on the ground of misjoinder of parties was overruled, issue was joined and the cause proceeded to trial. At the close of the evidence a nonsuit was granted as to B on the ground that he was improperly joined as a party. A nonsuit was denied as to the insurance company, but the trial resulted in a verdict for defendant. An appeal from the judgment of nonsuit was taken by B. It was held that section 31 of the Workmen's Compensation Act (St. 1913, p. 295) operated to transfer the legal title to the claim for damages from the employee to the employer or his insurer, but that the employee retained an equitable interest therein as to any surplus that might be recovered over the amount paid by the employer and was a real party in interest in the litigation and therefore the trial court erred in granting a nonsuit as to him. The court affirmed the judgment, however, because it appeared that the error was harmless, inasmuch as the case was conducted to its conclusion by the attorney whom B had selected to represent him and the verdict, amounting as it did to a finding that defendant was without fault, was a negation of the existence of any right whatsoever in B, as his interest was necessarily predicated upon a showing of negligence on the part of defendant and a recovery of a sum in excess of that paid him by his employer. A rehearing was denied. Bassot v. United Railroads of San Francisco, — Cal. App. —, 177 Pac. 884 (1918).

Plaintiff, an employee of an iron company, while engaged in cleaning the runways of the elevator doors to the elevator shafts he was assisting to install in a building for which his employer had a subcontract, was struck by an elevator negligently operated in the shaft, without warning by employees of defendants which had the subcontract for installing the elevators. He fell five stories to a cement floor, receiving severe injuries for which he commenced an action for

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such building, and the city settled with the deceased's widow and minor child under the Workmen's Compensation Act (No. 20 of 1914, p. 44), and at the time of accepting payment from the city the widow entered into an agreement whereby she subrogated it to all of the rights of herself and her child against the electric company, and stipulated that the city should pay over to her the full amount of the judgment recovered less that part which it had already paid to her for herself and her child, held, that the act of subrogation was valid not only as to the widow but as to the child as well.

7. **Workmen's compensation—Right of action against third persons.**
The right of an employee, under the Employers' Liability Act, to compensation from his employer for personal injuries does not exclude the right of an injured person to recover damages from third persons through whose fault the damage happened.

Provosty, J., dissenting.

damages against the elevator company and one of its employees and recovered judgment. Defendants appealed. The negligence alleged by plaintiff was that the work being done by the iron company and the elevator company was conflicting and rendered the work dangerous for employees of both if they were permitted to work in the same elevator shaft at the same time, and that the shaft in question had been turned over to the ironworkers and instructions issued to defendants not to use that shaft or the elevator during working hours, but, notwithstanding such notice, and without any warning or other precaution, defendants lowered the elevator, striking plaintiff. It was held that the pleading warranted an instruction on the theory that if defendants knew or in the exercise of ordinary care could have known, plaintiff's position, it was the duty of the one in charge of the elevator to have given reasonable warning of an intention to move it and that a statement in an instruction that "it is admitted or established in this case that the work being performed by the plaintiff made it necessary or proper for him to be about or in the elevator shaft known as the south shaft" was justified, as it was not disputed that plaintiff had been ordered to clean up the runway of the doors and that the position he assumed was proper for that purpose. It was also held that evidence that a few days before the accident the individual defendant, who was operating the elevator at the time of the injury was ordered by the superintendent of the general contractor, in the presence of the elevator company's foreman, to stop it during working hours as the use of the shaft was necessary for the ironworkers to complete their work, was strong evidence that the foreman heard such instructions and knew that the shaft was in use by the ironworkers and that an express agreement with the ironworkers was not necessary. Defendant pleaded that under the Employers' Liability Act where a third person was liable to the employee for the injury, the employer was subrogated to his right against such third person and by reason thereof plaintiff assigned his cause of action against defendant to his employer and was not a proper party to institute this action. Plaintiff's reply alleged that the action was brought with the approval and under the direction of the iron company, that in the trial court the iron company admitted its liability for compensation and its willingness to assign its right of action against the elevator company, and that the court authorized plaintiff to proceed with the action and to apply the proceeds first to the satisfaction of any claim plaintiff might have against

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[Headnotes by Publishers' Editorial Staff.]

Action by subrogated employer which had settled under the Workmen's Compensation Act for the death of an employee against the third person causing the death. Judgment for plaintiff. Affirmed.

For appellant—Alexander & Wilkinson, and E. W. & P. N. Browne.

For appellee—J. C. Henriques.

the ironworks for compensation. The court held that plaintiff had a right to bring the action in his own name under section 3659, Rev. St. 1913; that the section was designed for the protection of an employer who had paid the compensation; and that, if the employer's rights were protected, it was no concern of the third party. It was urged that the verdict for $25,000 was exorbitant in that the amount invested at 6 per cent would bring an amount largely in excess of plaintiff's normal income. The court pointed out that the fall caused a compound fracture of both legs, broke one arm, fractured the jaw, dislocated a number of teeth and otherwise severely sprained, bruised and injured plaintiff, necessitating a number of surgical operations which resulted in shortening both legs, one about 1½ inches more than the other; that he suffered severe pain and was a cripple for life, though he was an active, strong and healthy young man prior to the injury; and held that the verdict was not excessive. The verdict was also attacked as being a quotient verdict, affidavits to that effect from two of the jurors being filed and a new trial asked. The court held that this evidence was unsatisfactory, as the affidavits were not made until 3 months after the trial, did not show that the jury had previously agreed to be bound by the result, and were not filed until the day the motion for a new trial was passed upon, so there was no opportunity to obtain counter-affidavits; and refused to set aside the verdict. Thomas v. Otis Elevator Co., — Neb. —, 172 N. W. 53 (1919).

Appellee was libelant of a vessel in an action for damages for personal injuries received by him while assisting in loading the vessel, as the employee of a stevedore company which was loading the ship as an independent contractor. The injury was caused by the fall of a bale of cotton due to the breaking of defective tackle furnished by the ship which it was the duty of the ship to use reasonable care while inspecting. It was held that the district judge was justified in finding that a reasonable inspection would have disclosed the defect in the tackle. Appellant contended that the decree in favor of appellee was erroneous because he accepted $112.50 from the insurance company, with which the stevedore company and the ship agents had insured as required by the Texas Workmen's Compensation Act. It was conceded that the provisions of the Texas act were not applicable to the situation, but it was contended that, by asserting a claim against the stevedore company under that act, appellee had elected to waive his remedy elsewhere. The court said that whatever force that argument might have as against appellee's right to not proceed against his employer, the stevedore company, it could not

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PROVOSTY, J. In the course of fighting a fire that was inside the second story of a furniture store, the firemen set up a ladder against the sheet iron awning which extended from the building over the sidewalk at the elevation of the second floor, and three of them went up this ladder with the nozzle end of a hose. There was an arc light wire of the defendant company four feet five inches above this awning and six feet eight inches from the building; and below it were two other wires. The foremost firemen managed to pass between this top wire and those below it. The third fireman, just as he stepped from the ladder to the awning, was seen to fall down upon the awning, and to be holding the top

affect his right to proceed against the ship, as he was not employed by it and had made no claim against the insurance company as insurers of the ship and the release given purports to be in favor of the insurance company and the stevedore company only, so far as it applied to the Workmen's Compensation Act. As the release shows that both parties understood the Texas Compensation Act to be applicable and executed it to carry out its terms, the release should be given no greater effect than the Texas law would, if applicable, have given to the receipt of payments by the appellee. As the Texas law did not preclude him from pursuing his remedy against a stranger who was jointly liable for his injury it would be necessary, to bar the action, to show that he had been fully satisfied by the payment made by the insurer and that could be done only by showing an agreement on his part to accept such payment as full satisfaction or by convincing the court that the payment was adequate in amount to that end. The court held that the utmost effect to be given to the payments and release, either under the compensation act or at common law would be to estop him from suing his employer and to operate as a *pro tanto* satisfaction of his cause of action against the stranger and, as the evidence of the payment was before the district judge, it must be assumed he gave it its legal effect in fixing the amount of the decree. A decree for libelant was affirmed, the amount not being stated in the opinion. The Emilia S. De Perez, 160 C. C. A. 490, 248 Fed. 480 (1918).

Plaintiff was injured while in the employ of a tie company and engaged in loading ties upon cars placed upon a spur track on the premises of the tie company by defendant railroad company, the injury being caused by the negligence of defendant in pushing a train of cars upon the spur against the cars plaintiff was engaged in loading. He brought action for damages against defendant, a demurrer to his declaration on the ground that the parties were within the compensation act was sustained, plaintiff elected to abide by the declaration and judgment was rendered in bar of the action and for costs, to reverse which this writ of error was prosecuted. It was first contended by plaintiff that it did not appear from the declaration that the tie company was engaged in an extrahazardous business as contemplated by section 3 of the Workmen's Compensation Act. It was held, however, that while the declaration did not specifically allege that the tie company or defendant were operating under the compensation act the allegations were sufficient to show that defendant was a common carrier

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wire with one hand, while electrical sparks were spitting out at the place where he had hold of the wire. Whether he had stumbled, or slipped, on the steep awning and caught the wire in his fall, or had fallen as the result of having put his hand on the wire, is not known. His companions instantly pulled him off; but he was already dead—electrocuted. The water had just begun to spout from the hose. It was after night, but light enough from the flames and from the street lamps for him to have seen the wires, as his companions had done. The city of Shreveport, as his employer, settled with his widow and children her liability to them under the Employers' Liability Law (Act No. 20, p. 44 of 1914), and deeming

and that the tie company and plaintiff were engaged in "loading or unloading" in connection with carriage by land or water so that, under the terms of the act, the tie company would conclusively be presumed to be operating under the act until it was shown to have elected not to so operate, which presumption also applied to plaintiff and was not controverted by any allegation of the complaint. It was next contended that the injury did not arise out of and in the course of plaintiff's employment which contention was not sustained, the declaration having alleged that plaintiff was in the employ of the tie company which was engaged in loading ties for shipment with defendant railroad and that he was injured while loading ties on the spur track. The court held that section 6 of the act which limits the remedy of an employee or his dependents to that provided by the compensation act and section 29, which gives an employer who has paid compensation a right of action for reimbursement against a third party causing the injury, must be construed together and so construed they limit an employee to recovery under the compensation act against the employer and give the employer the right to recover from a third party, whose negligence caused the injury, the amount paid to the employee when the employer, the employee and the third party are all operating under the compensation act. The judgment of the trial court sustaining the demurrer to the complaint was affirmed. Rogers v. Illinois Cent. R. Co., 210 Ill. App. 577 (1918).

Plaintiff, employed as a lineman by a telephone company, was injured when he came in contact with a telephone wire which had, without his knowledge, come in contact, at a point 200 yards away, with an electric wire owned by defendant city. In response to special issues the jury found the injuries to plaintiff were directly and proximately caused by the negligence of the city in so constructing its poles and wires as to permit them to come in contact with the telephone wires. Defendant answered that the telephone company was a subscriber to the industrial accident board which became liable to plaintiff for the injuries and had settled with plaintiff in the manner provided by statute and that plaintiff, having accepted such settlement, was precluded from recovering against defendant. The trial court sustained an exception to the plea and defendant appealed. The court held that the principles that when an injury was occasioned by the acts of two or more joint tort-feasors, the injured party could have but one satisfaction though he might have judgment against all of them, and that where a plaintiff settled with

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that under section 7 of said law she was legally subrogated to whatever right they might have to claim damages from the defendant company, and having also obtained from them an express subrogation, brought the present suit.

An exception of no cause of action based upon the supposed ineffectiveness of the subrogation was sustained below. On appeal to this court, the judgment was reversed; this court holding that, while legal subrogation had not taken place, the contractual subrogation was good as to the widow. 140 La. 1078, 74 So. 559. The question as to the validity of the contractual subrogation of the rights of the children was expressly reserved.

one tort-feasor another was entitled to have such payment credited as an offset *pro tanto* against any damages recovered against him, were inapplicable inasmuch as the responsibility of the insurance association did not arise from the tort of the employer, but from its contract to indemnify the employee for the injury without reference to any negligence on the part of the employer, its liability being purely one of contract supported by a valuable consideration on the part of the employer by the premium paid and on the part of the employee by his surrender of his cause of action against his employer, to which contract a third party causing the injury was not a party, sharing none of its burdens and being entitled to none of its benefits. The court pointed out that the Texas Employers' Liability Act omitted a provision contained in some other acts that an employee should not be entitled to recover both compensation and damages against a third party and also that, under the Texas act, the insurer was given no right to indemnify itself against the wrongdoer, except when he was an independent contractor or subcontractor doing work for the subscriber, and held that the settlement with the plaintiff by the insurance company did not operate as a waiver of his right to sue defendant for damages. Judgment for plaintiff was affirmed. City of Austin v. Johnson, — Tex. Civ. App. —, 204 S. W. 1181 (1918).

Appellant began an action for personal injuries against appellee and two others for personal injuries alleged to have been caused by their negligent operation of an automobile. A verdict for $5,000 was recovered. On appeal the judgment was reversed because there was no liability against the other two defendants and remanded for further proceedings against appellee. Upon reinstatement the suit was dismissed as to such defendants and an amended declaration filed against appellee alone. Appellee filed pleas of the general issue, the statute of limitations and five special pleas, and after withdrawal of the plea of limitations the court overruled appellant's demurrer to the special pleas. Appellant stood by his demurrer and, from a judgment in bar of the action, appealed directly to the supreme court on the ground that the constitutionality of section 29 of the Workmen's Compensation Act was involved. Three of the special pleas alleged that both appellant and his employers had elected to be bound by the Workmen's Compensation Act and that appellee had elected not to be so bound. The other pleas were substantially the same except that they contained no averments that appellee had or had not elected to be bound by the act. The

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The reason why the court held that the legal subrogation had not taken place was that the said section 7 of the Employers' Liability Act in making provision for such legal subrogation mentions only the injured employee himself, saying nothing of "dependents." The decision became final in March, 1917. The Legislature of 1918 (Act No. 38) amended the said section 7, doubtless in view of that decision, by adding after the word "employee" the words "or his dependent"; so that, as the law now stands, the employer who has made a settlement of his liability under said law is subrogated by operation of law not only when the settlement has been with the employee himself but also when it has been with his dependents.

pleas were based on section 6 of the compensation act, which provided that no common-law right of recovery should be available to an employee within the act, and section 29, providing for action against a third person causing the injury. Appellant contended that if section 29 deprived employees of the right to recover from third parties who were not within the act, such provision was unconstitutional as not being within the title of the act and as depriving appellant of his property without due process. The constitutional questions were held to have been decided by the earlier cases of Keeran v. Peoria, B. & C. Traction Co., 277 Ill. 413, 115 N. E. 636 (1917), and Friebel v. Chicago City R. Co., 280 Ill. 76, 16 N. C. C. A. 390, 117 N. E. 467 (1917), which held in substance that neither an employee, his personal representative, nor his next of kin had any vested right to recover for personal injuries to the employee that the legislature could not, at any time, do away with by a public enactment. It was further held in the present case that section 29 of the compensation act preserved in full the common-law right of action against a negligent third party who had elected not to be bound by the act, in which case the employee was not required to elect between compensation under the act and damages at common law, but might prosecute both at the same time, and recovery in the common-law action would not be limited to the amount recoverable under the compensation act, the only modifications of the common-law right of action made by the section being that the employer was given a right to sue for the entire damages either in his own name or the name of the injured employee or that he might continue any suit begun in the name of the employee after his liability under the act was fixed or paid. The law action in such case would be continued and maintainable for the use of both employer and employee; each would have an enforceable interest in the judgment if it was in excess of the indemnity of the employer, a suit in the name of the employee and judgment therein would bar another suit in the name of the employer, whether the suit was in fact prosecuted and controlled by the employee or employer, and payment of the judgment by defendant if one was obtained would completely discharge him from all liability. The pleas were held to state no defense, and judgment was reversed with directions to sustain appellant's demurrer. Gones v. Fisher, 286 Ill. 606, 122 N. E. 95 (1919).

3. **Action as bar to claim for award.**

A mother, whose son was killed by collision with the truck of a creamery

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The learned counsel for plaintiff contends that the said amendment controls this case. We think not. The rights of the children could not be taken away from them and transferred to the plaintiff by any act of the Legislature. It would be the divesting of vested rights.

And so far as concerns the contractual subrogation which the mother and tutrix undertook to make for these children, it was nothing more than an alienation of minors' property without observance of the forms prescribed by law for the alienation of minors' property; and therefore null. Were the city to fail in the present suit, the judgment would be in no way binding on the

company while he was riding his motorcycle as messenger for a telegraph company, made a settlement with the creamery company for a sum slightly in excess of the funeral expenses, she being a foreigner unacquainted with the English language and being told that if she did not accept that sum she would get nothing. An application to the probate court was made for her appointment as administratrix and on the same day she was appointed, filed a petition to accept the amount for a release, received such permission and released all claims, this being the sixth day after the death of the son. Later the mother applied to the industrial accident board for compensation, an award of $10 per week for 300 weeks was made and the employer appealed, claiming that, by giving the releases, claimant had deprived it of recourse against the creamery company. The court sustained the award, holding that the release did not amount to a release of the employer and that, as the compensation act clothed the employer with the absolute right to recover such payments as it was obliged to make from the third person liable for the injury, such third person, in making a settlement, would be held to have done so with knowledge that it might be called upon to respond to the employer of deceased who was, primarily, legally liable under the terms of the compensation act to the injured employee or his dependents in case of his death. The industrial accident board based its award upon a finding that the creamery company was not legally liable for the accident and therefore the amount it paid was a mere gratuity and the release was no bar to compensation from the employer. The court found it unnecessary to pass upon that question because, in any event, the telegraph company was left free to proceed against the creamery company as though no settlement had been made. Naert v. Western U. Tel. Co., 206 Mich. 68, 172 N. W. 606 (1919).

Plaintiff, who was employed as a teamster by a corporation which was under the Workmen's Compensation Act, was injured in consequence of his horse being frightened by the flapping of the canvas cover on a machine used by defendant, a street railway company, for grinding rails. The machine had been left on the street after it had been used at another place instead of having been placed in defendant's storage house, and no written license to place an obstruction in the street had been obtained from the street commissioner as was required by ordinance. It was held that whether, under the circumstances, the machine rendered the street dangerous for travelers was a question for the jury and, if they found it constituted

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minors, who could obtain the annulment of the said attempted transfer, or subrogation, of their rights, and then renew against the defendant company the present suit.

The exception of no cause of action must therefore be sustained in so far as plaintiff's suit is founded upon the rights of the minors.

On the merits, the case is closely analogous to that of Clements v. Electric Light Co., 44 La. Ann. 692, 11 So. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348, where a workman going on a roof to repair it was killed by contact with an insufficiently insulated wire, and the company was held responsible.

Evidence was offered to show that the insulation of wires soon

an obstruction, defendant's failure to procure the license could be considered in passing upon its negligence and that the question of defendant's liability was properly submitted to the jury. It was contended that, as plaintiff had given notice of a claim for compensation to the insurer of his employer, he could not maintain the present action. It was held that, under the compensation act, plaintiff could not concurrently proceed at common law for damages and for compensation under the statute, but that the action at law, having been begun before the notice of claim for compensation was given, was an election by which plaintiff as well as defendant was bound and that the action at law was maintainable. The court further held that it was unnecessary to consider whether payment, by plaintiff's employer, of his wages during the first week of his disability was made under the statute or was a gratuity or whether his subsequent notice of withdrawal to the insurer operated as a waiver of the claim for compensation. Labuff v. Worcester Consol. St. R. Co., 231 Mass. 170, 120 N. E. 381 (1918).

4. Action as ground for suspending award.

An employee of a city was killed through the negligence of a power company, and compensation was awarded to the mother as dependent and payments made thereon by the city. An administrator was appointed and suit brought against the power company and a part of the recovery therein paid to the mother. The city filed a petition to intervene in this suit, but failed to prosecute its claim to the fund recovered. After payment of the mother's share of this judgment the city filed a petition with the industrial board praying that it be permitted to cease paying to the mother on the compensation award and that it be allowed credit on the amount of the award to the mother to the extent of the amount paid to her as proceeds of the judgment. The court, after pointing out that the compensation statute did not require dependents to elect whether to proceed under the act against the employer or at law against the negligent third party as is required of the employee himself, held that the city, having failed to protect its rights in the manner pointed out by the statute, could not, by petition to the board, have credited upon the award against it any sums received by the mother as a result of the suit against the power company. Vereeke v. City of Grand Rapids, 203 Mich. 85, 168 N. W. 1019 (1918).

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deteriorates under the action of sun and rain, and that therefore it is not commercially possible to keep the wires safely insulated. This was held in the case of Moren v. N. O. R. & L. Co., 125 La. 944, 52 So. 106, 136 Am. St. Rep. 344, not to be a good defense.

There was also some evidence to the effect that the insulation of wires is not for protection, but only for preventing a wasteful escape of the fluid. That view of the matter does not recommend itself to the humanity, not to say the common sense, of the court.

Another defense is that the fireman was a mere licensee, and therefore had to take the premises as he found them, and abide by the consequences. He may have been a mere licensee in so far as

5. Right of insurer or employer to share in recovery.

Plaintiff, an employee of a transfer company, was injured in the course of his employment by collision of defendant's engine with the truck upon which he was riding. After receiving compensation payments from his employer authorized by the compensation act amounting to $378, plaintiff brought this suit against defendant for damages and obtained judgment for $7,197, under instructions to deduct the amount of compensation received from the employer from the amount the jury found to be due from defendant. The court intimated that it did not consider such deduction proper, but did not decide that question, inasmuch as plaintiff made no objection thereto. Defendant's principal point was that the transfer company, by making payment of the sum due the plaintiff under the compensation act, became subrogated to whatever right of action plaintiff had against defendant and, by reason of such subrogation, plaintiff was not entitled to maintain this action against defendant, its theory being that the transfer company was completely subrogated to all the rights of plaintiff and that such subrogation had the force of an assignment of plaintiff's entire claim. The court held that defendant's contention could not be sustained and pointed out that, while the statute did not provide how the employer's indemnity or subrogation should be adjusted (whether by intervention after the verdict or during trial, or by making him a party defendant, or whether the wrongdoer might serve notice on the employer before making payment on the judgment), the employer should in some way be brought in when compensation has been made and, under the circumstances of the present case, removed the cause with directions that the employer be brought in, to the end that compensation paid by him might be deducted from the judgment and paid to him and the balance to plaintiff. It was also contended that plaintiff was guilty of contributory negligence as matter of law because he approached the track, or allowed the driver to approach it, at a speed that made it impossible to stop after reaching a point where the train could be seen, or else that he did not look, or do anything to induce the driver to reduce the speed of the truck until within 15 feet of the track. The court held, under the evidence, that as they approached the track and passed obstructions, both plaintiff and the driver were looking for trains, that both saw the train at about the same time and that the driver applied the emergency brakes at the same time plaintiff saw the danger and that the

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the owner of the furniture store was concerned, and might not have had any right of action against this owner for any injury received as the result of peculiar conditions in or about this building, though even then circumstances might perhaps alter cases; but he certainly was not a licensee with regard to the defendant company who was occupying with its wires the public street. The cases cited by defendant are New Omaha Thompson, etc., v. Anderson, 73 Neb. 84, 17 Am. Neg. Rep. 601, 102 N. W. 89; Hamilton v. Minneapolis Desk Co., 78 Minn. 3, 6 Am. Neg. Rep. 595, 80 N. W. 693, 79 Am. St. Rep. 350; Beehler v. Daniels, 18 R. I. 563, 29 Atl. 6, 27 L. R. A. 512, 49 Am. St. Rep. 790; Pennebaker v. San Joaquin L. & P. Co.,

question of plaintiff's contributory negligence was for the jury. A request by defendant to instruct that plaintiff would not be excused from looking and listening because there was an ordinance limiting the speed of the train to 6 miles per hour was held to have been properly refused as being unnecessary because plaintiff did not claim he supposed defendant would comply with the ordinance or that he was excused from looking because of it. Instructions that it was not negligence in itself, in the absence of ordinance, to operate a train at any particular speed and that the burden was upon plaintiff to show that ordinary care required the train to be operated at a slower speed and that if the train was operated at a greater speed than the ordinance permitted it would constitute negligence, were approved as being correct individually and not in conflict, being given upon different issues. No prejudicial error was found and the judgment was affirmed. Black v. Chicago Great Western R. Co., — Iowa —, 174 N. W. 774 (1919).

An employee of a lumber company, while driving a wagon in the course of his employment, was struck by a train and received injuries causing his death. Suit was begun against the railroad company by the surviving wife, children and father of deceased. The railroad company answered with a general denial and a plea of contributory negligence. The insurance carrier of the employer intervened and pleaded payment to the legal representatives of deceased of the compensation provided by law and that it was entitled to be subrogated to the rights of plaintiffs against the railway company to the extent of such payments. Both parties excepted to the plea of intervention and it was dismissed. Exceptions were taken to such dismissal and notice of appeal given. The trial proceeded between the original parties resulting in judgment for plaintiffs and both the railway company and the insurance company appealed. After perfecting the appeal a compromise was effected between the original parties whereby judgment was to be entered as if originally in the sum of $11,000, of which $7,000 was apportioned to the widow and $4,000 to a minor child, the wife to file a remittitur of $3,000, and payment of the agreed judgment was to be made subject to the opinion of the court of civil appeal or supreme court on the subrogation claim of the insurance company. On this appeal, therefore, only the right of the insurance company to subrogation to the extent of $2,225.70 paid by it as compensation was considered. It was held that the compensation act made no provision for subrogation of an insurer under such circumstances, that in issuing its

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158 Cal. 579, 1 N. C. C. A. 349, 112 Pac. 459, 31 L. R. A. (N. S.) 1099, 139 Am. St. Rep. 202; Griffin v. U. S. Electric L. Co., 164 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477; Minneapolis Gen. Elec. Co. v. Cronon, 166 Fed. 651, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816; Memphis Consol. Gas & Electric Co. v. Speers, 113 Tenn. 83, 16 Am. Neg. Rep. 596, 81 S. W. 595; National Fire Ins. Co. v. Denver Consol. Electric Co., 16 Colo. App. 86, 63 Pac. 949; Cleveland, C., C., etc., Co. v. Ballentine, 84 Fed. 935, 28 C. C. A. 572, 4 Am. Neg. Rep. 735; Woodruff v. Bowen, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198; Hector v. Boston Elec. Co., 161 Mass. 558, 37 N. E. 773, 25 L. R. A. 554; Sullivan v. Boston & A. R. Co.,

policy it took the risk of not having anything to pay, and, having lost, it must stand the consequences. The remittitur was deducted and the judgment as so reduced was affirmed. Texas & P. Ry. Co. v. Archer, — Tex. Civ. App. —, 203 S. W. 796 (1918). Rehearing denied.

Plaintiff, an employee of an ice machine company, was injured while installing machinery for an ice cream company through the negligence of the latter. The ice machine company settled with plaintiff under the Workmen's Compensation Act and refused to proceed against the ice cream company on behalf of plaintiff, whereupon plaintiff commenced this action against both companies. It was held that plaintiff was entitled to maintain the action under section 3659, Rev. St. 1913, and to recover as much as a jury would award, the ice machine company being subrogated to the extent of payments it had made to plaintiff under the compensation act. Letton and Sedgwick, JJ., concurred, but were of the opinion that plaintiff's right of action against the third person was not given by the compensation act, but that section 3659, Rev. St. 1913, allowing subrogation of the employer, was intended merely to provide for the reimbursement of the employer for payments made by him to the injured person, and that in such an action both the employer and third person should, as was done in this case, be made defendants, plaintiff being entitled to recover his damages, less the amount received under the compensation act from the employer, and the employer, if he asked for the relief, being entitled to a judgment equal to the amount he had paid as compensation. Judgment for defendant was reversed and remanded for further proceedings. Muncaster v. Graham Ice Cream Co., — Neb. —, 172 N. W. 52 (1919).

B. Against employer and third person.

1. Employer refusing to sue.

Deceased, who was employed by a railroad company as a pile inspector and construction engineer, received injuries, through the negligence of a construction company, resulting in his death. An award of $5,100 to be paid in weekly instalments, was made under the Workmen's Compensation Act. Thereafter plaintiffs requested the railroad company to commence an action for damages against the construction company, the excess of any amount recovered over the amount of the award, to be paid to plaintiffs. The railroad company refused to commence such suit whereupon this action was brought by plaintiffs against the construction company and the railroad was also joined as a defendant, the

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156 Mass. 378, 31 N. E. 128; Keefe v. Narragansett Elec. L. Co., 21 R. I. 575, 4 Am. Neg. Rep. 218, 43 Atl. 542; Hargreaves v. Deacon, 25 Mich. 1; Newark Elec. Co. v. Garden, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725; Denison Light Co. v. Patton, 105 Tex. 621, 154 S. W. 540, 45 L. R. A. (N. S.) 303; Cumberland Telephone v. Martin's Adm'r, 116 Ky. 554, 76 S. W. 394, 77 S. W. 718, 63 L. R. A. 469, 105 Am. St. Rep. 229.

This fireman was in the ordinary discharge of his duties, and was guilty of no negligence. The fact that his two companions ahead of him saw and avoided this wire does not argue against him. His opportunity for seeing it, or for appreciating at the moment its

prayer being for judgment for $50,000 "in favor of the Southern Pacific Company, for the use of the plaintiffs." Defendants filed separate demurrers, both of which were sustained, and, plaintiffs declining to amend, judgment was entered against them from which this appeal was taken. The court construed section 31 of the Workmen's Compensation Act, which provides that the making of a lawful claim against an employer under the compensation act shall operate as an assignment to the employer of any right to recover damages against any other person for the injury or death of the employee and the employer shall be subrogated to any such right and may enforce it in his own name, any amount collected by the employer in excess of the amount paid by him to be held for the benefit of the injured employee or other person entitled, as permitting the injured employee to join with the employer or insurer in an action against the third party for damages. It was further held that, upon refusal of the employer to join as plaintiff in such suit, the injured employee or his heirs at law may, to protect their equitable interest in the surplus that may be recovered, bring the action against the third party and join the employer as defendant. Judgment was reversed with instructions to the trial court to overrule the demurrers to plaintiffs' complaint. Rehearing was denied by the supreme court April 21, 1919. Hall v. Southern Pac. Co., — Cal. App. —, 180 Pac. 20 (1919).

2. Employer's manager as third person.

In Swader v. Kansas Flour Mills Co., 103 Kan. 378, 176 Pac. 143 (1918), plaintiff sued defendants for the wrongful death of her husband, who was killed by a fall through a false flooring placed near the top of a tall grain bin. Deceased was in the employ of the defendant company and the other defendant was the company's manager. The corporate defendant pleaded that both the rights and liabilities of itself and decedent were prescribed by the Workmen's Compensation Act, that pursuant thereto an arbitration had been made and defendant corporation found liable to plaintiff and her children in the sum of $2,297.16, payable in weekly instalments of $20.15, that a bond for such payments had been exacted and payments were being made thereunder to the clerk of the court. The individual defendant answered to the same general effect, but also denied negligence and alleged that plaintiff had refused to agree to the arbitration, but that it had been duly made and adjudicated. Plaintiff's reply admit-

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dangerous character, may not have been as good as theirs. And if even they had failed to observe it, there would have been nothing to wonder at under the circumstances: The imperfect light; the necessary precipitancy of their movements; the flames inside; the excitement; the insecure footing on the steep awning. The man, for all that is known, may have stumbled and fallen against the wire. And we suspect that as he was stepping from the ladder to the awning the stream of water from the hose had already begun to splash about him.

Other defenses are contributory negligence on the part of the plaintiff city, and estoppel because of the city's electrician not

ted that the corporation was within the provisions of the compensation act, but alleged that she had not consented thereto nor accepted the proceeds of the award and was not bound by decedent's failure to file an election not to come within the provisions of the compensation law and that, in so far as the compensation act attempted to restrict the company's liability to the dependents of the workman, it was unconstitutional. Replying to the answer of the individual defendant, plaintiff alleged that, even if the compensation act furnished the proper measure of the liability of the milling company, as between plaintiff and such individual defendant, plaintiff was not bound by the provisions of the act and, not having accepted the benefits of the court's adjudication against the milling company, she was not barred from proceeding against such individual defendant. Demurrers to plaintiff's reply were sustained and plaintiff appealed. As to her first contention that the title of the compensation act was not broad enough to embrace those portions dealing with the remedies of dependents when an employee is killed in the course of his employment, the court adhered to its former decision that the title was sufficient. It was further held that when the circumstances show a legal liability against a third party the compensation act permits the workmen, or in case of fatal injury, the person acting for his dependents, to proceed against the employer for compensation and against the third party for damages, but that he is not entitled to recover both compensation and damages. As plaintiff had not accepted compensation, she was not estopped from exercising the dual action permitted by the statute. The court said that a stage in the proceeding would probably be reached when plaintiff must accept either the compensation awarded or the damages she may recover against the individual defendant, but that the statute did not require her to make the election until she knew which would be most to her advantage. The court ordered that the demurrers to plaintiff's replies be overruled and that the cause proceed. On rehearing plaintiff asked a construction of the word "recover," fearing that in further proceedings she might be put to an election between the relatively small allowance made under the compensation act and a large uncollectible judgment against the individual defendant. The court construed the term "recover" to mean the obtaining of payment and held that neither the obtaining of an uncollectible judgment nor an unsuccessful attempt to realize thereon would bar plaintiff's right to compensation under the act.

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having condemned the location of this wire, but having, on the contrary, impliedly approved it by not objecting to it. Suffice it to say of these defenses that the city is not suing in her own right, but is simply enforcing the rights of the widow and children of the decedent.

He was 28 years old, in good health, earning $70 a month, and his wife and children were entirely dependent upon him.

Following the Moren case, *supra,* the learned trial judge, by whom the case was tried without a jury, allowed for the rights of the widow $5,000.

Judgment affirmed; defendant to pay the costs of the appeal.

II. Action by employer or his insurance carrier.

A. Right to sue.

1. In general.

Deceased received injuries solely through the negligence of defendant, causing his death, under conditions making the Workmen's Compensation Act applicable and the employer and plaintiff, the insurance carrier, liable. The surviving widow and children elected to take compensation under the law and not to pursue their remedy against defendant, which was a third party. Compensation was awarded and the cause of action of the dependents was assigned to plaintiff with the approval of the industrial commission and this action commenced for $25,000 damages. Defendant demurred, the trial court overruled the demurrer and the appellate division reversed the decision, sustained the demurrer on the ground that the action must, under section 1902 of the code, the ordinary wrongful death act section of the statute, be prosecuted by an executor or administrator of deceased. The court in construing section 29 of the Workmen's Compensation Act, which provided for action against a negligent third party causing the injury or death of an employee, recognized that no civil action for causing death would lie except as provided for by statute and that the language of section 29 was not clear and applied the rule of construction that the court is bound to search for the legislative intent in such facts and through such rules as may, in connection with the language, legitimately reveal it. So construed, the court found the language of the section to reveal the legislative intent to give to the dependents of the employee a cause of action for his death, to empower the dependents to assign such cause of action and to constitute them the sole beneficiaries in case they enforce it. The cause of action so provided is independent of that created by section 1902 of the code, though the remedy provided by that section is to be pursued so far as it is applicable, and the amount recovered, if any, within the amount of compensation awardable under the compensation law, must be distributed as the compensation would have been awarded. This cause of action, the dependents were empowered to assign to plaintiff, the insurance carrier, and the latter had the right without special authorization to enforce such cause of action in the courts. In a provision of the constitution that "the right of action now existing to recover damages for injuries resulting in death shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation," ar-

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DAWKINS, J., takes no part.

On Rehearing.

SOMMERVILLE, J. The city of Shreveport, as subrogee of the widow and minor child of Crayton Hilburn, sued the defendant company in damages, and the suit was dismissed on an exception of no cause of action.

On appeal, this judgment was set aside, and the case was remanded for trial on the merits. 140 La. 1078, 74 So. 559.

This suit was based on an alleged subrogation by the widow and minor child of the deceased employee of the city of Shreveport

ticle 1, § 18, was held to be restricted by article 1, § 19, so that the legislature was not disabled from enacting laws for the payment, in any method it selected, of compensation for death of employees resulting from injuries to them and to provide that the right to such compensation and the remedy therefor shall be exclusive of all other rights and remedies for death resulting from such injuries and that the latter section clearly restored the right of the legislature to give to the dependents of the employee, as defined by the compensation act, and not to his next of kin, the right to maintain an action for his death. The judgment of the appellate division was reversed and the judgment of the trial court overruling defendant's demurrer was ordered reinstated and affirmed. Travelers' Ins. Co. v. Louis Padula Co., 224 N. Y. 397, 121 N. E. 348 (1918).

A farm hand in the service of an employer who was insured by plaintiff was cutting barley in a field along the edge of which, and about 10 feet inside the line, were placed poles carrying defendant's high power transmission lines, the pole in question being guyed by wires running from a point near the top to the ground on either side. The guy wires were so insulated that if they broke near the ground and thus came in contact with the live wires, the current could not be carried to the ground. While the injured employee and his companion were eating lunch, having turned the team loose to graze, one of the horses got astride of a guy wire and, while the employee was trying to back it off the wire, some strain was put upon the wire causing several strands to become detached from the top of the pole, allowing the wire to sag so that it came in contact with the transmission wire below the insulation, permitting the current to pass down it, killing the horse and severely and permanently injuring the employee. The insurance carrier paid the claim against the employer, sued defendant, claiming subrogation to the rights of the injured employee, and recovered judgment for $13,000. The question of negligence in the manner of fastening and insulating the guy wires was raised. The evidence showed that ways of insulating guy wires to make them safe in case of breakage at any point were commonly known to electrical engineers, and the court found that the jury were justified in finding that defendant should have anticipated that the wire might be subjected to sufficient strain, by contact with the usual instrumentalities employed in farming operations, to cause a breaking of the strands and consequent sagging of the wire, and should have

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in favor of the said city under and by virtue of the terms of the Workmen's Compensation Act (No. 20 of 1914, p. 44). The court held that subrogation did not take place in favor of the city under the act referred to, but that it took place under a conventional agreement entered into between the city of Shreveport and Mrs. Hilburn. The court expressed no opinion as to the validity of the act of subrogation made by Mrs. Hilburn for her minor child.

On the last trial of the case, judgment in favor of Mrs. Hilburn individually was affirmed against the defendant company; but it was held that the conventional subrogation made by her for her minor child was null and void, and that plaintiff, the city of Shreveport, subrogee, could not recover thereon. A rehearing was granted,

insulated its wires accordingly. The court also found that the jury were warranted in finding that the negligence of defendant as to insulation of its wires was the proximate cause of the injury. It was also held that the employee was not guilty of contributory negligence, as he had a right to assume that the wire was safe, either because of its strength or its insulation, and hence presented no special peril to a man engaged, as he was, in the performance of ordinary farm duties. In addition to the foregoing defenses, defendant questioned the right of the insurance carrier to maintain the action because the complaint contained no express allegation that plaintiff was an insurance carrier. The amended complaint alleged that plaintiff, by its policy of insurance in writing, did insure the employer and his employees at the time of making the policy and that the policy was written under and in conformity with the terms of the compensation act. The court held that this allegation carried with it the implied allegation that the plaintiff was an insurance carrier and was sufficient. Defendant further contended that there was a failure of proof that the policy of insurance had been properly executed by the plaintiff and, therefore, that there was a failure of proof of the allegation that the injured employee had made a lawful claim to the insurance company, which was necessary under the compensation act to work a subrogation of the insurance carrier. The court held that, even if proof of execution of the policy was insufficient, there was yet proof that the plaintiff ratified its policy and paid the money to the injured employee under the policy; that the employee's claim would be lawful, whether made under a policy which had been properly issued in the beginning, or which had been defectively executed by the agents of the company, and afterwards ratified; and that there was sufficient proof that a lawful claim had been made by the employee and paid by plaintiff to entitle it to be subrogated to the rights of the injured man. Counsel conceded that the judgment was not excessive and same was affirmed. Royal Indemnity Co. v. Midland Counties Public Service Corporation, — Cal. App. —, 183 Pac. 960 (1919). Rehearing denied by supreme court.

2. Effect of employee's negligence.

In Thede v. Jefferson Deposit Co., 210 Ill. App. 450 (1918), it appeared that employees of plaintiff were engaged in hauling and delivering rolls of paper to a tenant in the basement of an office building owned by defendant. On a previous trip the

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and we shall now consider the right of plaintiff to recover for the minor Hilburn.

Mrs. Hilburn for herself and her minor child, had two causes of action and two debtors because of the death of Mr. Hilburn. One of the debtors was the city of Shreveport and the other was the Southwestern Gas & Electric Company. The claim against the city was for a small, liquidated amount, as compensation, which has been paid in part to her for herself and child by the city, and arrangements have been made to pay the balance in monthly installments. The claim against the Southwestern Gas & Electric Company was for damages in a larger and for an unliquidated amount.

Mrs. Hilburn, in accepting payment from the city of Shreveport,

employees left the door guarding the elevator open and the driver, while going to the platform to pull up the elevator, which in some way had been lowered, slipped on a wet roll of paper and fell into the elevator shaft. For the injuries sustained he was paid by the employer, who then brought this suit to recover the amount so paid from defendant whose negligence was alleged to have caused the accident, recovering judgment for $474.50. On appeal the judgment was reversed on the ground that the employee was guilty of a lack of due care in avoiding a known danger.

3. Effect of employer's negligence.

An employee of a telephone company was killed when a wire he was stringing on its poles came in contact with a high tension wire strung on defendant's poles near the wires of the telephone company. The insurer of the telephone company brought this action against defendant, alleging that it was negligent in placing high tension lines along the highway without adequate poles to conduct the current at a safe height above the wires of the telephone company and in placing the same in dangerous proximity thereto and failing to equip the same with proper insulation or guard nets. Defendant denied negligence and averred that the death of deceased was due in whole or in part to his own negligence or the negligence of the telephone company. Defendant appealed from a verdict and judgment against it, alleging error on the part of the trial court in instructing that plaintiff's rights to recover "are precisely the same as the rights of said Leland Esslinger [the employee] as against the defendant electric company, no more and no less," and in refusing to instruct that plaintiff could not recover if the fault of the telephone company contributed to cause the injury. The supreme court sustained the judgment and approved the giving and refusal of instructions, holding that if the death of the employee "was the direct and proximate result of the negligence of the defendant, a cause of action arose in favor of his estate unaffected by any negligence upon the part of the employer contributing thereto." Judgment in favor of plaintiff was affirmed. Fidelity & Casualty Co. v. Cedar Valley Elec. Co., — Iowa —, 174 N. W. 709 (1919).

4. Effect of release or other recovery by employee.

An employee who was injured through the negligence of defendant, a third party, sued defendant, obtaining a judgment for $2,300, which was paid. Plaintiff, the insurer of the

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the smaller debtor, entered into an agreement with it and subrogated it to all her rights and her child's rights in damages against the Southwestern Gas & Electric Company; agreeing that if the city prosecuted the claim successfully against the electric company, at its own expense, she would allow it (the city) to deduct from the amount of the judgment secured against the electric company the small sum paid by the city to her for herself and minor child.

The law authorizes conventional subrogations, and there is no reason why Mrs. Hilburn, as tutrix of her child, should not enter into such an agreement on behalf of that child. The Code says, in article 2162, that the legal or conventional subrogation "cannot injure the creditor, since, if he has been paid but in part, he may

employer, paid to the employee $572.33 in compensation for loss of time and medical expenses incurred by the employee under the compensation act and brought this action against defendant to recover that amount. Defendant appeared and demurred to the petition, first, because the action was for personal injuries and was not begun until more than 2 years after the injury and consequently was barred by the statute of limitations; second, because it appeared from the petition that the employee had proceeded against and recovered the full amount of his damages from defendant and for that reason plaintiff could not recover anything from defendant, but must recover from the employee the amount of compensation alleged by it to have been paid to him; third, because full payment had been made to the employee of his claim against defendant. The court found it unnecessary to consider the claim based upon the statute of limitations, but affirmed the sustaining of the demurrer as to the other grounds, saying: "At the time this action was commenced this defendant owed Whitney [the employee] nothing. It had made full reparation for the wrong that it had done. There were no rights left Whitney against this company to which this plaintiff, or the employer, could be subrogated. There was one action to recover for the wrong. There cannot be another. The wrong was indivisible, and the right to bring the action was vested in Whitney, and the right of plaintiff rested in subrogation to that. Whitney is not entitled to receive double compensation. Had the employer discharged his obligation to Whitney under the act, and it had been made to appear that this defendant was the negligent cause of the injury, then the employer, or the person who made the payment required by the act, would be subrogated to all Whitney's rights against the wrongdoer. It might have proceeded against the wrongdoer and recover the full amount, which, at common law, was recoverable against the wrongdoer, just the same as Whitney could have done and did. Out of this it could reimburse itself for the amount advanced. The sum thus received at common law, over and above the amount necessary to reimburse itself, would belong to Whitney, the injured party. * * * Defendant discharged its full obligation to Whitney. There was nothing to which Whitney's employer or the insurance company could be subrogated." Southern Surety Co. v. Chicago, St. P., M. & O. Ry. Co., — Iowa —, 174 N. W. 329 (1919).

Plaintiff was the insurer of an employer whose employee was severely injured while working in a street when

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exercise his right for what remains due, in preference to him from whom he has received only a partial payment." And in this conventional subrogation entered into between Mrs. Hilburn and the city of Shreveport it was expressly stipulated that the city of Shreveport should pay over to Mrs. Hilburn the full amount of the judgment recovered, less that part which it (the city of Shreveport) had already paid to her for herself and minor child.

The so-called act of subrogation really was a mandate authorizing the city of Shreveport to institute the suit for damages which were due Mrs. Hilburn and her child, with the stipulation that the city was to retain a certain portion of the amount of the judgment which might be recovered against the electric company.

defendant's street car came in contact with an auto-truck, causing it to strike such employee. He was immediately taken care of by plaintiff and certain sums expended for medical treatment. Thereafter the injured employee accepted $300 from the defendant as consideration for a full receipt and discharge of its liability to him. Later he filed an application for compensation against his employer and plaintiff insurer, at the hearing of which the settlement with defendant was shown and an award made amounting, with the sums already expended by plaintiff, to $212.82. Plaintiff then began this suit against defendant, in the superior court, as an equitable action, alleging that the intent of defendant in making the settlement with the employee was to destroy any right plaintiff, as insurer, had, or might have, to commence and prosecute an action against defendant pursuant to the provisions of the compensation act. Plaintiff included in its complaint a demand for $100 as attorneys' fees. Defendant demurred upon the ground of want of jurisdiction in the superior court, inasmuch as the demand was for less than $300 and therefore should have been commenced in justice court. Plaintiff sought to sustain the jurisdiction of the court on the ground that its suit was an equitable cause of action because of the subrogation feature and because of its allegations that the intent of defendant in making the settlement with the employee was to destroy plaintiff's rights against it as insurer. The court construed sections 31 and 34 of the Workmen's Compensation Act of 1913 as permitting an assignment of the injured employee's right of action against his tort-feasor and as constituting the making by him of a lawful claim under the compensation act against the employer and insurer, a transfer to them of his legal title to his claim for damages against the tort-feasor. As to the contention of plaintiff that the use of the word "subrogated" in the compensation act rendered the right of action acquired thereunder an equitable cause of action, the court held that while, as between the employee and insurer, the right of subrogation would be equitable, arising out of the payment by the insurer of the employee's claim of damages still, when the payment had been made and the assignment of the cause of action consummated by such subrogation, the right accruing in plaintiff was to maintain, as the assignee of the employee, the same action which the latter could have maintained, which action, being strictly legal, could not have been maintained in the superior court for an amount

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Under such an agreement, there was no parting with any property belonging to the minor, nor was there any compromise of his rights. The tutrix had the undoubted right to enter into the contract without reference to a family meeting, and without authority from the judge.

Article 353 of the Civil Code says that—

"The tutor cannot borrow for the minor, purchase for him immovables or compromise respecting his rights, without an authority from the judge, granted on the advice of a family meeting."

Article 3071, C. C., defines a "compromise" to be:

"A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a law suit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.

"This contract must be reduced to writing."

less than $300, the addition of a claim for attorneys' fees not having the effect of increasing the jurisdictional amount. To the insurer's further contention that it had given the action the nature and quality of an action in equity by its averments that defendant, in making the settlement with the employee, did so to destroy or attempt to destroy any right which plaintiff as insurer might have to a further recovery against it in event of payment under the compensation act, the court answered that if, at the time of the settlement, the employee had made a lawful claim against the employer, the making of such claim had operated, under the provisions of the compensation act, to transfer to his employer or the insurer his right of action against defendant as fully as though he had executed a written assignment, and no subsequent settlement could destroy the already transferred right; while if the employee had not made a lawful claim against the employer nor insurer prior to the time of settlement, such settlement would have been effectual to destroy any subsequently assigned right of action. In either case plaintiff's averment as to the intent of defendant in making the settlement would be immaterial to its asserted cause of action and could not confer jurisdiction upon the superior court. The judgment was reversed with directions to the trial court to enter an order dismissing the action. Rehearing was denied by the supreme court, March 13, 1919. Massachusetts Bonding & Ins. Co. v. San Francisco-Oakland Terminal Rys., — Cal. App. —, 178 Pac. 974 (1919).

B. Subrogation as to payments in futuro.

Complainant brought action as the insurance carrier of the employer of an employee engaged in sewer construction, against defendant railway company, whose negligence it was alleged caused an injury to such employee under circumstances rendering complainant and the employer liable under the Workmen's Compensation Act. Complainant alleged payment by it of certain sums for hospital and medical services and the assumption of the obligation to pay the weekly award amounting to $1,887.60 and demanded judgment for the total amount. Defendant demurred for want of facts, the demurrer was sustained, plaintiff stood upon its demurrer and appealed from a judgment against it. The plaintiff based its right to sue upon a clause of its policy which provided that: "In case of the payment of loss or expense under this policy,

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The law suit between Mrs. Hilburn and the city of Shreveport had been put an end to before the act of subrogation was made, and the judgment in that suit had been settled by the city.

In authorizing the city to sue the electric company for the amount due her and her child as damages, Mrs. Hilburn was beginning a law suit; she was not putting an end to one by taking something, which she preferred to the hope of gaining, balanced by the danger of losing. She had all to gain, and nothing to lose by the agreement.

The city was a debtor of Mrs. Hilburn and her child, made such by the fault of the electric company, which was also a debtor. It was to the interest of the city, under the act of subrogation, to sue the electric company for damages, and thus acquit itself of satisfy-

the company shall be subrogated to all the rights of this employer or any employee or dependent covered hereby to the extent of such payment, and this employer shall execute all papers required and shall co-operate with the company to secure such rights." It was held that this provision when considered in connection with other portions of the policy conferred the right of subrogation upon plaintiff only in the event it has paid the whole liability due in a given case and that, the complaint showing on its face that weekly compensation payments had been merely assumed but not paid, plaintiff was not, under the general rules of subrogation, entitled to maintain the action. Maryland Casualty Co. of Baltimore v. Cincinnati, C., C. & St. L. Ry. Co., — Ind. App. —, 124 N. E. 774 (1919).

C. Basis of recovery where third person also under act.

1. Necessity of proof of negligence.

Plaintiff was engaged in the scavenger business and one of his drivers was killed by being thrown from his wagon when one of defendant's street cars ran against one of the wagon wheels. The widow of the employee proceeded against plaintiff under the compensation act and secured an award. Plaintiff sued defendant, which was also subject to the compensation act, to recover the amount so paid and the jury found there was no negligence on the part of defendant or its employees. From a judgment for defendant, plaintiff appealed, contending that he was entitled to recover from defendant under the compensation act the amount he had been compelled to pay, regardless of whether defendant was negligent. It was held, however, that the words, "legal liability for damages" in the provision that when an injury for which compensation was payable under the act "is caused under circumstances also creating a legal liability for damages on the part of any party other than the employer," the employee or his dependents might proceed either at law against such party to recover damages or against the employer under the compensation act, had reference to the common-law right of recovery and therefore negligence on the part of the third party would have to be shown. Carlson v. Minneapolis St. Ry. Co., — Minn. —, 173 N. W. 405 (1919).

2. Necessity of proof of election.

A lineman employed by plaintiffs, who were a committee of reorganization of a telephone company, was found beneath a tree, through which ran telephone wires of plaintiffs and

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ing the judgment rendered against it in favor of Mrs. Hilburn and child.

The city was bound with the electric company, in a certain sense, to compensate Mrs. Hilburn and her child for the death of Mr. Hilburn. It might be said to have been bound for the fault of the electric company and for a part of the debt due. The city therefore had an interest in discharging in part the debt due by the electric company to Mrs. Hilburn and her child; and, in acting, it became legally subrogated to their rights.

As was before said, the city clearly became subrogated to the rights of Mrs. Hilburn and child against the electric company under the conventional subrogation.

high tension wires of defendant, badly burned and unconscious, and died without regaining consciousness. An award of $2,370.61 was made under the compensation act and this suit was brought against defendant under section 29 of that act to recover that amount from defendant. The declaration charged that defendant was negligent in maintaining the high tension wires, without proper insulation, in such proximity to the other wires as to endanger any person lawfully in the tree; that defendant knew or should have known of the dangerous condition of its wires and had been notified thereof within 30 days of the accident; that deceased was in the tree in performance of his duties of inspecting plaintiffs' wires and, while in the exercise of due care and because of defendant's negligence, the high current carried by defendant's wires was communicated to his body, severely burning and injuring him and causing him to fall to the ground; and as a result of such injuries he died. The declaration set out in section 29 of the compensation act alleged the making of the award and payment thereunder and that both plaintiff and deceased had elected to accept the compensation act, but did not allege that defendant had accepted the act. Defendant pleaded the general issue and two special pleas, a demurrer was sustained as to the special pleas, the declaration was subsequently amended but no other pleas were filed. Defendant insisted that, as the declaration did not allege that defendant had elected to be bound by the compensation act, recovery could not be had under the first clause of section 29, which provided for recovery when all the parties were under the compensation act, and further that, as the declaration did not allege that defendant had elected not to be bound maintained under the second clause of that section which provided for suit against a third party who had elected not to be bound by the act. The court held that it was unnecessary to explicitly allege that defendant had elected to be bound by the act inasmuch as it was alleged, in substance and effect, that defendant was engaged in "electrical work," an occupation conclusively presumed by the act to be within its provisions, this presumption existing in case of a third party as well as between employer and employee. The court said that if recovery had been sought under the second clause of section 29 it would have been necessary to have averred that defendant had elected not to be bound by the act. It was also held unnecessary to prove that plaintiffs and the employee had elected to be bound by the act, as the proof

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In our former opinion, we found that the electric company was at fault, and was liable in damages for the death of Mr. Hilburn. We adhere to that finding.

Defendant, in a supplemental brief, argues an exception of no cause of action which is said to have been overruled by the trial judge, and which was not urged or argued in this court on the original hearing or orally on the rehearing. One exception of no cause of action was disposed of in 140 La. 1078, 74 So. 559.

The exception is stated to have been based on section 34 of the Employers' Liability Act, which declares:

"That the rights and remedies herein granted to an employee on account of a personal injury for which he is entitled to compensation under this act

showed plaintiff engaged in an occupation made subject to the act in the absence of an election not to be bound by it and that neither plaintiffs nor defendant had elected not to be so bound. Error was claimed in the admission in evidence of the coroner's verdict finding that deceased came to his death by coming in contact with the wires of defendant "which were not sufficiently insulated." It was held that the competency of such verdict was immaterial as the proof abundantly showed the wires were not sufficiently insulated so that, in any event, defendant was not harmed by its admission. Defendant sought to prove that plaintiffs were insured and that the insurance company had paid the award so that nothing had been paid by them. The refusal of the trial court to admit such proof was held proper as, if plaintiffs insured their employees it was for their benefit, not for the benefit of defendant. The court held that the proof sustained the allegations that the employee was in the exercise of due care for his own safety, that it was the duty of defendant to insulate its wires at the point of contact and that its failure to do so caused the death. Judgment was affirmed. Vose v. Central Illinois Public Service Co., 286 Ill. 519, 122 N. E. 134 (1919).

D. Subrogation as to rights of dependents.

1. Right of insurer to maintain action.

While a painter was standing on a plank placed across the elevator well in a building under construction, the elevator was operated by employees of the defendant, which had the contract for installing the elevator. As a result, the elevator counterweight struck the plank, precipitating the painter to the bottom of the shaft, whereby he sustained fatal injuries. An award of compensation for the death having been made against the painter's employers, in favor of the employee's widow and minor child, the plaintiff, as insurance carrier of the employers, assumed responsibility under its policy for the payments required by the award, and thereafter brought this action for damages, joining the employers as parties plaintiff, and obtained a judgment for $10,000. The principal grounds urged for reversal which were discussed by the court were that the damages given were excessive; that defendant was not negligent and that the deceased was guilty of contributory negligence; that deceased was an employee of an independent contractor and as such was, at most, a mere licensee, to whom defendant owed no duty except

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shall be exclusive of all other right and remedies of such employee, his personal representatives, dependents, relations, or otherwise, on account of such injury."

This limitation of the right of action by an employee and his dependents is against his employer, or the insurer of the employer, or the employer of an employer. It is a part of the "Employers' Liability Act," which prescribes for "the liability of an employer to make compensation for injuries received by an employee in performing services arising out of and incidental to his employment." The act does not embrace or refer to the liability of others than employers for damages suffered by or through the fault of third persons. The act is restricted to contracts between employers and employees and to compensation by employers to employees for

to avoid wantonly injuring him in using the elevator shaft; and that plaintiff had no legal capacity to sue in this case. As to the question of the damages being excessive and given under the influence of passion or prejudice, the court said no evidence to that effect had been called to its attention and it had failed to find anything in the record from which such an inference could be drawn. The court found that the evidence sustained the finding of negligence in that the things which ordinary prudence would have suggested for the safety of deceased and others who had similarly used the shaft were omitted; that the presence of the plank across the shaft was notice requiring further investigation; and that, though others were working in the shaft, no warning that the elevator was to be moved was given. As to contributory negligence, it was held that an alleged agreement between the employers that workmen should not use the shaft without notifying the foreman of defendant must be shown to have been brought to the notice of deceased to be binding upon him and there was no evidence that such notice was given and that, at any rate, the question of whether deceased was negligent in being on the outer end of the plank was for the jury. The contention that deceased was at most a bare licensee was held to be without merit. Upon the contention that plaintiff had no legal capacity to maintain the suit, the court held against defendant, saying: "The fact that the act does not specifically mention the matter of the subrogation of the employer, or his insurance carrier, to the rights of the injured employee, or, in case of death, to the rights of the heirs or personal representatives, we think is immaterial. All that the act itself does is to provide that the payment of compensation shall be contingent upon the subrogation of the employer, or his insurance carrier, to the rights of the injured employee. This is a mere incident to the liability, or to the payment of compensation, and is included in the general language of the title of the act, and especially of that portion of the title providing for the creation of a liability. 'The right to subrogation' is, we think, included within that portion of the title of the act which reads: '* * * Providing the means and methods of enforcing such liability.' 'Subrogation,' under these conditions, is one of the essential steps necessary to the enforcement of such liability, and embraced within the title of the act." The judgment was affirmed. Rehearing denied by supreme court October 16, 1919. Fidelity & Casualty Co. v. Llewellyn

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injuries suffered in performing services arising out of or incidental to their employment.

Section 7 of the act recognizes the right of the person injured to obtain compensation from his employer and to proceed at law for damages from third persons for his injuries; and, in the event that the injured person has recovered compensation from his employer and damages from a third person, the employer becomes subrogated to the rights of the injured party against said third person to the extent of the compensation made by the employer.

The right of the employee to compensation from his employer for personal injuries does not exclude the right of an injured person to recover damages from third persons through whose fault the damage happened.

Iron Works, — Cal. App. —, 184 Pac. 402 (1919).

Plaintiff was the insurer under the Workmen's Compensation Act of a firm engaged in the mercantile business and became liable under its policy and paid $3,408.79 for the death of a painter employed by a subcontractor while engaged in rebuilding and repairing the store building of the insured, the death being caused through the negligence of defendant elevator company, an independent contractor also engaged in the work on such building. This suit was commenced by the insurer against the elevator company to recover the sum paid by it because of the death of such employee, claiming subrogation, under the compensation statute and the terms of its policy, to the rights of the insured against the elevator company. A general demurrer to the petition was sustained and plaintiff appealed from a judgment of dismissal. The court of civil appeals held that the statute regarding subrogation in the case of independent contractors and subcontractors did not apply to the present case inasmuch as, by its express terms, it did not apply "to independent or subcontractors on any contract which is merely auxiliary and incidental to, and is not a part of or process in, the trade or business carried on by the subscriber," the remodeling of the store building being no part of or process in the mercantile business of the subscriber. It was further held that the statute was inapplicable because it only gave the right of subrogation when a cause of action for an injury to an employee caused by a third person had vested in the employee, which is different from giving the right of subrogation to a cause of action accruing under the compensation statute to the beneficiaries of an employee who had been killed by the negligence of a third person, the cause of action which the beneficiaries have under the Workmen's Compensation Act being given by statute and vesting originally in them so that the insurance company had not become liable to deceased in any sum and no right of subrogation was given by the statute. The insurance company further contended that, independently of the statute, it had the right of subrogation in equity. The court pointed out that it is settled by former decisions that equitable subrogation exists in favor of a fire insurance company which has paid for a loss occasioned by the negligence of third persons, but that no

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The cases of Veasy v. Peters, 142 La. 1012, 77 So. 948, Dupre v. Coleman, 143 La. 69, 78 So. 241, Boyer v. Crescent Factory, 143 La. 368, 78 So. 596, and Philps v. Guy Drilling Co., 143 La. 951, 79 So. 549, were all cases between employees and their employers; and what may have been said therein had reference to rights of action by employees against their employers, and not against third persons for damages. The exception was properly overruled.

The judgment appealed from is affirmed, with costs.

PROVOSTY, J., dissents, adhering to original opinion.

O'NIELL, J., concurs in the decree.

such right exists in favor of a life or accident insurance company and that the insurance provided for under the Workmen's Compensation Act is purely accident insurance and the mere fact that the premiums are not paid directly by the employee should not have the effect of giving an equitable right of subrogation to the insurance company when no such right exists in other species of accident insurance. Judgment for defendant was affirmed. Aetna Life Ins. Co. v. Otis Elevator Co., — Tex. Civ. App. —, 204 S. W. 376 (1918). Rehearing denied.

2. Right of insurer to share in recovery.

Deceased, a baker, was killed in the course of his employment by an electric shock received from the wires of defendant electric company, which furnished light and power for the bakery in which he was employed and left surviving as claimants of compensation a widow, father and mother. Thereafter such survivors by their attorneys of record filed a suit for damages against the electric company, which suit was, without trial, compromised for $7,500, of which $3,500 was paid in cash and the balance was held in abeyance until final determination by the courts of the right of the insurance carrier to subrogation against the electric company for payments made by the insurer as compensation, aggregating $4,087.47. This suit was by the insurance company against the parties to the compromise to have the obligation of the electric company to pay the balance of $4,000 canceled as to the claims of the dependents of deceased and to have all right and interest in such sum vested in the insurance company. It was held that the Workmen's Compensation Act of 1913, in force at that time, gave no right to the insurance company to subrogation to the rights of dependents against negligent third parties causing the death of an employee for whose death the insurance company became liable to pay compensation under the terms of its policy, although the effect of such omission from the statute was to permit dependents to collect and retain both compensation under the Workmen's Compensation Act and damages from the third party causing the injury, leaving the insurance company without the right to reimbursement for the amount paid by it. Southern Surety Co. v. Houston Lighting & Power Co., — Tex. Civ. App. —, 203 S. W. 1115 (1918). Rehearing denied. R. L. S.

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ELLIS v. CHICAGO & NORTHWESTERN RY. CO. et al.

[Supreme Court of Wisconsin, May 21, 1918.]

167 Wis. 392, 167 N. W. 1048.

1. **Trial—Question for jury—Bona fide character of transaction.**
Where conflicting inferences may be drawn from the facts proved as to whether a transaction is bona fide, the question is one for the jury.

CASE NOTE.

Actions and proceedings between joint tort-feasors to enforce contribution or indemnity for damages paid as result of their negligence.

I. Municipal corporation and property owner, 144-161.
- A. Defective sidewalk, 144-155.
  - 1. In general, 144-147.
  - 2. Door to cellarway, 147-148.
  - 3. Coalhole cover, 148-149.
  - 4. Slippery with ice, etc., 149-151.
  - 5. Inequality of level, 151-152.
  - 6. Drainpipe cover, 152.
  - 7. Defects due to construction work, 153-154.
  - 8. Brick removed to use water fixture, 154-155.
- B. Obstructed sidewalk, 155-158.
- C. Objects falling upon pedestrian on sidewalk, 158-160.
  - 1. Bricks piled on sidewalk, 158-159.
  - 2. Defectively built shed collapsing, 159-160.
- D. Pedestrian blinded by steam, stepping into hole, 160-161.

II. Municipal corporation and its contractor, 161-170.
- A. Excavations left open, 161-165.
- B. Defective crossing, 165.
- C. Defective sidewalk, 165-167.
- D. Sewer pipe left on sidewalk, 167.
- E. Obstruction in street, 167-169.
- F. Hole in pavement, 169.
- G. Scavenger failing to remove carcass of horse, 170.

III. Municipal corporation and public utility, 170-180.
- A. Telephone and telegraph companies, 170-174.
  - 1. Hole for pole left unguarded, 170-172.
  - 2. Obstructions left in alley, 172-173.
  - 3. Sagging wires causing light wire to break, 173-174.
- B. Railroad companies, 174-179.
  - 1. Defective bridge or approach, 174-177.
  - 2. Negligent construction of tunnel, 177-178.
  - 3. Defective planking of track in street, 178-179.
- C. Street railway company, 179-180.

IV. Municipal corporation and owner of vehicle, 180-181.

V. Municipal corporation and one moving building over bridge, 181-182.

VI. Municipal corporation and one tampering with light wires, 182.

VII. Municipal corporation and owner of falling billboard, 183.

VIII. Municipal corporation and one exploding fireworks, 183-185.
- A. Under license, 183-184.
- B. Without license, 184-185.

IX. Municipal corporation and one repairing street under permit, 185.

X. Public utility corporations, 185-237.

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2. Assignments—Validity—Choses in action.

Where separate actions are brought by the parties injured in a collision between a street car and a railroad train at a crossing against the street railroad company and the railroad company, and one of the actions is tried and a verdict rendered against the street railroad company, but afterwards discontinued, a nonsuit having been rendered as to the railroad company, and no evidence was offered regarding the negligence of the latter, and later a stockholder of the street railroad company purchased the claims of the plaintiffs and took an assignment thereof, borrowed the money from the street railroad company and gave his note therefor, and paid the injured parties the amount agreed upon as consideration of the purchase, the mere fact that the stockholder was interested in the street railroad company and took the assignments because of such

A. Railroad companies, 185-196.
  1. Injury to passengers, 185-189.
    a. Collision, 185-188.
    b. Ejection, 188-189.
  2. Injury to employees, 189-192.
    a. Collision, 189-190.
    b. Cinder in eye, 190-192.
  3. Loss or damage to property, 192-196.

B. Railroad company and traction company, 196-199.
  1. Passenger injured in collision, 196.
  2. Pedestrian struck by broken trolley wire, 196-198.
  3. Property damaged by derailed car, 198-199.

C. Railroad company and electric company, 199-202.

D. Railroad company and express company, 203-205.
  1. Employee injured by defective car, 203.
  2. Passenger struck by misplaced truck, 203-205.

E. Railroad company and sleeping car company, 205-208.

F. Railroad company and car manufacturing company, 208-209.

G. Railroad company and its employee, 209-210.

H. Railroad company and its contractor, 210–214.
  1. Injury to passenger, 210.
  2. Locomotive engineer killed, 210-211.
  3. Employee of contractor injured, 211.
  4. Team frightened by pile of rails, 211-213.
  5. Stone thrown upon adjoining land, 213-214.

I. Railroad company and adjoining owner, 214-217.
  1. Flooding of land, 214-215.
  2. Injury to railroad employee by object near track, 215-217.

J. Railroad company and licensee using its car, 217-219.

K. Street car companies, 219-220.

L. Street railway company and adjoining owner, 220-222.

M. Street railway company and operator of vehicle, 222-225.

N. Electric light companies, 225-226.

O. Electric light company and telephone company, 226-234.
  1. In general, 226-227.
  2. Telephone company employee injured or killed, 227-232.
  3. Light company employee injured, 232-233.
  4. Telephone company customer killed, 233-234.

P. Steamship company and shipper, 234-236.
  1. Using loading equipment of shipper, 234-235.
  2. Using dock facilities of shipper, 235-236.

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interest and with a view of aiding his company did not render the assignments to him void or ineffectual, if in fact he purchased the claims and took the assignments for himself and at his own risk, even though he might have believed that such purchase would eventually operate for the benefit of the street railroad company.

3. **Trial—Verdict—Special questions—Change by court in answers to.**
Where the evidence is ample to sustain findings of the jury it is error for the court to change their answers to questions of the verdict.

4. **Appeal—Conclusiveness of finding of jury—Speed of train.**
A finding of a jury as to the speed of a train at the time of a collision, based upon conflicting evidence, will not be disturbed on appeal.

Q. Oil refinery and railroad company, 236-237.
XI. Lessor and lessee, 237-239.
XII. Contractors, 239-244.
A. Employee of subcontractor injured, 239-242.
1. Collapse of bridge pier, 239-241.
2. Negligence in use of elevator, 241-242.
B. Third person injured, 242-243.
1. Falling over debris left on sidewalk, 242.
2. Falling into excavation left unguarded, 243.
C. Building flooded by pipe left uncapped, 243-244.
D. Bridge damaged by fire, 244.
XIII. Retailer and manufacturer, 244-245.
XIV. Property owner and contractor, 245-250.
A. Employee of elevator construction company injured, 245-246.
B. Employee of property owner injured, 246-248.
C. Customer of property owner injured, 248-249.
D. Pedestrian injured in fall on sidewalk, 249-250.
XV. Property owner and one delivering goods, 250-253.
XVI. Employer and employee, 253-254.
XVII. Miscellaneous cases, 254-257.

Scope of note. This note does not include cases arising under the subrogation provisions of the workmen's compensation acts, nor proceedings in admiralty courts.

I. Municipal corporation and property owner.

A. Defective sidewalk.

1. In general.

In a suit by a city to recover the sum of $631.15 which the city alleged it had been compelled to pay in satisfaction of a judgment rendered against it for personal injuries sustained by a pedestrian on account of a defect in a sidewalk, it was averred in the petition that the defective condition of the sidewalk had been created by the defendant by driving horses and wagons over the walk in front of a building owned and used by the defendant; that the defendant after causing the defective condition had failed to correct it; that the ordinances of the city prohibited riding or driving over a sidewalk; that the defendant had been notified of the action against the city, and asked to defend, but had made no defense; and that the city had paid the judgment rendered. Affirming a judgment in the plaintiff's favor, the court said, in part: "The argument of the defendant is that the parties to this action are *in pari delicto*, and that therefore the one cannot recover from the other; that, because the defendant is an abutting property owner and had a right to use the walk, it was under no duty to repair, and therefore it is not liable; that the

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5. **Railroads—Collision with street car—Proximate cause—Unlawful speed of train.**

The operation of a railroad train at a prohibited speed, resulting in a collision with a street car at a crossing, was the proximate cause of the accident.

6. **Railroads—Collision with street car—Unlawful speed of train as negligence per se.**

It is negligence *per se* for a railroad train to run at an unlawful speed at the time of collision with a street car at a crossing.

7. **Contribution—Joint tort-feasors—When rule not applicable.**

The rule that there can be no contribution between joint tort-feasors has no application where the element of moral turpitude is not involved and there

ordinances of the city do not render the defendant liable; and that, because there was no notice requiring the defendant to repair the sidewalk pleaded, it is not liable. The defendant caused the defective condition of the sidewalk. The plaintiff did not participate in producing that condition. The plaintiff was negligent in permitting the condition to remain, but it did not in any manner cause the condition. The plaintiff was not in equal wrong with the defendant. * * * The fact that the defendant was an abutting property owner and had a right to use the walk does not relieve it from liability to the city. * * * This liability of the original wrongdoer is not dependent upon the existence of any ordinance declaring his liability, nor upon the fact that there has been no notice given to the wrongdoer to repair the sidewalk. He is liable because of his active fault in producing the defective condition.'' City of Topeka v. Central Sash & Door Co., 97 Kan. 49, 154 Pac. 232 (1916).

A borough ordinance imposed upon owners of property the duty of repairing sidewalks, subjecting them, upon failure, to a penalty and a charge by the borough for doing the work. A sidewalk in front of the defendant's property fell into disrepair and the defendant was notified by the borough council to repair. It failed to do so for almost two months, when certain persons sustained personal injuries as a result of the defect. Judgment having been recovered and collected from the borough, the present action was brought to recover over against the defendant owner. At the trial a judgment was had for the plaintiff, and on appeal the judgment was affirmed, the supreme court adopting the opinion rendered by the common pleas court, reading in part as follows: ''Notwithstanding the secondary liability of the municipality against which the person injured may at option proceed, and notwithstanding the principle of noncontribution among joint tort-feasors, which would ordinarily shut off recourse, the negligent municipality is permitted to seek reimbursement from the negligent owner or occupier. While both may be equally responsible for the wrongful condition in their relation to the person injured thereby, they are not so in relation to each other; but the municipality stands upon a superior plane, on account of the primary duty resting upon the owner or occupier. The liability of the municipality in these cases under ordinary circumstances is of a technical character, not involving positive delinquency on its part; but there are exceptional cases in which positive delinquency of the municipality is involved, so that its right of reimbursement may be extinguished on the principle of contributing or participating negligence.'' Mention may be made of a further holding in the case, to the effect that the statute of limitations does not begin to run in

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is no wilful or conscious wrong between the parties against whom a judgment in a tort action is recovered.

8. **Contribution—Joint tort-feasors—Collision between railroad train and street car.**

Where a railroad train runs at an unlawful rate of speed in approaching a crossing, where a collision results with a street car, but the acts of the railroad company are not intentional or wilful and involve no conscious wrong, and the acts of the street railroad company are likewise not wilful and involve no conscious wrong, contribution between the companies is proper, upon payment of the judgment by one of them.

Vinje, Rosenberry and Eschweiler, JJ., dissenting in part.

such a case, as affecting the remedy of the city over, until entry of judgment in the prior suit against it. Ashley Borough v. Lehigh & Wilkes-Barre Coal Co., 232 Pa. 425, 81 Atl. 442 (1911).

The plaintiff city was compelled to pay a judgment of $2,000 rendered for a personal injury sustained as the result of a hole in a sidewalk, which was 2 feet long, 1½ feet wide, and 3 inches deep at its deepest point. This hole in the sidewalk came into existence through gradual wear, and partially as the result of making deliveries of barrels of beer and other products by the defendant at that point, the barrels having been transferred to chutes from the delivery wagon and then allowed to reach the sidewalk of their own motion, after which they were placed on end and rolled to a nearby elevator to be lowered to the basement of a saloon situated at that place. The defendant was notified by the plaintiff, prior to trial of the personal injury suit, that it would be expected to pay any judgment rendered therein. The present suit was to recover the amount paid in satisfaction of the judgment against the city. From a judgment for the plaintiff, the defendant appealed. The court in reversing the judgment, pointed out that it was not shown that the unsafe condition of the sidewalk was brought about by any wrongful act of the defendant. It said: "The use of the sidewalk for the purpose of delivering its merchandise was in common with a similar use of the sidewalk made by a number of other persons. The defect in the sidewalk was not a result of any affirmative wrongful act on the part of * * * [the defendant], but was the result of the continuous use thereof for four years or more by this appellant and others, including the general public walking over such sidewalk, which continuous use for four years resulted in the defect complained of. The duty of repairing streets and sidewalks is upon the city and not upon the abutting property owners, or upon the persons using such streets or sidewalks in a legitimate way, and such abutting property owners and such persons so using the street are not liable to a person injured by reason of the defect produced by such uses, unless such uses were wrongful and unlawful." Home Brewing Co. v. City of Indianapolis, — Ind. App. —, 123 N. E. 721 (1919).

The plaintiff, while passing over a plank sidewalk in front of the defendant's premises, was severely injured by reason of a defect therein. Suit was instituted against the defendant property owner, who filed a demurrer to the complaint, alleging, among other things, a defect in parties in that the city of Auburn was a necessary party defendant. The charter of the city provided that property owners should repair the sidewalks in front of their premises and be liable for any injury occurring by reason of an omission to make such repairs. The demurrer was sustained and from a

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Action by assignee of claims for personal injuries. Judgment against the plaintiff and in favor of one of the defendants, on its cross-complaint, against the other defendant. Reversed and cause remanded with instructions.

For appellant Ellis—Lawrence A. Olwell (P. H. Martin, of counsel).

For appellant Chicago & Northwestern Ry. Co.—R. N. Van Doren.

final judgment entered for the defendant the plaintiff appealed. The court reversed the judgment and ordered the defendant's demurrer overruled, holding that the plaintiff could bring suit directly against the defendant owner and was not required to first institute action against the city. For as was pointed out, any judgment recovered against the city in such a suit could be recovered against the property owner as indemnitor, under the city charter and state statute. Willis v. Parker, 225 N. Y. 159, 121 N. E. 810 (1919).

2. Door to cellarway.

In City of Lewiston v. Isaman, 19 Idaho 653, 115 Pac. 494 (1911), the city, having paid a judgment for $12,000 recovered by a woman injured by falling into a cellarway through a defective door thereover, which formed part of a sidewalk, sought to recover over from the owner of the abutting property of which the cellarway was a part. By its charter the city was liable for personal injury caused by defective conditions in streets or public grounds, but the charter recited that it did not relieve from responsibility any person through whose wilful neglect, wilful misconduct or gross negligence an injury to one on a street should be brought about. An ordinance had been passed requiring owners of abutting property to maintain two trapdoors over each opening in the sidewalk, to prevent persons from falling in. Prior to the accident the defendant had parted, under lease, with full possession, except so much control of the roof as was incidental to an agreement on his part to keep that part of the place in repair. While original faulty construction of the doors was charged, the evidence indicated that the cause of the accident was the breaking of the hinges of one door by a tenant, and there was no proof of gross or wilful negligence, or of wilful misconduct, on the part of the defendant. It appeared that in the suit against the city by the injured woman the present defendant had requested, but been denied, permission to take part in the defense. In a decision reversing a judgment had by the plaintiff, and remanding the cause, the court, passing over the effect of the city's refusal to permit the defendant to intervene in the prior action, said that upon the showing made, which did not include proof of wilful misconduct, wilful neglect or gross negligence, and which disclosed, moreover, complete possession and control of the defective property by another, the recovery allowed clearly could not be sustained. The court, in the course of the decision rendered, distinguished the case from those in which injury was caused by an obstruction or other condition amounting to a nuisance, and said: "Had the city performed the duty imposed on it by law—that is, of keeping its streets in reasonable repair—said accident would not have happened. The city, then, may be considered a wrongdoer, and, if it should be held

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For respondent Wisconsin Traction, Light, Heat & Power Co.—Vandyke, Shaw, Muskat & Vandyke (Ralph M. Hoyt, of counsel).

The following are the pleadings in the action:

Amended Complaint.

This, the further amended complaint of the plaintiff, appearing by Lawrence A. Olwell, his attorney, alleges:

That the above named Al. M. Frederick is a resident of the city of Oshkosh, Winnebago County, Wisconsin, and is a traveling salesman by occupation.

that the appellant [defendant] was also at fault * * *, the city could not escape the charge of being a joint tort-feasor, and could not recover over against the defendant, since * * * one of two joint wrongdoers cannot have contribution from the other."

3. Coalhole cover.

Acting under an implied license from a city the owner of premises abutting upon a street caused a sidewalk to be constructed, and made in the sidewalk a coalhole, fitting it with a cover that was too small for the rim, and was, in consequence, likely to tip when stepped upon. The city made no complaint with respect to the construction of the coalhole or cover, and nearly 10 years after their construction a man fell into the hole by reason of the defect in the cover, and was injured. He sued the city and recovered. At the trial of an action by the city against the property owner to recover over, a judgment was had by the defendant. The plaintiff city appealed to the appellate court. That court reversed the judgment and remanded the cause, saying in part: "A municipal corporation which has been compelled to pay a judgment to a person injured by an obstruction, excavation or defect in the street or sidewalk of such corporation, may recover over against the person who is the author of such defect which caused the injury, * * * unless such corporation was itself at fault * * *, and * * * in such an action, if the defendant had notice of the former action and an opportunity to defend the same, such former suit and judgment are conclusive against the defendant upon the issues as to whether the sidewalk was in fact defective, whether the person was injured as alleged, without fault on his part, and whether he sustained damages to the amount of the judgment." The court said further: "The fact that Torrance [the defendant] was permitted by the city to construct the coal vault and coalhole in the sidewalk gave him implied license only to construct the same in a reasonable and proper manner, but not to render the sidewalk less safe than it would have been without such coal vault and coalhole. * * * The fact that while acting under such implied license he constructed a coalhole which was in fact defective, does not estop the city from recovering in this case; that is to say, the city was not a wrongdoer in such a sense as to preclude its recovery." City of Canton v. Torrance, 151 Ill. App. 129 (1909).

In the case of City of Omaha v. Philadelphia Mortgage & Trust Co., 88 Neb. 519, 129 N. W. 996 (1911), the action was by a city to recover over against the owner of hotel premises the amount of a judgment the city had been compelled to pay, apparently by reason of personal injury to a pedestrian caused by his falling through a defectively covered coalhole in front of the premises. The defendant apparently had notice and

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That defendant Chicago & Northwestern Railway Company is a Wisconsin corporation and operates a steam railway system in said state, one line of which passes through the city of Neenah, in Outagamie County, and it is hereinafter called "the defendant railway."

That said city of Neenah was at all times mentioned herein an incorporated city.

That defendant Wisconsin Traction, Light, Heat & Power Company, a Wisconsin corporation, hereinafter called the "interurban company," at all the times herein recited operated an interurban railway through and between the city of Neenah and the city of Menasha, in said county and state; and operated an electric railway in said city of Neenah and on and along a certain public traveled street of said city of Neenah known as Commercial street.

privilege to defend in the prior suit against the city. A judgment in favor of the city was affirmed.

One N was injured by reason of the raising of a trapdoor in the sidewalk fronting upon the defendant's property at the instant N was about to step upon it. The trapdoor was raised by a janitor in the employ of a tenant of the upper floor of the building who had charge of the heating of the entire building. It appeared that the trapdoor in question was originally placed in the sidewalk with the permission of the city to give the defendant and his tenants access to the coal cellar. A part of the lower floor was vacant and hence constructively in the possession of the defendant landlord at the time of the accident. The city notified the defendant of the suit started against it by N, and tendered the defense of the suit to him. The latter, however, did not appear in the action, and a judgment for $357.20 having been recovered the city paid the same without taking an appeal and brought this suit against the defendant to recover that sum and $79.60 expended in defending the action. From a judgment for the plaintiff, the defendant appealed. The court affirmed the judgment, saying: "It has been generally held that a landlord who secures the privilege from a city to install such an instrumentality in the sidewalk for his own profit and benefit is liable over, not only for defective installation and maintenance but also for negligent operation." The court further pointed out that it was not necessary for the city to appeal from the judgment rendered against it to preserve its rights against the defendant, and that whatever right the landlord had against the tenant, whose negligent operation of the trapdoor caused the injury, could not be urged as a defense in an action brought by the city against the landlord. City of Spokane v. Fisher, — Wash. —, 180 Pac. 139 (1919).

4. Slippery with ice, etc.

Borough of Hollidaysburg v. Snyder, 258 Pa. 206, 101 Atl. 955 (1917), was an action to recover from an estate the amount of a judgment the borough had been compelled to pay as the result of a suit against it by one injured through falling on an icy pavement in front of property owned by the estate. On appeal from a judgment in favor of the plaintiff the only question decided related to the admission in evidence of the record of the prior suit against the borough. It was objected on behalf of the defendant that the admission of that record was error because the estate had not received notice from the borough of the former proceeding so as to have opportunity to intervene as a defendant. Affirming the judgment, the court held that since in addition to some evidence of express notice it appeared that the representative of the estate had actually been present at the trial of the prior case and had testified in it as a witness, the record in that case had properly

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That the main line of the defendant railway through the said city of Neenah crosses Commercial street at grade, and the tracks of the interurban company cross said main line of the defendant railway in said street at grade.

That the defendant railway at all times mentioned herein maintained said public traveled grade crossing in said city of Neenah, and at all times maintained gates on both sides of said crossing.

That on or about the 25th day of August, 1886, the common council of the city of Neenah duly passed and enacted, and the mayor of said city duly approved and caused to be published, an ordinance entitled, "An ordinance to require railroad companies to station flagmen at street crossings," the material portions of which are:

Sec. 1. Each and every railroad company owning, operating or managing

been admitted in evidence against the defendant.

In City of Seattle v. Puget Sound Improvement Co., 47 Wash. 22, 12 L. R. A. (N. S.) 949, 125 Am. St. Rep. 884, 14 Ann. Cas. 1045, 91 Pac. 255 (1907), the action was by the city to recover over against the defendant, the owner of property abutting on a street, the amount of a judgment for personal injuries recovered against the city and paid by it. It appeared that the cause of the injuries was the slippery and unsafe condition of certain iron trapdoors, maintained in the sidewalk by the defendant owner, in front of its premises. In affirming a judgment in the plaintiff's favor the court applied the rule that a municipality held responsible for the result of another's active negligence causing a dangerous condition of a highway might, after paying a judgment rendered against it, recover over against the negligent person. It was said: "Where the trapdoors were placed in the sidewalk by the defendant for its sole use and benefit, it was the duty of the defendant to properly and safely place and maintain them. The defendant's negligence in regard thereto would be construed as the city's negligence with reference to third persons who might be injured thereon, because of the duty of the city to keep the streets reasonably safe. But, while the city would be liable to third persons on account of an injury occasioned thereby, it would not be a joint tort-feasor with the defendant, because the acts of negligence are the wrongful acts of the defendant alone. The great weight of authority seems to hold that there can be a recovery over by a municipality where a street is rendered unsafe by the wrongful use of another, and where damages are recovered against the municipality therefor."

Mention may be made of the case of City of Philadelphia v. Bergdoll, 252 Pa. 545, Ann. Cas. 1918 C 1141, 97 Atl. 736 (1916), in which the action was by the city against an absent landlord to recover the amount of a judgment paid to a person injured as the result of an icy condition of a section of sidewalk in front of the landlord's property, which at the time was in the possession of a tenant. During the pendency of the prior suit against the city the defendant landlord had been notified and asked to defend. She had not, however, taken such action. In the course of a decision affirming a judgment entered for the defendant on a directed verdict, the court held that while the prior judgment against the city might conclude the defendant owner so far as the facts relating to the slippery condition of the pavement, the injury to the third person and the latter's due care at the time of the accident, as well as the amount of damages suffered by him, were concerned, yet it did not estop the present defendant "from showing at the trial of the case against her [the landlord] that, under the circumstances involved, she,

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any railroad running along, upon or across Main street, Wisconsin avenue, Cedar street or Commercial street in the city of Neenah shall keep stationed upon each and every of said streets a flagman with a good and sufficient flag properly displayed in such manner as to fully and completely warn all persons of the approach of any and all cars, engines and trains of cars.

Sec. 2. Each and every railroad company violating any provision of section one of this ordinance by running any cars, engines or trains of cars upon any of the streets mentioned in section one of this ordinance at any time when there shall not be upon such street a flagman with a good and sufficient flag properly displayed as required by section one of this ordinance, shall forfeit and pay for each and every such offense a fine of ($25) twenty-five dollars and costs of such prosecution.

individually, had not been guilty of any act of negligence towards the injured man," and could not be "extended as a definite adjudication beyond the issues necessarily determined by it"; and that, the evidence acquitting the defendant of actual negligence, there could be no recovery.

The subject of this note was, with other questions, involved in City of Seattle v. Shorrock, 100 Wash. 234, 16 N. C. C. A. 469n, 170 Pac. 590 (1918), in which the plaintiff was a city against which a judgment had been rendered in favor of a pedestrian who had been injured by slipping and falling on an icy sidewalk somewhat obstructed by a wire belonging to an abutting owner; the action being against the abutting owner to recover over.

5. Inequality of level.

A pedestrian was injured by stepping into a 10-inch depression in a sidewalk, and sought to recover damages for her injuries. It appeared that the adjoining property owner, desiring to substitute a concrete pavement for a brick one, procured from the city authorities the grade of the street, which had been theretofore fixed by ordinance, and constructed his concrete pavement on the grade so furnished him. At the time of such construction there was no ordinance requiring residents of that street to construct such pavement, but subsequently such an ordinance was passed, and the pavement so previously constructed conformed to the requirements of the ordinance. Upon completion of the concrete walk on the grade so fixed, it was found that the south end of the walk so constructed was 10 inches lower than the pavement of the adjoining property owner. Two or three days after the completion of the concrete sidewalk, the property owner observed that the bricks in the pavement of the adjoining owner were breaking loose, and he set a plank edgewise along the elevation so as to hold the brick in the upper walk in place, the upper portion of the plank being level with the upper surface of the brick walk. Plaintiff, having injured herself in stepping off such elevation, sued the city, and recovered a judgment for $1,250 damages which on appeal was affirmed. Shortly after the institution of this action the city notified the property owner of the pendency of the action, and called upon him to defend the same. This he failed to do, and the city thereafter instituted this suit against him to recover the amount it had been compelled to pay to the injured party, upon the theory that the property owner was negligent in placing the plank edgewise between the brick and concrete pavements, and that this was the cause of the accident. The trial court dismissed plaintiff's petition, finding that the property owner constructed his concrete walk on a grade established by the city, which necessarily created the step-off and the junction with the brick pavement in front of the adjoining property;

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Said ordinance was in force and effect at all the times herein recited.

That said Frederick, on the 21st of January, 1915, at about 8 o'clock p. m., was a passenger on one of the cars of said interurban company in the city of Neenah, and when said car was crossing said main line of the defendant railway in said street at said grade crossing, said interurban car was struck, collided with and wrecked in part by a north-bound passenger train operated by the defendant railway.

Upon information and belief, that said passenger train of defendant railway, as it approached and crossed said Commercial street, was negligently run at an excessive and illegal rate of speed and without giving proper signal or warning of its approach, and was run in such a manner that it was not under proper control having regard to the rights of persons lawfully upon said high-

that the property owner placed the plank edgewise some 2 or 3 days after the completion of his concrete walk at such point, to hold the bricks of the upper pavement in place; that the top of the plank was practically even with the brick pavement; that the purpose of placing the plank was to prevent the bricks from falling; and that the elevation of 10 inches between the two walks remained substantially in that condition up to the time of the injuries complained of. The evidence in the personal injury action showed that the injured person stepped off the elevation in the dark, in ignorance of the inequality in level. Plaintiff appealed from a judgment in favor of defendant, and the court, affirming the judgment, held that the negligence which caused the injury was primarily that of the city, the condition having been created by and with its approval and under its ordinance, which, together with its failure to properly light its street, was the direct cause of the injury. City of Owensboro v. Skillman, 155 Ky. 108, 159 S. W. 659 (1913).

6. Drainpipe cover.

A pedestrian on a sidewalk was injured by a defect in the walk, caused by a drainpipe which extended from a building and across the sidewalk to the gutter. The injured person sued the city, and the property owner, notified of the pendency of the suit, made no effort to defend. Judgment was recovered against the city, which paid it and then sued the property owner to recover over. The agreed statements of fact were as follows: The defendant owned the real estate in front of which plaintiff was injured. The drainpipe in the sidewalk in front of the property was connected with the downspout attached to the house located on such property, and carried water from this downspout alone, and did not connect with downspouts on any other property, or drain water from any other property. Defendant never paid plaintiff, the city, any sum on account of the judgment or costs that accrued in the action for personal injuries. The drainpipe in the sidewalk in front of the property of defendant was in a defective condition, in that a hole or holes had come into its cover, and had been there for many days, and plaintiff received the injuries complained of because of such defect, by falling over the drainpipe. The trial court gave a peremptory instruction to find for defendant, and from a verdict and judgment in accordance with such instruction, plaintiff appealed. Reversing the judgment, the court held that as the drainpipe across the sidewalk was for the individual or private purpose of the property owner, it was his duty to repair the same; so that the city had a right to recover from the property owner, who was primarily liable, the sum which it was compelled to pay in damages. City of Louisville v. Metropolitan Realty Co., 168 Ky. 204, 182 S. W. 172 (1916).

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way grade crossing; and further that the defendant railway did not then have any one in charge of its said gates at said crossing, and said gates were not lowered or used in any manner so as to indicate the approach of said passenger train. And the defendant railway at the time of said collision did not keep or have stationed at said Commercial street crossing, a flagman, as required by said ordinance to warn persons of the approach of engines or trains of cars.

Upon information and belief, that defendant railway at the time of said collision had negligently stored or permitted cars to remain upon its railway tracks so near the said Commercial street crossing as to obstruct the view of persons in the lawful use of the street at such crossing; and likewise the view of its own train operators in charge of its trains approaching said crossing.

Upon information and belief, that the negligent acts of the defendant rail-

7. Defects due to construction work.

The owner of a city lot in excavating for the foundation of a building made an opening that extended through the entire width of the adjacent sidewalk. He put up a plank fence across the sidewalk as a barrier, but a heavy rain caused the dirt sustaining the fence to give way. While the property owner's workmen were engaged in setting the fence up again, the plaintiff, a boy 11 years of age, rode up on his bicycle and leaned against the fence, which gave way, causing him and his bicycle to fall into the excavation, with the result that his arm was broken. He brought suit against the city, which then notified the owner of the lot and asked to have him made a party defendant. The property owner himself requested that he be made a party. The trial court, however, declined to permit him to enter the suit. The defendant city excepted, and appealed to the supreme court. The court, after stating that it was the policy of the law to determine a controversy in one action, rather than several, when feasible, proceeded to determine whether, in case there should be a recovery against the city, the property owner would in turn be liable to the city in an action for indemnity. The general rule that there can be no contribution between joint tort-feasors was recognized, as well as the exception thereto applying in cases in which one wrongdoer is primarily liable for the negligence involved and the other only secondarily liable. The present case fell, the court held, within the exception stated. The fact that the plaintiff might sue both the city and the property owner did not, the court said, determine that the two wrongdoers were respectively liable in the same degree. While the city, having given the permit, was charged with the duty of supervising the excavation to prevent injury to the public, and was liable for failure so to do, the "primary liability" was upon the property owner, "because his negligence, if any, was antecedent to that of the city if it was negligent." The ruling of the trial court was therefore reversed. Guthrie v. City of Durham, 168 N. C. 573, 84 S. E. 859 (1915).

A city property owner undertook extensive improvements which necessitated the excavation of the entire sidewalk between the building and the curb line, and the erection of a temporary sidewalk for the use of the public during the progress of the work. He obtained from the city commissioner of public works a permit for the construction work in question. The permit included the permission to build over the excavation a bridge not exceeding 5 feet in height above the sidewalk and 10 feet in width. The property owner entered into a general contract with one C for performance of the work, which was in turn committed to a subcontractor. After the temporary bridge had been built and had been in use by the public for about two

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way above alleged, and the failures on its part to observe said ordinance, were each a proximate cause of the said collision and of the injuries which the said Frederick suffered therein as a passenger, as above recited.

Upon information and belief, plaintiff further alleges that the defendant interurban company failed to exercise that degree of care towards the said Frederick as a passenger required of it by law in operating its said interurban car while approaching and going upon the tracks of the said defendant railway, in that the agents and servants of the said interurban company in charge of its said car negligently failed to adequately look for and observe the approach of the passenger train of the defendant railway company at and before the time that the car of the said interurban company entered upon the tracks of the railway company, and that such failure was a proximate cause of the said

weeks, it collapsed, and a man who was upon it at the time was precipitated into the excavation and killed. His administrator obtained a judgment at law against C, the general contractor, and the city. The city, having paid the judgment, brought the present action against the property owner and C. At the trial the complaint was dismissed as against both defendants on the ground that they were joint tort-feasors with the city, so that the city was not entitled to recover contribution or indemnity. The city appealed. The court affirmed the judgment as to the contractor, saying: "He cannot be held, either because he opened the street for his own benefit, as he did not, nor because of the negligence in the construction of the bridge, which he did not construct. In applying for and obtaining a permit to open the street, he acted merely as agent for Corn [the property owner], and he sublet the actual work of construction." With respect to the defendant owner, however, the judgment was reversed, and a new trial was granted, on the ground that the fault of that defendant was primary with reference to that of the municipality. The court said: "The relative duties of Corn [the defendant in question] and the city were * * * as follows: Corn was bound to exercise due care to so construct and maintain the bridge as to protect the public from injury. The city was under an obligation, not to Corn, but to the public, to use due diligence to see that Corn performed his duty, and the judgment against the city, by which Corn is concluded, established beyond contradiction that neither Corn nor the city performed their respective duties. The rule of law upon which the learned court below dismissed the complaint has no application to a case like the present for the parties, although both wrongdoers towards the person injured, are not *in pari delicto* as between themselves. That the municipality may, in a case like the present, recover over against the primary wrongdoer, has been so often held that it is impracticable, within the reasonable limits of an opinion, to cite all the authorities." City of New York v. Corn, 133 N. Y. App. Div. 1, 117 N. Y. Supp. 514 (1909).

8. Brick removed to use water fixture.

The defendant company occupied, under assignment of a long term lease, certain premises abutting on a street. In the sidewalk in front of the building was a water faucet to which the defendant company attached a hose from time to time for the purpose of washing the sidewalk. To attach the hose it was necessary to remove a brick from the walk. The faucet was not used by any one except the defendant. It appeared that a pedestrian had sustained injuries through stepping into a hole at this point made by the removal of one or two bricks from the walk, and that on account of injuries so caused had sued the plaintiff city and recov-

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Frederick's injury, received in said collision, and the negligence of the defendants concurred and was a proximate cause of the said collision and of the injuries suffered by the said Frederick therein.

That when said collision occurred, the said interurban car was partially wrecked and said Frederick was thereby seriously and painfully bruised and injured. That he sustained numerous severe and painful cuts, bruises and contusions on various parts of his body, together with severe nervous shock. That one of the bones of his right leg was fractured. That the ligaments, tissues and membranes of his right knee and right foot were sprained, torn and lacerated. That his right arm was severely injured, and his clothing and wearing apparel were torn and damaged.

That by reason of said injuries, said Frederick was confined for several

ered a judgment, which the city had paid. The present action was brought to enforce indemnity. It appeared that the charter of the city contained a provision to the effect that in case of injury to one using a sidewalk, caused by its defective condition, "the abutting property, where the injury or damage occurs, and the owner or owners thereof, shall be liable to the city for all damages, injuries, costs and disbursements which it may be required to pay to the person injured." The court affirmed the judgment had by the plaintiff at the trial, rejecting a contention that the duty imposed by the charter was upon the owner proper, and not operative against a tenant, and ruling that recovery over would be allowed under the well-settled rule in such cases that, as between the parties, the negligence of the person creating the defect was the primary cause of the injury. It was said: "As we view the facts, the charter provision has no controlling importance in this case. The city is not seeking to hold the abutting owner or lessee for a failure to remove an obstruction or repair a defect not occasioned by his own negligence, nor maintained for his own use or purposes. The right of recovery is not referable to mere passive negligence in failing to repair, but to active negligence in creating or at least maintaining a dangerous condition for his own personal convenience. In such a case, though the city, when chargeable with notice of the condition, is primarily liable to the person injured, this is only because of its duty to the public to keep the streets reasonably safe resulting from its control over the streets. But the person who actually created or maintained for his own use the dangerous condition is, as between the city and himself, still primarily liable on elementary principles, and regardless of any statute or charter provision so declaring, simply because the dangerous condition was the result of his own personal negligence. As between him and the city, his was the active negligence, while that of the city was merely passive." City of Spokane v. Crane Co., 98 Wash. 49, 167 Pac. 63 (1917).

B. Obstructed sidewalk.

A pedestrian sustained personal injuries by falling over an obstruction upon a sidewalk, and sued the city and the adjoining property owner to recover damages therefor. She recovered a judgment for $500 and costs against both defendants, which was affirmed on appeal. Subsequently the judgment plaintiff sold and assigned the judgment to the wife of the property owner for $672, which amount she paid plaintiff. She then brought suit to mandamus the city to pay such judgment, alleging that the city had no property subject to execution. The city answered, alleging that the property owner and his wife were engaged in the reconstruction of a building, making additions and improvements thereto, and that while so engaged in the erection of the building they

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weeks to Theda Clark Memorial Hospital in the said city of Neenah, and after he left said hospital was confined for several weeks to his home, and later was obliged to spend several weeks at Hot Springs, Arkansas, upon advice of his physician.

Upon information and belief, that as a result of such injuries said Frederick constantly suffers from nerve exhaustion and physical weakness. His right knee is painfully inflamed and swollen, and that the use thereof is greatly restricted and impaired, due to chronic synovitis, and the use of his right foot is greatly impaired and restricted. Upon information and belief, that the said injuries and pain due thereto are permanent.

Upon information and belief, that said Frederick, on account of said inju-

permitted bricks to be placed or to fall on the sidewalk, and that the plaintiff in the personal injury action tripped over such bricks, so sustaining the injuries for which she recovered judgment; that the injuries sustained by her were due to the negligence of the property owner and his wife; that the property owner and his wife had knowledge of this situation, and of the prosecution of the suit for personal injuries against the city, and that although the wife was not a party to the action, she was a real party in interest, and voluntarily paid the judgment to the plaintiff in the personal injury action, and afterwards procured an assignment thereof, which was a mere pretense, not made in good faith, but at the instance and request of her husband, the property owner. Plaintiff in the mandamus suit denied the allegations of the city. The court found that the plaintiff in the personal injury action obtained a judgment against the city and the property owner; that such judgment was affirmed on appeal; that the wife of the property owner paid the amount of the judgment to the plaintiff in the personal injury action, and took an assignment thereof; that the house was being erected by the wife of the property owner, and, in the course of the work, bricks were negligently placed in a position where they fell and incumbered the sidewalk, and that the plaintiff in the personal injury action sustained injuries in consequence of such negligence on the part of the property owner and his wife, who had notice of the suit for damages for personal injuries, and that she was chargeable with notice of the result of such suit. Plaintiff appealed from a judgment in the mandamus suit in favor of the city, but the court, affirming the judgment, said: "It is well settled that, although a person injured by an obstruction in the street may sue the city alone, or both the city and the person who placed the obstruction in the street, and recover damages against both, and look to either or both for satisfaction of the judgment, yet as between the wrongdoers the city may, if it is required to satisfy the judgment, recover the amount thereof from the person who placed the obstruction in the street." Blocker v. City of Owensboro, 129 Ky. 75, 110 S. W. 369 (1908).

A city, having been compelled to pay a judgment for personal injuries sustained by one who stumbled over dirt, brick and a water box placed upon the sidewalk, and fell into the hole from which the water box had been taken, sued the adjoining property owner to recover indemnity for the judgment so paid. It appeared that the property owner had employed a plumber to do some work in his residence, and it had been agreed between the property owner and the plumber that the ditch for the water pipe was to be dug by the property owner. The property owner had employed a man to dig the ditch, and the plumber had laid the pipe in the ditch, and was ready to make the

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ries, was obliged to spend large sums of money for hospital treatment, medical services and nursing.

That he has been under the constant care of physicians from the date of such collision and that it will be necessary for him to continue such treatment.

That he was for a long time wholly and entirely, and for a long time partially, prevented and disabled, by reason of said injuries, from tending to his business.

Upon information and belief, that he will never again be able to perform the duties of his occupation with the same degree of ease and efficiency with which he was able to perform such duties prior to receiving the injuries hereinbefore described.

Upon information and belief, that the said Frederick, by reason of said

connection with the sewer. It being necessary to cut off the water from the pipe, the property owner and the plumber went out to look for the cut-off. The water box having been covered over with dirt and grass, they were unable to locate it, and went to find the plumber who had put it in. The latter told them where the box was located. The property owner did not return with the plumber, and the latter, after digging around a while, found the water box, but on getting it open found that it was out of order. In order to cut off the water, he dug out a considerable hole around the water box, throwing the dirt upon the pavement, and, when he finally got the water box out, he put it on top of the dirt. He then cut off the water, and made the connection, and it being late in the afternoon, went home, leaving the hole and the material that came out of it just as he had placed it. Soon after dark plaintiff, an elderly woman, walking along the pavement fell over the bricks, dirt and water box and into the hole, so sustaining the injuries for which she recovered judgment. The property owner contended that he was not responsible for the negligence of the plumber, as he was an independent contractor, and that he had no notice of what the plumber had done, until after the injury. The trial court instructed the jury to find in favor of the property owner. In reversing the judgment on appeal by the city, and remanding the cause, the court held that the plumber was working for the property owner in digging the hole; that it was incumbent on the property owner to see that such work was so done as not to create a nuisance; that the hole, with the bricks, dirt, and water box placed as they were, rendered the sidewalk unsafe, and constituted a nuisance; that it was incumbent upon the property owner to see that the excavation adjacent to his property was kept in a reasonably safe condition for the public, and in failing to do so, was primarily liable, as between him and the city, which had nothing to do with the creation of the nuisance; that the property owner, having notice of the previous action, and being present at the trial, was concluded by the judgment against the city, and that the court should have peremptorily instructed the jury to find for the city as to the amount it had to pay on the judgment in favor of the injured party. Roberson v. Commonwealth, 148 Ky. 630, 147 S. W. 1 (1912).

Plaintiff was injured by falling over a stone placed and left upon the sidewalk by an adjoining property owner or his contractor in the course of the construction of a building on an adjoining lot. The stone was 3 or 4 feet in length and about 18 inches high. Plaintiff's attention was attracted to a frightened child, and she stopped for a moment to comfort it. Then, on turning to continue her journey along the sidewalk, she fell over the stone, which she had not before seen. The injuries sustained by her

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injuries, the pain and suffering caused thereby, loss of time, past and future, expenses incurred for hospital, medical and surgical treatment, has been damaged in the sum of fifteen thousand dollars ($15,000).

That on or about the 5th day of October, 1915, this plaintiff, being then and now a resident of the city of Appleton in said county, for a valuable consideration then paid, purchased from the said Frederick his said cause of action for the injuries arising out of said collision, and said Frederick assigned to this plaintiff all claims, demands or causes of action for such injuries arising out of said collision that he, the said Frederick, was possessed of, or in any wise entitled to enforce.

That the plaintiff, as the assignee of the said Frederick, is now the owner of and entitled to enforce, in his own right as such assignee, all claims, de-

were painful, and incapacitated her from work for about 6 months. The stone had been lying on the sidewalk for about a month, and the city either knew of it, or by the exercise of ordinary care could have known of it. She instituted action against the city and the adjoining property owner jointly, alleging negligence on the part of the city in permitting the stone to remain on the sidewalk, and negligence on the part of the owner of the adjoining property in that his agent and the employees, in excavating for and constructing the building, negligently placed the stone on the sidewalk and left it there. Prior to the trial, plaintiff accepted from the property owner $100, and executed a writing purporting to release the property owner from "all claims on account of injuries received by her on account of the fall, * * * and accept said sum in full satisfaction of her claim against" the property owner, and she thereupon dismissed her action as against him. Thereafter the city filed an amended supplemental answer, setting up the settlement with the property owner, alleging that in consideration of a building permit issued to the property owner, he had executed to it an indemnity bond, obligating himself to pay all damages occurring on account of excavations made in or obstructions placed upon the sidewalk while engaged in the work of constructing the building, and alleging that in the prosecution of such work the stone was placed upon the sidewalk by those engaged in the work of excavating or in other work connected with the building. The city alleged further that by reason of such facts the city had a right of action against the property owner for indemnity, and that the release by plaintiff of the property owner was a bar to the action against the city. The court overruled a demurrer to the amended and supplemental answer. On the trial, the city relied solely upon the common-law liability of the property owner. Defendant appealed from a judgment in favor of plaintiff, and the court in affirming the judgment held that the city had the right to recover from the author of the nuisance such sum as it had to pay to the injured person on account of the obstruction in the sidewalk, and that such right of recovery was a right of indemnity, and not of contribution. City of Louisville v. Nicholls, 158 Ky. 516, 165 S. W. 660 (1914).

C. Objects falling upon pedestrian on sidewalk.

1. Bricks piled on sidewalk.

One W, who was engaged in dismantling an old building, obtained permission from the municipal authorities to use the sidewalk in front of the property as a place for piling bricks temporarily, until they could be removed. The bricks were stacked in a large pile. As the plaintiff's intestate, a pedestrian, was passing the pile, the jar from a passing street car caused the pile to fall, bringing about the man's death. Suit was

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mands, actions or causes of action which the law vested in said Frederick upon the happening of said collision, and collect and receive all damages resulting to said Frederick by reason of said collision which said Frederick, prior to the assignment, might have collected or received in his own right.

Wherefore, plaintiff asks judgment against the defendants in the sum of fifteen thousand dollars ($15,000), with costs and disbursements.

Answer of Railway Company.

And now comes the above named defendant, Chicago & Northwestern Railway Company, by Edward M. Smart, its attorney, and for separate answer to the amended complaint herein sets forth and alleges:

brought against W and the city. The latter defendant, as it was permitted by statute to do, prayed for judgment over against W in the event that it should be held liable. The defendant W demurred to this part of the city's answer. The jury having returned a special verdict that was inconsistent, in that they found the city liable while acquitting the other defendant, an appeal was prosecuted by both of the defendants. In reaching the decision that the trial court should have set aside the entire verdict, and in directing that that be done and that as to the city a new trial be had upon all issues, the court considered the relation of the parties defendant to each other, and in the course of the opinion said: "As between the defendants, Woolvin's [W's] liability is primary, and that of the city is secondary, not that Woolvin must be placed in front of the city with respect to the plaintiff's right to recover for the alleged wrong, but if the plaintiff recovers against the city, then the latter is entitled to judgment against Woolvin for the amount of the plaintiff's recovery, because it was his wrong in negligently piling the brick that originated the plaintiff's cause of action against the city, and without which there would have been none, and it is but just and right that he should answer over to the city and indemnify and save it harmless. It is a well-established rule of law that there can be no contribution or indemnity among mere tort-feasors. But the principle does not apply to a person seeking indemnity who did not join in the unlawful act, although he may thereby be exposed to liability, or to one who did not know, and was not presumed to know, that his act was unlawful; it must appear that the parties are *in pari delicto* as to each other before the plaintiff's recovery will be barred. * * * If the city had been sued alone and condemned to pay damages to the plaintiff, it could, by a separate action, have recovered the full amount of Woolvin, not merely a proportionate part, as it is not a question of contribution, but of indemnity. The conclusiveness of the judgment against the city upon Woolvin in the action against him for indemnity would depend upon the notice given to him of the pendency of the former suit, and his opportunity to defend the same." The same principles entered into the court's further holding, to the effect that the trial court had properly overruled the demurrer of the defendant W to the answer of the city in so far as it asked for judgment over. Gregg v. City of Wilmington, 155 N. C. 18, 70 S. E. 1070 (1911).

2. Defectively built shed collapsing.

The defendant was the owner of a building to which was attached a wooden shed or awning structure extending over a city sidewalk. A runaway mule hitched to a wagon ran against one of the posts of the shed, knocking it out of place. On instructions from the city chief of police,

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I.

As and for a plea in the abatement:

1. That this defendant is now, and was at the times hereinafter mentioned, a railroad corporation organized and existing under and by virtue of the laws of the state of Wisconsin, and the defendant Wisconsin Traction, Light, Heat & Power Company (hereinafter called "interurban company") is now, and was at all times hereinafter mentioned a Wisconsin corporation, maintaining and operating an interurban electric railway in and through the cities of Neenah and Menasha, Wisconsin, and particularly easterly and westerly on and along a certain public traveled street in the city of Neenah, known as Commercial street; that the railroad track of this defendant runs north and south and

the agent of the defendant repaired the shed. The chief of police inspected the repairs and apparently approved them. The next day the shed fell to the sidewalk, injuring several persons, including the minor son of M. M sued the city, charging negligence in that it had allowed the shed to remain in a dangerous condition over the sidewalk. The city served notice on the present defendant, who declined to defend. A verdict and judgment were rendered against the city for $300, which amount was paid. Thereafter the city brought the present action to recover over. Recovery was had at the trial, and the defendant appealed. In considering the appeal the court held that the judgment against the city was conclusive against the defendant property owner as to the right of the injured person to recover the amount assessed as damages, and also as to all defenses that either the municipality or the defendant owner could have set up in the first suit which were actually set up and passed upon in the suit. The court further held that the circumstances entitled the city to a recovery over, saying in part: "We do not think the owner of this shed or awning can escape liability for defective construction or defective repairs because a policeman of the city examined it after the repairs and it appeared to be in safe condition. The duty was still upon the owner of the property to exercise ordinary care in inspecting the shed or awning, to find out if in fact it was in a safe condition. If the owner placed an obstruction over the sidewalk of the city, which was defectively constructed, or if she maintained it in an unsafe condition, she would be liable for any damages caused by such defective construction or condition, and the fact that the city may have been also negligent in allowing such unsafe obstruction to be erected over the sidewalk, or to remain there in an unsafe condition, would in no wise relieve the owner from liability for her own negligence. The plaintiff in error admitted that she erected the shed, and that when it was injured by the runaway mule and wagon she paid for its repair; and the issuable facts as to her were whether she had exercised ordinary care in its original construction and in its repair after the injury." The judgment was affirmed. Byne v. City of Americus, 6 Ga. App. 48, 64 S. E. 285 (1909).

D. Pedestrian blinded by steam, stepping into hole.

A city was sued for recovery of damages for personal injuries which resulted from a pedestrian stepping into a hole in a sidewalk. The plaintiff in the personal injury action alleged that he stepped into the hole because he was blinded by steam which was escaping from pipes of a gaslight company whose plant adjoined the sidewalk. It was agreed between the city and the gaslight company that if the city should compromise and settle the case for a sum

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crosses said Commercial street and said track of said interurban company at or near this defendant's depot in the city of Neenah.

2. That on the 21st day of January, 1915, at about 8 o'clock p. m., the said interurban company was operating one of its cars along said street, and across the tracks of this defendant, and one Al. M. Frederick and one Ben Schneider were passengers in the said car, and being conveyed as such by the said company; that as the said car was crossing the tracks of this defendant the same was struck and partially demolished by a north-bound passenger train of this defendant, and the said Frederick and the said Schneider, by reason of the collision, suffered personal injuries.

3. That the said collision and the injuries to the said Frederick and Schneider were caused solely by the negligence of the conductor and motorman

not exceeding $500, the settlement should be treated as a verdict of a properly instructed jury for that amount, the compromise to have the same effect as if a judgment for the sum agreed upon had been entered. Thereafter the city compromised the claim for the personal injuries on the terms specified in the agreement between it and the gaslight company, and sued the gaslight company to recover the amount so paid, making the pleadings in the personal injury action an exhibit of the petition. The petition alleged the operation of the gaslight plant adjacent to the sidewalk on which repairs were being made, and charged that the gaslight company carelessly and negligently, and without authority or consent of the city, emitted or permitted to escape large quantities of steam and vapor from pipes extending from said plant into the sewer, and negligently permitted to escape large quantities of steam into the openings where the sidewalk was torn up, whereby the plaintiff in the personal injury action was blinded and caused to fall into the opening in the sidewalk, without knowledge of the existence of the hole or opening therein; and that the accident and injury to plaintiff in the personal injury action were the direct and proximate result of the negligence of the gaslight company in permitting the steam to escape under and upon the sidewalk and through the opening into which the injured person fell. The petition did not charge that the gaslight company was notified of the necessity of stopping the flow of its steam while the sidewalk was being repaired. The court, in affirming the judgment on demurrer, held that under the facts alleged it was the duty of the city to provide means to warn pedestrians of the danger, but that it failed to do so; that the city's petition against the gaslight company charging that it carelessly and unlawfully emitted quantities of steam from pipes extending from its power house into the sewer of plaintiff, and carelessly and unlawfully emitted quantities of steam into the opening where the sidewalk was being torn up and repaired, had the effect of stating that the right of the gaslight company to permit its steam to escape into the sewer was not questioned, but only that it was guilty of negligence and was acting without the authority or consent of the city in permitting it to escape at the particular time that the sidewalk was being repaired, and that the petition did not state a cause of action against the gaslight company for indemnity, although such class of cases is an exception to the general rule that there is no right of contribution between joint tort-feasors. City of Bowling Green v. Bowling Green Gaslight Co. (Ky.), 112 S. W. 917 (1908).

II. Municipal corporation and its contractor.

A. Excavations left open.

In the case of Murphy v. City of

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of the said interurban company in this to wit: The conductor of said car carelessly and negligently failed to go near or upon defendant's track upon which the said passenger train was approaching and look for the approach of trains, and carelessly and negligently directed the said car to approach and cross defendant's track without ascertaining whether any train was coming on the sidetrack, and the said motorman carelessly and negligently operated and ran the said car towards, on and over defendant's track, without looking for the approach of any train thereon.

4. That thereafter the said Frederick and the said Schneider each started separate action in the circuit court of Winnebago County, wherein this defendant and the said interurban company were named as joint defendants, and wherein it was charged by the plaintiff that the injuries received by him in the

Yonkers, 213 N. Y. 124, L. R. A. 1915 F 598, 107 N. E. 267 (1914), it appeared that the plaintiff city had made a contract with the defendant for the performance of certain work necessitating excavations in the street, the defendant binding himself to indemnify the city as to damages resulting from any failure on his part to guard the work. The city had been sued by a traveler claiming to have been injured as a result of failure to guard the excavations. Having lost the suit, the city notified the defendant contractor that it would appeal, whereupon the latter expressed the hope that the city would win. In successive appeals taken, the city lost, and later, in a suit against it by the contractor, to compel payment of a balance on the contract, it set up by way of counterclaim the judgment recovered against it by the injured person, and the judgments for costs on the unsuccessful appeals. In a decision affirming conditionally a judgment for the city on the main substance of its counterclaim, the court of appeals held that the contractor was not liable for the costs of the appeals, since the taking of an appeal without the request or authority of the indemnitor would be simply in the interest of the indemnified, while the mere expression of a hope that the city would win "fell far short of a request or authorization." The court in part said: "With the recovery of a judgment in the court of original jurisdiction, the reason ceases for any further proceedings by the indemnified at the expense of the indemnitor without his consent. By the recovery of judgment after proper notice to the indemnitor, all of the issues are settled against him in favor of the indemnified which can thus be settled without his presence in the action. Such judgment * * * fixes as against the indemnitor the amount of damages suffered by the injured party, the existence of the defect or obstruction in the street, and that the injured party was himself free from negligence, and the remaining questions could only be settled in an action wherein the indemnitor was a party. * * * Nothing further as between indemnitor and indemnified could be accomplished by an appeal."

While a construction company, in the performance of a contract with a city, was doing under the direction of the city engineer certain excavating in a street, in accordance with specifications prepared by the city, one of the banks of the excavation caved in and injured a teamster in its employ. After settling a claim of the employee for damages the construction company brought an action against the city, to enforce contribution. The complaint alleged the foregoing facts, and averred that the injuries to the employee were caused proximately and primarily by the negligence of the city in that its plans and specifications required high, perpendicular embankments, instead of safely sloped ones, and that the city engineer had assured the

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said collision aforesaid were caused by the joint negligence of this defendant and the engineer and motorman of the said interurban company, and wherein a joint judgment was demanded on account of such negligence and injury;

5. That the said defendants in the said actions appeared and answered separately. Lawrence A. Olwell, attorney for the plaintiff herein, appearing as the attorney for the said interurban company;

6. That in the said respective answers in both of said actions each of the said defendants denied negligence on its part or on the part of its employees, and alleged that the injuries to the plaintiff therein were caused solely by the negligence of the employees of its co-defendant;

7. That the said Schneider case was first called for trial and tried, and at the conclusion of the plaintiff's testimony, and on motion of this defendant,

plaintiff construction company that the bank in question was safe. The case went before the supreme court on an appeal by the plaintiff from an order sustaining a demurrer to the complaint. The court was of opinion that the complaint stated a cause of action, and it therefore reversed the decision of the trial court and remanded the case. In the course of the opinion rendered, the court, after pointing out that the contract contained no stipulation that the plaintiff warranted the sufficiency of the plans and specifications, the sufficiency of which, it followed, was warranted by the city, spoke as follows: "To now hold, as a matter of law, that appellant, in performing its contract in accordance with such plans and under the direction of the city engineer, was in equal fault with the respondent, or was guilty of negligence as between it and respondent, would be unjust. The only wrong charged against appellant as between it and its employee involved no moral delinquency or turpitude, nor was its offense one that can be considered * * * immoral in any respect. It therefore should not be held to be against the policy of the law to inquire into the relative delinquency of appellant and respondent. Assume that respondent had let the contract to an individual, instead of the appellant corporation, and that such individual had been doing the work personally in accordance with the plans and specifications under the direction of the city engineer, and upon his assurance that the banks were free from danger, and assume that the contractor had been injured by the bank falling upon him, it would hardly be contended, as a matter of law, that he could not recover damages from the city. At most, under such circumstances the questions whether he assumed the risk or had been guilty of contributory negligence would be issues of fact which should be submitted to the jury. While it must be conceded that, as between it and its employee, appellant was guilty of negligence in failing to furnish the employee a safe place in which to work, it would seem that, as between it and the respondent municipality, it should not be held guilty of negligence as a matter of law in performing the work in exact compliance with the defective plans and specifications and under the supervision of the city engineer." Aberdeen Const. Co. v. City of Aberdeen, 84 Wash. 429, 147 Pac. 2 (1915). An appeal that followed a trial subsequently had developed in a way that did not present the parties as joint wrongdoers, and so it lies outside the limits of this note. Aberdeen Const. Co. v. City of Aberdeen, 97 Wash. 158, 165 Pac. 1058 (1917).

A person injured by falling into a ditch constructed across a sidewalk recovered a judgment for $750 against the city, which judgment the city was compelled to pay. The city then sued the subcontractors who performed the work, to recover the amount of the judgment over against the subcontractors. The subcontractors had cut

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the court granted an involuntary nonsuit and dismissed the complaint in said action as to this defendant;

8. That thereupon the trial proceeded to verdict as against the interurban company, and the jury duly rendered and entered a verdict therein, wherein it was found and determined that the employees of said interurban company were guilty of negligence, proximately causing the injuries to the said Schneider, and assessed his damages in the sum of $4,200; that promptly thereafter, and at the same term, the said Frederick case was called for trial, and was about to be tried.

9. That A. K. Ellis, the plaintiff herein, was, at the time of said collision aforesaid, and ever since has been and now is the general superintendent of said interurban company, and in active charge and management of the operation of

the ditch at the place indicated by the city's assistant engineer, but after doing so, had discovered that it was at the wrong place. Before it was refilled, the assistant engineer ordered the servants of the subcontractors not to close the ditch that night, but to throw the dirt back from the fence and make a plank walk way across the ditch for the use of pedestrians during the night. This the servants of the subcontractors did, and put a signal light on the dump near the fence to warn passers-by of the presence of the ditch. The ditch was 2 feet wide and 6 feet deep. It had been raining during the day, and the rain, together with the digging of the ditch, made the sidewalk near the ditch and the plank across it muddy and slippery. Shortly after dark plaintiff, traveling along the sidewalk, slipped from the plank way into the ditch, and was injured. The assistant engineer did not direct the manner of doing the work of constructing the crossing, but left its performance to the judgment of the subcontractors, and was not present when the work was done. The city recovered a judgment against the subcontractors for the amount claimed, and they appealed therefrom. In affirming the judgment, the court held that it was apparent that the subcontractors did not properly perform their duty as to the crossing over the ditch; that in failing to do so, and in failing to provide sufficient light at the crossing, they were guilty of negligence; that such negligence, as between the subcontractors and plaintiff, was the proximate cause of the injuries, and that the city was entitled to recover indemnity of the subcontractors. Robertson v. City of Paducah, 146 Ky. 188, 40 L. R. A. (N. S.) 1153, 142 S. W. 370 (1912).

In City of Omaha v. Yancey, 91 Neb. 261, 135 N. W. 1044 (1912), it appeared that the defendant contractors were directed, in connection with a contract between themselves and the city, to build 50 feet of sidewalk and that in doing the work they made and left unprotected a certain excavation. A woman fell into the opening and was injured. She prosecuted a successful suit against the city, which, after paying the judgment, brought the present action against the contractors and their bondsmen to recover the amount, $5,000. In arguing an appeal, taken to the supreme court after entry of judgment in the city's favor, the defendants contended that they had not had such notice in connection with the prior suit as would cause them to be bound by the decision rendered in that action. But the court held that this position could not be maintained, since it appeared that the city had given to one of the defendants personal notice of the original action, of the nature thereof, of the court before which it would be tried, of the docket number, of the defendants' right to make defense and of their liability for the amount of any judg-

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the said interurban company, and had charge of the preparation of the defense in the said actions aforesaid, together with the said attorney, Lawrence A. Olwell, and the said Ellis assisted on the trial of said Schneider case, and was present and ready to assist in the trial of the said Frederick case, he and the said Olwell having immediate charge and control thereof;

10. That both the said Schneider and the said Frederick were represented in said litigation by the same attorneys; that as said Frederick case was about to be tried, as aforesaid, the said Ellis and the said Olwell, acting for the interurban company, negotiated a settlement of both of said cases with the plaintiffs therein and their attorneys, wherein and whereby it was agreed that the said interurban company pay to the said Schneider the full amount of the verdict in said case, and wherein it was agreed that the said interurban com-

ment which might be rendered against the city. The judgment appealed from was affirmed.

B. Defective crossing.

A contractor was engaged by a city to grade and park a street. He agreed to save the city harmless from "all suits for any royalty, liens or other actions by reason of any failure, neglect, oversight or incompetency * * * relative to the work." In the course of the work a crossing was left in a dangerous condition, and a woman fell and was injured thereon. In a suit against the city, to which the contractor was not made a party, negligence was charged touching the dangerous condition of the street surface, and also with respect to alleged insufficiency of the city's street light at the place. A judgment was recovered against the city, and, presumably, was paid. In an action brought by the city against the contractor to enforce indemnity, recovery against the contractor was allowed, but on appeal the supreme court reversed the judgment, with directions to dismiss, saying that in view of the fact that in the prior suit against the city negligence with respect to the condition of the city's street lights was charged, that evidence was submitted and instructions given on that issue, and that the issue was determined against the city by a general verdict of the jury, an "independent act of negligence" on the part of the city stood as established. Therefore, the court said, it was immaterial that there may have been concurring negligence on the part of the contractor. The injury having resulted from concurring negligence of the parties, the case was, it was held, subject to "the elementary principle that there is no contribution between joint tort-feasors." It was held, further, that the contract to save the city harmless did not operate to prevent recovery. Upon this point the court said: "The obligation [of the contract] is no more than a promise to save harmless for all damages arising from the manner and method of construction. An obligation to answer to a third party for an independent tort is not within the terms of the contract, nor within any of its fair implications." City of Puyallup v. Vergowe, 95 Wash. 320, 163 Pac. 779 (1917).

C. Defective sidewalk.

A judgment was recovered against a city by a woman who, in passing along a street at a place where improvements were being made by contractors, had caught her foot on some spikes that had been left protruding through a girder of an old wooden sidewalk, and had thus been injured. The street improvement was being made by contractors whose agreement with the city contained a condition to the effect that contractors would erect and maintain good and sufficient guards, barricades and signals at all unsafe places at or

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pany should pay to the said Frederick a valuable and substantial consideration in settlement thereof;

11. That as a means and method of consummating said settlement it was agreed that the said Schneider and the said Frederick should in form transfer to the said A. K. Ellis all causes of action that they separately had against this defendant and the said interurban company. Thereupon the said Olwell and Ellis in form caused an amount or amounts of money requisite to carry out said settlements to be transferred from the treasury of the interurban company to said A. K. Ellis, and the said A. K. Ellis took the said money and obtained drafts in favor of the said Schneider and Frederick for their attorneys respectively, sufficient in amount to consummate said settlements, and delivered the same, and in form received from said Schneider and Frederick certain

near where the work was to be done and would indemnify the city in respect to all suits against it on account of injuries sustained through neglect on the part of the contractors in the premises. After paying the judgment recovered by the injured person the city brought an action against the contractors and their surety on a bond given for the performance of the conditions of the agreement. A trial resulted in a judgment for the plaintiff, and the defendants appealed, contending in part that the trial court had given too great an effect to the judgment obtained by the injured person against the city, in ruling that the negligence of the contractors was conclusively established by the prior judgment. In disposing of this contention the court, in the course of an opinion affirming the judgment, spoke as follows: "The judgment offered in evidence, since the appellants were notified of the pendency of action in which it was obtained and were given an opportunity to defend that action, was conclusive of every fact necessary to be proven in order to entitle the plaintiff therein to recover; that is to say, it was conclusive evidence of the existence of the defect in the street, of the primary liability of the city for existence of such defect, of the fact that the plaintiff in that action was injured without fault on her part, and of the amount awarded her in the judgment. It was not, of course, conclusive of the fact that the contractors were the cause of the defect on which the plaintiff was injured; but, when the city proved the contract and bond, by which it appeared that the appellants had undertaken to save the city harmless from an action for damages brought against it by negligence on the part of the contracting appellant, and proved the judgment obtained against it by Mrs. Brennan, and so much of the judgment roll therein as showed the nature of the defect on which the recovery was had, and the fact that the appellants had been given timely notice to defend that action, nothing remained to be proven in order to make a case against the appellants other than the fact that the contractors were the responsible cause of the defect for which the recovery was had. The city was not obligated to show, as the appellants argue, that the defect must have been upon some part of the work they were engaged in constructing. They could not without incurring liability upon their bond, throw the materials of the old sidewalk, it was necessary for them to remove, into the middle of the street merely because their work did not extend to that part of the street, nor could they without incurring such liability take up the boards, and leave exposed girders containing dangerous nails and spikes, even though the boards so removed were outside of their work, and it was no part of their duty to remove that part of the walk. Nor did the trial judge deny to the appellants the right to intro-

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papers or writings purporting to transfer said causes of action, as aforesaid, and the said A. K. Ellis now pretends and represents to be the real owner and holder thereof.

12. Defendant further alleges that long prior to the dates herein mentioned, for a sufficient and valuable consideration, it made and entered into an agreement in writing with the Fox River Valley Electric Railway Company (hereinafter called the "electric company"), predecessor of the said interurban company, wherein and whereby it was agreed that the trains and cars of the electric company should at all times be brought to a full stop before crossing the tracks of this defendant; the person in charge of said train or cars of the electric company should go upon the tracks of this defendant to look for trains thereon, and such trains or cars of the electric company should not cross

duce evidence tending to show that they did not cause this defect. On the contrary, he gave them the fullest opportunity to show this fact. He merely denied their right to contest anew the question whether any defect existed at the place where the injury was alleged to have occurred, and whether the defect, if it did exist, was properly guarded." City of Seattle v. John C. Regan & Co., 52 Wash. 262, 100 Pac. 731 (1909).

D. Sewer pipe left on sidewalk.

In Kansas City v. Mullins, — Mo. App. —, 209 S. W. 558 (1919), the plaintiff city sought to recover from the defendant the amount of a judgment rendered against it in favor of a third party. Such third party had sustained personal injuries by falling over sewer pipe alleged to have been left upon a sidewalk by the defendant, who was a contractor with the plaintiff city for putting in a sewer. The third party had brought suit against the city only, thereupon the city had filed a motion to require the defendant herein to be made a party. The third party amended his petition to make the contractor a party defendant "for the purpose indicated" in the city's motion. The defendant contractor was then considered to be a party and the cause was so tried, but at the conclusion of the evidence the court ruled that as respected the defendant contractor the third party could not recover. In the present action to obtain contribution, the defendant contractor pleaded that judgment as *res adjudicata* of his liability. A judgment was given for the defendant and the plaintiff appealed. The court, in affirming the judgment, held that a cause of action was stated and tried against the defendant contractor in the suit against the city, and the judgment therein having been in his favor, it was *res adjudicata* in this case. As the court pointed out, the third party was not required to "hunt up evidence" against the party charged as the primary wrongdoer, but that it was the duty of the city, if it desired to fasten responsibility upon another, to set forth in its motion the facts constituting the cause of action against such other and see to it by the introduction of proper proof, that a case as to such party was made out. "Where the city and a wrongdoer who is primarily liable are jointly sued by an injured party," said the court, "the two defendants are adversary parties, and a judgment in favor of the property owner is *res adjudicata* in an action by the city against him," if a cause of action was properly stated in the petition against both.

E. Obstruction in street.

Under a contract with a city, D undertook to lay a concrete sidewalk in front of certain property. As part of the contract, it was the duty of D to remove certain trees, but after doing so, he left the trunks lying in

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the tracks of this defendant except upon a signal from the person making such examination;

13. That after the making of said contract, before the collision hereinbefore referred to, the said interurban company acquired the properties and franchises of said electric company, and for a valuable consideration duly assumed the duties and obligations of said contract aforesaid, and agreed to perform the same;

14. That promptly upon the commencement of said actions by the said Schneider and Frederick aforesaid, this defendant, in writing, duly tendered to the said interurban company its defense therein, and made claim, under and by virtue of said contract aforesaid, if this defendant was held liable in the said actions it would look to the said interurban company to reimburse it for what-

the street. One driving along the street was injured by running into the trunks. The injured person recovered a judgment against the city, which judgment the city paid, and then brought suit against D and the property owner for indemnity. The property owner answered, denying that she had any interest in or control over the obstructions so placed in the street, or that she prevented D from removing the same, or that she alone or jointly with D placed them in the street, or caused the same to remain there until the accident. D alleged that the property owner ordered him not to remove the logs; denied that he, jointly with the property owner, left the logs in the street; and alleged that he ceased to exercise any control over them after the property owner ordered him not to remove them; that after the trees were cut down, and while he was removing them, the property owner informed him that the trees belonged to her, and to leave the logs where they were, and that in accordance with such direction, he did not remove the logs, and so informed the mayor of the city, and that the mayor consented to leaving the logs where they were until he could see the property owner and make arrangements for their removal; and that by reason of such agreement, if there was any negligence on D's part, he and the city were joint tort-feasors. The evidence on behalf of the city showed that the property owner had only asserted her ownership of the logs, and was protesting against their being sold or converted by D, and that the property owner had not placed the logs in the street, and had not prevented D from removing them therefrom. Immediately after the accident, D removed the logs without consulting the property owner. D admitted that the property owner had never directed him not to remove the logs back from the street. Prior to the accident, the city had directed and urged D to move the logs from the street, and his only reason for not removing them was that the owner had directed him not to remove them. Judgment was rendered in favor of defendant in the suit for indemnity. The court, in affirming the judgment as to the property owner, and reversing it as to D, held that the property owner was not shown to have been guilty of any negligence, and was entitled to a peremptory instruction in her favor; that under D's written contract with the city it was his duty to remove the trees without regard to their ownership; that D was guilty of primary negligence resulting in the injury, that the facts of the case brought it within the exception to the rule that there cannot be contribution or indemnity between joint tort-feasors; that as between the city and D, the latter was liable, because of his failure to carry out his contract with the city, which thereby made the city liable to the injured party, and that

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ever amounts it was obliged to pay therein on account of any judgments recovered against it.

15. Defendant further alleges that the method and scheme adopted by the said Olwell and the said Ellis aforesaid was adopted and employed for the sole purpose of bringing and maintaining in behalf and in the interest of the said interurban company, actions against this defendant, to recover from this defendant the amounts paid by the said interurban company in making said settlements, and to avoid any claim made by this defendant that the said interurban company could not recover of it, either by way of contribution or indemnity, on the ground that at best said interurban company was a joint tortfeasor, and by reason thereof without remedy against this defendant.

16. That the advancement of pretended payment of the said money to the

the city was entitled to a peremptory instruction as against D. City of Georgetown v. Cantrill, 158 Ky. 378, 164 S. W. 929 (1914). For former opinion, see City of Georgetown v. Groff, 136 Ky. 662, 124 S. W. 888 (1910).

F. Hole in pavement.

An asphalt company entered into a contract with a city for the paving of a street. It agreed to keep the pavement in repair for seven years, or to pay the city the reasonable cost of remedying any defects that might appear within the period stated. Within the limits of the paving, and within the 7-year period, at a point near a street corner, a hole appeared in the pavement. A pedestrian sustained serious injury as a result of stepping into the hole. He sued the city and recovered. It appeared that in that action the city served written notice on the asphalt company to appear and defend, but that the asphalt company paid no attention to the suit. After paying the judgment rendered against it, the city brought an action against the asphalt company to obtain indemnity. A demurrer was interposed to the petition of the plaintiff, and the court, in a decision sustaining the demurrer, said in part: "It is a general rule that one wrongdoer cannot compel a cowrongdoer to contribute the whole or part of the damages. To this rule there are two important exceptions: The one exception is that if one wrongdoer is not equally criminal or at fault, he may recover back what he has been compelled to pay from the other wrongdoer, who is the more culpable. * * * The second exception, although blended with the first, is that if the one wrongdoer, who has been compelled to pay damages, was only passively negligent, he may recover from the other wrongdoer, who put the wheels in motion, and by his affirmative act of negligence caused the injury. * * * But it is believed no case can be found wherein a recovery back has been allowed if both wrongdoers were actively and affirmatively negligent. To otherwise hold puts a premium on indolence or inefficiency of city officers. In the case at bar the city had actual notice of the defect, because it notified the asphalt company of such defect. The officers of each trifled with the situation, trusting no one would be hurt, and then each gambled with the proposition as to who would pay the damages if a person did get hurt. There is no equity in favor of either of the wrongdoers as against the other. * * * It was the absolute duty by law of the city to keep its streets in safe condition. It was the duty, as contended, of the asphalt company by contract to keep the street in good condition for seven years. Neither was guilty of an affirmative or purposed wrong. Each was passively negligent." City of Des Moines v. Barber Asphalt Co., 208 Fed. 828 (1913).

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said Ellis, as aforesaid, and any and all writings and papers that may have passed between them, if there be any such, were mere formalities. The said interurban company was the real party therein, and the party beneficially interested;

17. That said transaction was, in fact and in truth, a mere settlement between the interurban company and the said Schneider and Frederick, and the said Ellis has no interest therein; that by reason thereof the plaintiff in the action is not the real party in interest, but the said interurban company is such real party in interest.

Wherefore, this defendant demands that this action be dismissed, and that defendant have and recover of the plaintiff its costs and disbursements herein.

G. Scavenger failing to remove carcass of horse.

A city had a contract with one to remove dead animals from the streets within 6 hours after notice thereof, and a bond was executed for the faithful performance of such duty. The carcass of a dead horse was not removed within the time fixed by the contract, with the result that another horse, about 12 or 13 hours after the expiration of the time limit, became frightened at the carcass, overturned the vehicle to which he was hitched, and injured the plaintiff, who occupied the vehicle. The injured person sued the city for such injuries and recovered a judgment against it for $1,487.17, which the city was compelled to pay. The city brought suit against the contractor and his bondsman to recover the amount so paid by it. The contract for removal of dead animals provided that in event of failure by the contractor to remove any carcass within 6 hours after notice, it should forfeit to, and pay, the city the sum of $500 as liquidated damages. The contract did not, in express terms, bind the contractor to pay any loss which the city might sustain by reason of the failure of the contractor to remove any carcass within 6 hours after notice. In affirming a judgment for defendants, the court held that there was a primary, nondelegable, legal duty upon the city to remove the carcass within a reasonable time after the death of the horse; that, as between the city and the public, that duty was not shifted; that the city's negligence was the proximate cause of the injury and the loss, and that the city had no right to recover over against the contractor and his bondsman. City of Nashville v. Singer & Johnson Fertilizer Co., 127 Tenn. 107, 153 S. W. 838 (1913).

III. Municipal corporation and public utility.

A. Telephone and telegraph companies.

1. Hole for pole left unguarded.

A telegraph company, having secured permission from a city to construct a conduit system in the street, engaged a contractor, who agreed to indemnify against damages caused by his negligence in doing the work. A pedestrian was injured as a result of stumbling over boards left as a covering over the hole made in the sidewalk in connection with the performance of the work. He sued the city and recovered. Thereafter the city brought an action against the telegraph company. The defendant in that action gave notice to the contractor and opportunity to defend. The suit resulted in a judgment in the city's favor against the telegraph company, which then brought the present action against the contractor to obtain reimbursement. The trial court ruled that the judgment recovered against the plaintiff in the prior suit by the city conclusively established the liability of the present plaintiff to the city, and the amount

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II.

For further answer:

1. Defendant admits the residence and business of plaintiff's alleged assignor, the corporate capacity and business of this defendant, the corporate capacity of the city of Neenah and the corporate capacity, business, location of lines, etc., of the defendant, Wisconsin Traction, Light, Heat & Power Company, called the interurban company.

2. Admits that the main line of this defendant intersects the tracks of the interurban company at grade on Commercial street in the city of Neenah.

3. That on the 21st day of January, 1915, at about 8 o'clock p. m., plaintiff's alleged assignor was a passenger on one of the cars of said interurban company, and while the same was crossing the tracks of this defendant was

of damages, but that it did not establish that the negligence for which the present plaintiff had been held liable was the negligence of the defendant; and, the plaintiff having no further evidence to offer, a motion by the defendant for dismissal was granted. On appeal, the judgment was reversed and a new trial was granted, the court saying: "The real point presented for decision is * * * whether the proof of the judgment roll, including the testimony in the action against the plaintiff, of which the defendant had timely notice, is evidence, either conclusive or prima facie, that the condition of the sidewalk for which the plaintiff was held liable was caused by the defendant. * * * The only theory on which the recovery was allowed against the plaintiff, according to the evidence [in the prior suit by the city], was that the condition of the sidewalk was caused by the acts of its contractor in the execution of the work authorized by the permit. Since the evidence adduced in that action on the part of the city related only to work done under the permit, and showed that that work was done by the defendant, it seems * * * clear that the judgment is at least prima facie evidence that the defendant is liable over to the plaintiff therefor." The court added, however, that since the adjudication in the suit by the city was not between the present plaintiff and the present defendant, doubtless the defendant was not estopped by the judgment therein from showing, if he could, that the plaintiff caused work at the point to be done by others, or to adduce further evidence tending to show that he, the contractor, was not guilty of negligence operating as a cause of the injury. Western U. Tel. Co. v. Gest, 183 N. Y. App. Div. 548, 170 N. Y. Supp. 808 (1918).

A judgment for damages for personal injuries was obtained against a telephone company and a city. The telephone company paid the judgment, and then sought to hold the city liable for contribution. The original action was for personal injuries sustained by slipping and falling into a hole at the foot of a telephone pole erected by the plaintiff telephone company. In the personal injury suit, both plaintiff and defendant in the present case filed separate answers denying the negligence charged, and alleging contributory negligence of the plaintiff in that action. In the present action, the city answered alleging that the pole was set by plaintiff in the street of the city, by its permission, under an ordinance requiring those erecting such poles to restore the street and save the city harmless from all loss or damage by reason of the exercise of the privilege of setting such poles, and alleging that the hole at the foot of the pole was caused by the negligent filling of the hole dug by the telephone company, and that the injuries suffered by the plaintiff in the personal

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struck and injured by reason of a collision between a passenger train of this defendant and the said car.

4. Admits that at the time of said collision this defendant did not have any flagman on said crossing, nor any person in charge of the gates at said crossing, and that no gates were lowered or used at the said time.

5. Admits that plaintiff's alleged assignor received some severe injuries, but as to the extent and character thereof defendant has no knowledge or information sufficient to form a belief, and, therefore, denies the allegations of the complaint in respect thereto.

6. Denies, on information and belief, that the plaintiff's alleged assignor assigned or transferred any cause of action to this plaintiff on account of said injuries, or that the plaintiff paid him any consideration therefor, and denies

injury action was caused by the negligence of the telephone company. Plaintiff in reply alleged that it refilled the hole with proper care, and had no subsequent knowledge that the earth about the pole had sunk; that the city did have such knowledge, but failed to impart it to the telephone company, and that it was the duty of the city to notify the telephone company of the existence of such depression. Plaintiff introduced in evidence the record of the personal injury action, and evidence tending to show that the telephone company, prior to such suit, had no notice of the condition of the ground about the pole in question, but that the inspecting officers of the city did, prior to such injury, know of and report such condition to the city. The city introduced in evidence an ordinance requiring all persons and corporations, after setting telephone poles, to replace the street to the satisfaction of the street commissioners, and requiring such person or corporation to give to the city a bond conditioned upon its compliance with the ordinance and its agreement to save the city harmless from any loss on account of any failure in that respect. Plaintiff introduced in evidence a written agreement between counsel for the telephone company and counsel for the city in the action for personal injuries to make a joint defense of the personal injury action. A statute provided that "defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in action founded on contract." Plaintiff appealed from a judgment in favor of the defendant, but the court, affirming the judgment, held that the telephone company could not avoid its own primary liability by showing the sole liability of the city, as that point was concluded against it by the judgment in the action for personal injuries; that the agreement to make a common defense did not estop the city to contest the present suit; and that the primary liability for the judgment in the personal injury action was upon the telephone company, both by the bond, and by the law, even without the bond. Kinloch Tel. Co. v. City of St. Louis, 268 Mo. 485, 188 S. W. 182 (1916).

2. Obstructions left in alley.

A city, having paid a judgment in a personal injury suit, sued a telegraph company to compel it to indemnify the city, alleging that the injuries so sued for were due to the negligence of the telegraph company. In the action for personal injuries, plaintiff had alleged that the accident occurred just north of the first alley south of a named street, and that her fall was caused by tripping over boards, planks or obstruction of like nature, whereas the plaintiff, in a deposition taken before the trial,

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that the plaintiff has any right, title or interest in any cause of action arising out of said collision.

7. On information and belief, denies that any negligent act of this defendant, or any of its employees, or any failure on its part to observe said alleged ordinance were a proximate cause of the said collision, or of the injuries which plaintiff's assignor received.

8. Admits that the defendant, interurban company, failed to exercise that degree of care towards plaintiff's assignor as a passenger required of it by law in operating its said interurban car, and that such failure was a proximate cause of his injury.

9. Denies that any negligence of the defendants concurred in said injury,

stated that the obstruction she fell over was at the mouth of the alley, and not north thereof. The trial court had denied the city's motion for a directed verdict on account of this variance, and had permitted the city to prove by parol that the obstruction over which the plaintiff fell was in fact in the alley. The telegraph company, although notified of the pendency of the action against the city, and of the deposition, had failed to defend. The present suit having resulted in a judgment for the city, the telegraph company appealed. Affirming the judgment, the court held that defendant was in no position to complain of a variance between the pleading and the proof; that whether the variance was material was a question for the court in the original action, and the court in that action having held that the variance was immaterial, defendant could not complain that the city was allowed to show by parol evidence in this action where the injury occurred, and who created the conditions causing the street to be unsafe; and that the city was not to be denied the right of recovery over because of any mere oversight or slips of its counsel in the trial of the personal injury action. Western U. Tel. Co. v. City of Louisville, 160 Ky. 499, 169 S. W. 994 (1914).

3. Sagging wires causing light wire to break.

The plaintiff village, operating the light plant of the town, authorized the defendant telephone company to string its wires in the streets, under an ordinance whereby the plaintiff was to be indemnified against any damage occurring by reason of the construction of the telephone plant. At a certain point on one of the village streets, the telephone wires crossed over the electric light wires and sagged to such an extent that they often came in contact and wore off the insulation of the light wires. On the day of the accident a high wind prevailed. The light wire, which carried a voltage of 2,000, came in contact with the telephone wire and broke, after which one of the ends came in contact with a 10-year-old boy, causing his death. The boy's mother hurried to his assistance, and in attempting to extricate him, received a serious shock herself. A judgment of $1,200 against both the plaintiff and the defendant was recovered for the death of the boy, and $9,000 was paid in settlement for the injuries to the mother. Of this settlement, each of the parties to the present suit paid half. The plaintiff village then instituted the present proceeding against the telephone company to obtain recovery of the $4,500 so paid, and expenses of $3,500 incurred in the litigation. From a judgment for the defendant on a directed verdict, the plaintiff brought error. The court, in affirming the judgment, held that both parties were joint tort-feasors, both guilty of the active negligence which concurred in

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and alleges that the said accident and injury were solely and proximately caused by the negligence of the said interurban company and its employees.

Except as hereinbefore expressly admitted, qualified or explained, defendant denies the allegations of said complaint, and each and every part thereof.

III.

As and for an equitable defense herein, defendant alleges as follows:

1. It hereby refers to, realleges and adopts the allegations set forth in the first subdivision of this answer denominated a plea in abatement.

2. The defendant alleges that if the facts set forth in said plea in abatement do not entitle this defendant to have this action abated, then defendant is without adequate remedy at law; that it would be unjust and inequitable for

producing the death and injuries, and that, being *in pari delicto*, neither was entitled to contribution or indemnity against the other. As the court said: "It is true that * * * the defective condition (of the sagging wires and improper insulation of the light wire) was as well known to the village as to the telephone company. With these two wires in such close proximity that they would come in contact when the wind was blowing, the village during a high wind, sent a deadly current of 2,000 volts over its improperly insulated wire. * * * This was an active act of negligence, a positive tort." Village of Portland v. Citizens' Tel. Co., 206 Mich. 632, 173 N. W. 382 (1919).

B. Railroad companies.

1. Defective bridge or approach.

A railroad company built and maintained, and a city permitted, at a street crossing, an inclined apron or approach to its track without any railing or barrier at its sides. A pedestrian passing over the bridge at night fell from it and thereby sustained serious injuries. He sued the city, which gave notice to the railroad company. The latter, however, did not defend the suit. The city defended, but recovery was had against it in the sum of $5,000, which amount, together with attorney's fees and other costs aggregating an additional sum of $1,063.80, the city subsequently paid. Later it brought an action against the railroad company to recover over. Recovery was had at the trial, and on appeal the supreme court affirmed the judgment, saying in part: "The paramount question here involved is whether plaintiff and defendant stand as tort-feasors in an equal decree [degree] with respect to the wrong which caused the injury to Annie Anderson. If so, confessedly, plaintiff cannot maintain this action, as the rule is almost universal that joint wrongdoers standing *in pari delicto* cannot compel contribution. However, to work an inhibition, the parties must stand *in pari delicto*, and the fact that the parties stand *in delicto* each to the other will not foreclose contribution. * * * In order accurately to determine whether plaintiff and defendant are joint tort-feasors standing *in pari delicto* * * *, recourse must be had to the complaint * * * in the action against plaintiff herein. The pleading recites that the city * * * had, at a time prior to the accident, granted to the railroad company a right of way 50 feet in width on Eleventh street; that in constructing its track the company laid its rails above the grade of the street about 18 inches, which necessitated the placing of sloping aprons from the grade of the street to a point in line with the top of the rails of the railroad track; that this apron only covered a portion of the street on the north side, leaving a perpendicu-

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the plaintiff herein to acquire and enforce said so-called cause of action against this defendant; that he should be enjoined from attempting so to do and from proceeding with and maintaining this action.

IV.

1. It hereby refers to, realleges and adopts the allegations set forth in the first subdivision of this answer, denominated a plea in abatement.

2. Alleges that the payment, made in form by the said Ellis to the said plaintiff, was made at the instance, request and in the interest and in behalf of the said interurban company; that the said payment was a full and complete satisfaction and discharge of any and all claims that the said injured person had on account of injuries received in the said accident, and fully and com-

lar descent of about 18 inches; that no railing was placed along the sides of the apron to protect travelers from falling therefrom; and that the city was liable, for the reason that the apron was a dangerous structure, and that there was no barrier or railing to prevent plaintiff from falling. * * * It plainly appears that the active negligence charged is against the railroad company, while passive negligence only is laid at the feet of the municipality. All that is urged against the city is its failure properly to care for the safety of the traveling public, by not providing barriers along the street where the accident occurred. While the city failed to perform its full duty in not requiring the company to construct and maintain aprons sufficient to protect the public from harm, and in not seeing that proper barriers were placed along the track where injury was possible, and, for that account, was liable to Annie Anderson [the injured person], yet that situation does not render the parties equally delinquent. The efficient and primary cause of the accident was the negligence of the company, while the subsequent negligence of the city in not enforcing obedience to the terms of the ordinance was constructive rather than actual. If, however, the city and the railroad company had, as a joint undertaking, constructed the railroad track above the street grade and left the thoroughfare in the dangerous condition which produced the injury to Annie Anderson, there could be no recovery over against the company, because there would be concurring and mutual negligence on the part of the city and the railroad company. According to the ordinance granting to the company the use of the street in question, it was the duty of the company to lay its track rails even with the grade of the elevated street and to keep the street crossing in good condition and repair. A nonobservance of these provisions was the proximate cause of the accident, and by rule of law defendant is liable over.'' City of Astoria v. Astoria & C. R. R. Co., 67 Ore. 538, 49 L. R. A. (N. S.) 404, 136 Pac. 645 (1913).

A railroad company in relocating its right of way and track at a particular point, dumped quantities of earth and stone on the approach to a bridge, thus raising the surface to the top level of wing walls that had previously stood as barriers safeguarding the traveling public. This dangerous condition the county commissioners who were in charge of the highways of the county did not remedy. A traveler using due care drove off the approach, because of the absence of a barrier, and was thereby killed. His widow recovered a judgment against the county commissioners. The judgment having been paid by the county, an action was brought in the name of the commissioners against the railroad company to recover over. It was ad-

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pletely compensated him for all such injuries; that by reason thereof the plaintiff does not acquire or obtain any claim, demand or cause of action against any person whomsoever, by virtue of said pretended assignment.

Wherefore, defendant demands judgment as follows:

1st. For the abatement of this action, as prayed for in the first subdivision of this answer.

2d. That the complaint of the plaintiff be dismissed on the merits.

3d. That if it be not entitled to judgment as aforesaid, then that the plaintiff be restrained and enjoined from proceeding with or maintaining this action, or having or recovering any judgment at law herein; and that the defendant

mitted that the railroad company had not been given notice of the prior suit, and had not participated in any way therein. In disposing of a judgment had by the plaintiff commissioners at the trial the court rejected a contention that the plaintiffs were precluded from recovery on the theory that they and the defendant company stood *in pari delicto*, saying that the case was subject to the principle that when the parties are not in equal fault "the principal delinquent may be held responsible to his codelinquent for damages incurred by their joint offense." The court found error, however, in the granting of a prayer of the plaintiff that the jury be instructed that the prior judgment, recovered against the commissioners, was, notwithstanding the lack of notice to the defendant, conclusive upon it as to the facts showing fault on its part causing the death; the judgment being, in the court's opinion, although admissible as part of the plaintiff's case, "clearly not conclusive upon the defendant." In part on account of the error on this branch of the case, the judgment was reversed and a new trial was granted. On appeal from a judgment had by the plaintiff commissioners at the second trial, the court reached the conclusion that the evidence did not warrant a ruling as a matter of law that the parties, as between themselves were equally culpable with respect to the creation and maintenance of the dangerous condition at the bridge, since upon the case made by the plaintiff the road was safe when the defendant began its alterations, and the defendant was the sole creator of the dangerous condition, notwithstanding that the plaintiff was "greatly negligent in not repairing the road." The judgment in the plaintiff's favor was therefore affirmed. In the course of the opinion rendered it was said: "The proposition asserted by the appellant is that * * * actual knowledge and failure to discharge its duty of repairing the highway constitute the plaintiff a joint tort-feasor with the defendant with respect to the death * * *, and, therefore, there can be no recovery in this case. This is really the only substantial question to be decided * * *. We cannot give our assent to the contention of the appellant. In our opinion, the facts do not bring the case within the rule which denies indemnity or contribution among tort-feasors. Actual knowledge and failure of duty are not sufficient to invoke the application of the rule. There must be joint participation in the tort, and the parties must be in equal degree guilty in a case of this nature. * * * We have found no case, nor have we been referred to any, in which the right of recovery has been denied under the exceptional rule invoked by the appellant, unless it appeared that as between the corporation and the author of the wrong the parties were *in pari delicto*." Baltimore & O. R. Co. v. Howard County Com'rs, 111 Md. 176, 40 L. R. A. (N. S.) 1172, 73 Atl. 656 (1909). For opinion on appeal from second trial of

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have such other or different remedy or relief, as it may be entitled to in the premises.

4th. That the defendant have and recover of the plaintiff its taxable costs and disbursements herein.

The answer of defendant railway company in the case of plaintiff as assignee of Ben Schneider is similar to the foregoing answer.

Answer of W. T. L. H. & P. Co., Defendant.

The defendant, Wisconsin Traction, Light, Heat & Power Company, by Van Dyke, Shaw, Muskat & Van Dyke, its attorneys, answers the complaint of the plaintiff herein as follows:

this action, see 113 Md. 404, 77 Atl. 930 (1910).

The defendant railroad company in constructing a grade for its track had built a culvert over a street and graded for some distance on each side of the culvert the adjacent portions of the street. Across this culvert and grade it had built a board walk for pedestrians. After the walk had been used for several years a woman in passing over it caught her foot in a hole that had appeared in the walk, and was thrown and injured. She sued the city, and the city notified the railroad company, which, however, failed to appear and defend. Recovery was had against the city. After paying the judgment, the city brought the present action to recover over. Recovery was denied by the trial court, but on appeal the judgment was reversed, with directions that judgment be rendered for the plaintiff, the court saying: "The injured party might have brought her suit against the railroad company, whose neglect to repair the street caused the injury, or against the city. Both were liable. As between the city and the public, the city occupies the position of a guarantor for the company, that it will not be negligent, and the city is primarily liable to a traveler upon its streets who becomes injured on account of a defect therein, but, as between the city and the one whose neglect to repair the street caused the injury, the latter is primarily liable to indemnify the city for the damages it has been compelled to pay, together with the costs and expenses fairly incurred." City of Bloomington v. Chicago, I. & L. R. Co., 52 Ind. App. 510, 98 N. E. 188 (1912).

2. Negligent construction of tunnel.

A city rented to a railway company the privilege of constructing and maintaining a tunnel under the city. In filling in space over and about the concrete work of the tunnel the railway company used in part old timbers and cordwood, which later decayed, causing settlement. Several years after the completion of the tunnel the city laid a cement sidewalk which extended over the tunnel. At a point over the tunnel the sidewalk broke in a manner that left a perpendicular break or rise of 2 inches. A pedestrian in walking over the sidewalk tripped and fell as a result of the defect mentioned, and was injured. He sued the city and recovered. Subsequently the city brought the present action against the railway company to recover over the amount paid in satisfaction of the judgment obtained by the injured person. It was alleged for the plaintiff city that the defect which caused the injury was the result of negligent construction and maintenance of the defendants' tunnel. The plaintiff introduced the judgment roll in the prior suit, and supplemented this with evidence designed to show that the defendant railway company was responsible for the defect in the sidewalk, which, it was contended, had been caused by the settling of the ground under the

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1. This defendant admits the residence and occupation of Ben Schneider, as alleged in the complaint.

2. This defendant admits that the tracks of this defendant and the tracks of the defendant Chicago & Northwestern Railway Company cross at the grade at the point designated in the complaint, and that the defendant Chicago & Northwestern Railway Company at all times maintained gates on both sides of said crossing.

3. This defendant admits the existence of the ordinance set forth in the complaint.

4. This defendant admits that at or about the time and at the place mentioned in the complaint a train operated by the defendant Chicago & North-

walk by reason of the decay of the wood back-fill above the arch of the tunnel. The trial judge having dismissed the complaint, the city appealed. The supreme court, in considering the appeal, pointed out that in the prior suit against the city, faulty construction of the sidewalk and knowledge of the defect therein had been one of the issues. It was then said: "The jury returned a general verdict against the city. Faulty construction of the sidewalk would constitute an independent act of negligence as far as respondents [defendants] are concerned. Knowingly maintaining a defect in a public street is an independent act of negligence of the city. * * * If the city contributed to the injury by construction of a defective sidewalk or permitting the defect to exist for an unreasonable length of time without repairing, it cannot recover from a joint tort-feasor. There was some evidence that to the tunnel is to be attributed the settlement of buildings along the route of the tunnel, but we cannot infer from this that the particular defect in the sidewalk was caused that way." The judgment of dismissal was affirmed. City of Seattle v. Great Northern Ry. Co., 103 Wash. 294, 174 Pac. 4 (1918).

3. Defective planking of track in street.

A boy caught his foot in an opening in the planking on the track of a railroad company at a point alleged to have been on a public street, and while he was so caught and held he was struck and injured by a car of the railroad company. Through a guardian ad litem the injured minor brought suit in a federal court against the railroad company, charging negligence in permitting the existence of the opening, as well as in moving the car. Issues were joined as to negligence and contributory negligence. The trial resulted in a verdict and judgment for the defendant. After the return and filing of the verdict, but before judgment, the boy, by the same guardian, commenced in a state court an action against the city, alleging that the accident happened on a public street. The city notified the railroad company of the pendency of the action, whereupon the company notified the city that it had been exonerated by a judgment entered in the federal court in a case involving the same subject-matter. The city did not plead as an estoppel the judgment of the federal court. The trial resulted in a verdict and judgment against it. Thereafter the city commenced the present action against the railroad company to recover over the amount of the judgment and costs, basing its right upon alleged breach of conditions in franchise ordinances, wherein the defendant had agreed to keep certain portions of the street planked and in repair and to save the city harmless from the payment of damages in any way connected with the privileges granted by the ordinances in question. The defendant denied that the accident hap-

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western Railway Company struck and collided with an interurban car owned and operated by this defendant.

5. This defendant admits that Ben Schneider was a passenger upon the said interurban car of this defendant, and that he sustained injuries as a result of such collision.

6. This defendant admits that the cause of action, if any, accruing to said Ben Schneider as a result of said collision has been assigned to the above named plaintiff.

7. This defendant alleges that said collision was caused solely by the negligence of the defendant Chicago & Northwestern Railway Company, and

pened in a public street, denied the charges of negligence, and affirmatively pleaded as an estoppel the judgment entered in its favor in the federal suit that has been mentioned. The case is presented here for the purpose of showing the holding upon the last mentioned defense. The court, adhering to its decision rendered on a previous appeal [City of Seattle v. Northern Pac. R. Co., 47 Wash. 552, 92 Pac. 411 (1907)], rejected a contention of counsel for the city to the effect that "the party who is primarily liable cannot stay out of a case and dictate what defenses shall be interposed," and held that the judgment in the federal court was conclusive against the city upon the question of the liability of the defendant railroad company, quoting from its previous decision in part as follows: "The city is here seeking to recover against this railway company because of the negligent manner in which it maintained the planking along its track. * * * It was incumbent upon the city to show * * * such negligence. * * * This identical question having been by a court of competent jurisdiction determined in favor of the company in a case wherein Eskildsen [the injured person] was a party, it is evident that, had the city interposed that judgment in the action against it by Eskildsen, it would have been a complete defense, in so far as any negligence of this railway company was concerned. Had it been interposed, Eskildsen could not have recovered any judgment against the city by reason of any negligence of such railway company. The company having notified the city, after the commencement of such action and before it came to trial, of the litigation and judgment in the federal court, and offered to produce evidence to establish said facts, and requested the city to plead such judgment, we think that by refusing to so do, the city cannot now be permitted to recover." City of Seattle v. Northern Pac. R. Co., 63 Wash. 129, 114 Pac. 1038 (1911).

C. Street railway company.

One driving a wagon on a street of a city was killed in collision with a street car. His administrator sued both the city and the street car company to recover damages for the death. The court dismissed the action as against the street car company, and plaintiff recovered a judgment for $4,000 against the city. Plaintiff appealed from the judgment dismissing the action as against the street car company, and the judgment was affirmed. The city appealed from a judgment in favor of plaintiff against it, and this judgment was affirmed. The city paid the judgment in full, together with costs, attorneys' fees and damages, and instituted suit against the railway company praying for a judgment in contribution for one-half of the amount so paid by it. The city in its suit for contribution alleged that the accident occurred as the result of the joint concurring negligence of plaintiff and defendant herein; that the negligence of plaintiff consisted in permitting

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that said collision was not in any manner caused or contributed to by negligence on the part of this defendant.

8. This defendant denies that by reason of any negligence on the part of this defendant the plaintiff has sustained damages in the sum of fifteen thousand ($15,000) dollars, or any other sum.

9. This defendant denies that it was guilty of any negligence in the respects mentioned in the complaint or otherwise.

10. This defendant denies any knowledge or information sufficient to form a belief as to each and every allegation of the complaint not hereinbefore specifically admitted, denied, or otherwise answered.

its street at the point of the accident to be in a dangerous and defective condition; that the negligence of defendant consisted in operating its car in a negligent manner and at a negligent speed, and in failing to give warning of its approach. The city contended that the general rule denying contribution between wrongdoers had no application to this case, since neither of the parties stood in the position of an intentional wrongdoer, and neither negligent act was tainted with any moral wrong. In affirming the judgment in favor of defendant, the court held that the case did not present an exception to the rule, saying: "The negligent act of each was the violation of a duty it owed to the public; operating concurrently, the two negligent acts brought about the result; they were each equally remiss in the performance of their duties to the public. That being true, when either appeals to the public, through its courts, for redress against the other, it will be denied, and they will be left where they are found." City of Louisville v. Louisville R. Co., 156 Ky. 141, 49 L. R. A. (N. S.) 350, 160 S. W. 771 (1913).

IV. Municipal corporation and owner of vehicle.

A city street was built upon a fill 25 feet high and 19 feet wide at the top. On each side of the fill, the city set a line of posts 8 feet apart, and nailed planks on the top of the posts to serve as a guardrail. While plaintiff was driving along such fill with her husband, and was about the middle of the fill, a large motor truck belonging to M approached. The horse attached to the vehicle in which plaintiff was riding took fright at the truck, and backed the vehicle against the guardrail with such force as to break it, causing the buggy and horse and occupants of the buggy to fall down the fill. Plaintiff was severely injured, and sued the city and the owner of the motor truck to recover damages therefor. The owner of the motor truck filed a cross-petition against the city, charging that the negligence of the city in failing to maintain a sufficient guardrail was the proximate cause of the accident, and claimed judgment over against the city for any amount that it might be held liable for in the personal injury action. The court sustained a demurrer to the cross-petition. The evidence showed that the horse took fright some time before the motor truck reached the horse and buggy, but that the driver of the truck continued to approach until the horse backed the buggy down over the fill. It was also made to appear that the guardrail put up by the city was insufficient. There was a verdict against the owner of the truck for $2,000, but the jury found in favor of the city. From judgment on the verdict the truck owner appealed. The court, in affirming the judgment, held that while one not primarily liable, who had been made answerable for the wrongful act of another, might recover the amount he had been compelled to pay, neither of them

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Cross-Complaint.

Further answering the complaint of the plaintiff herein, and, by way of cross-complaint against the plaintiff and the defendant Chicago & Northwestern Railway Company this defendant alleges:

1. That the defendant Chicago & Northwestern Railway Company is a Wisconsin corporation engaged in the operation of a system of commercial steam railway in the state of Wisconsin and elsewhere; that the defendant Wisconsin Traction, Light, Heat & Power Company is, and was at all times mentioned herein a Wisconsin corporation engaged in the operation of a system of electric street and interurban railway in and through the city of Neenah,

could file a cross-petition in the action by the injured party against the alleged joint tort-feasors, for the plaintiff was entitled to try out his action without being incumbered with the controversy between the two defendants. The court said: "If one of them who is not primarily liable has anything to pay under the judgment, he may, after paying it, bring his action against the other to recover what he has paid; but he cannot sue until he has paid the judgment. Until he has suffered a loss, he has no cause of action which a common-law court can enforce. The circuit court therefore properly sustained the demurrer to the cross-petition." M. Livingston & Co. v. Philley, 155 Ky. 224, 159 S. W. 665 (1913).

V. Municipal corporation and one moving building over bridge.

The defendant, in moving certain buildings across a bridge in the plaintiff township, took away safe railings from the bridge and afterwards substituted unsafe railings, causing a third person going upon the bridge to fall into a mill race below and to be injured. The township, having paid a judgment recovered against it by the injured person, brought suit for indemnity. It was alleged in part that the defendant "wrongfully * * * removed and took away the substantial railings * * *, that the bridge thereafter was without railings for a period of some 14 days, when defendant placed upon the bridge railings unsubstantial and insufficient * * *, which remained for a period of some three months, and until a day certain," when the injury was sustained. Reversing a judgment had by the defendant after the sustaining of a demurrer to the declaration, the supreme court held that while in general "as between actual tort-feasors the law will not enforce contribution or indemnity," there are exceptional cases in which, while several persons may be liable as wrongdoers to one injured, the relation between those thus liable may be such as to raise a right on the part of one to compel the other to contribute or indemnify. This exceptional situation had often been held to exist, the court said, in cases of municipal corporations called upon, on account of some violation of a statutory duty to keep highways fit for travel, to pay persons injured on highways by defects caused by third persons. "In such cases, usually," the court said, "the liability of the municipality to the injured person is predicated of omission to remedy a defective condition, and [that] of the actual wrongdoer to the municipality [is predicated] of his actual wrongdoing." The court held that the present case fell within the class of cases affected by the exceptional rule indicated, and remarked: "It is evident * * * that the learned trial judge, called upon to apply a rule, considered only the relations of the several parties involved as defendants in the two actions to the injured man, and did not consider their relations to each other." Hart

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Winnebago County, Wisconsin, and elsewhere; that the tracks of this defendant cross at grade the tracks of the defendant Chicago & Northwestern Railway Company in the city of Neenah and at the point where the tracks of said Chicago & Northwestern Railway Company intersect Commercial street, in said city.

2. That the injuries and damages set forth in the complaint in the above entitled action are the result of a collision, at said grade crossing, between a train operated by the Chicago & Northwestern Railway Company and an interurban car operated by this defendant, upon which said interurban car Ben Schneider, the assignor of the plaintiff, was a passenger.

Tp. v. Noret, 191 Mich. 427, L. R. A. 1916 F 83, 158 N. W. 17 (1916). Subsequently to the decision just stated a trial was had. At the close of the testimony the township requested a directed verdict, but the court submitted the case to the jury, and judgment was entered upon a verdict for the defendant. In considering an appeal, the court first noticed that the judgment in the prior suit against the township was conclusive in the present case as to the following matters, viz., the existence of the defect causing the injury, the fact of injury, the freedom of the injured person from contributory negligence and the amount of damages. The only question open, therefore, the court pointed out, was that of the township's right to enforce indemnity. Reversing the judgment and ordering that judgment be entered for the plaintiff, the court concluded: "The defendant himself testified that he took away the railings, and that his workmen erected the ones in question. * * * The court should have granted the plaintiff's request." Hart Tp. v. Noret, 203 Mich. 376, 168 N. W. 1023 (1918).

VI. Municipal corporation and one tampering with light wires.

In City of Tacoma v. Bonnell, 65 Wash. 505, 118 Pac. 642 (1911), the action was by a city to recover over against the defendant the amount of a judgment which the city had been compelled to pay to the widow and minor children of one who had been killed through contact with an overcharged electric wire. In the suit against the city it had been established that a cause of the death was the negligent failure of the city to remedy a dangerous condition of its electric wires. No negligence against the present defendant had been charged in that action. In the present suit it was alleged by the city that a cause of the death was the negligent conduct of the defendant in permitting some plank to fall on the wires, with the result that certain wires were brought into contact so as to pass an excessive voltage into the secondary wire, which the deceased had touched with fatal result. In the trial court, recovery was not allowed. On appeal, while it was conceded that if the city and the defendant stood *in pari delicto* there could be no recovery over, counsel for the city contended that whatever negligence the city had been guilty of was "mere passive negligence" and that it was the active negligence of the defendant that had caused the death, so that the city, as the party secondarily responsible, might recover from the defendant as the one primarily responsible. This contention was rejected by the court, and a judgment dismissing the action was affirmed, the court holding that but for the continuing condition of the wires, negligently permitted by the city, the accident would not have occurred, and that therefore the parties were *in pari delicto* so that the case was governed by the general rule.

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3. That said collision and the injuries of said Ben Schneider were proximately caused by the active negligence of the defendant Chicago & Northwestern Railway Company; that said defendant Chicago & Northwestern Railway Company was guilty of the primary and active fault; that if any inadvertence on the part of this defendant contributed to said collision and injury such inadvertence was secondary and passive, and consisted, at the most, in the excusable failure of this defendant to discover and avoid the consequences of the active and primary fault of the defendant Chicago & Northwestern Railway Company.

4. That by reason of such affirmative primary fault on the part of the

VII. Municipal corporation and owner of falling billboard.

In City of Omaha v. Armour & Co., 116 C. C. A. 447, 196 Fed. 885 (1912), the action was by the city, to recover over against the defendant the amount of a judgment rendered against the city and paid by it, in a previous case arising out of injury to a street pedestrian by a defective billboard blown down by a high wind. The present defendant had been notified of the prior suit but had not intervened as a defendant. The billboard was one built on private property near the street line, by a partnership the members of which had later formed the defendant corporation. The pleadings on behalf of the plaintiff city contained allegations that the injured person in his action against the city, for failure to perform its duty with respect to the safety of highways for travel, had charged that the billboard was dangerous, first, because of original improper construction, and, second, because of delay and failure to repair. The pleadings further disclosed that the defendant had sold the billboard to another some 7 months before the occurrence of the accident. It also appeared that the verdict of the jury against the city in the prior action was a general verdict, and it was not averred anywhere in the pleadings whether the recovery allowed against the city was on both the grounds relied upon or only one. The court affirmed a judgment given for the defendant on the pleadings, holding that recovery could be allowed, thereunder, only if the defendant were liable on both grounds, which clearly it was not, since it appeared from the allegations on behalf of the city that the present defendant had before the injury occurred transferred the ownership and possession of the property with the billboard to another.

VIII. Municipal corporation and one exploding fireworks.

A. Under license.

A city council suspended during a political campaign a certain ordinance forbidding the discharge of fireworks in the city. During the campaign a man was killed by an explosion of fireworks which occurred in connection with a display caused to be made by a political organization of which the defendant was president. The administratrix of the deceased sued the city and recovered. It was admitted that when her action against the city was commenced the present defendant was notified but refused to defend. The present suit was by the city to enforce indemnity. In considering an appeal by the plaintiff from a judgment of dismissal, the court, after pointing out that the judgment in the prior case against the city was conclusive against the defendant as to the existence of an obstruction in the street, incident to the display of fireworks, the character of the display as a public nuisance, the freedom of the deceased from contributory negligence and the amount of damages, spoke in part as follows: "The ques-

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defendant Chicago & Northwestern Railway Company the judgment herein, if one be recovered by the plaintiff, should provide that execution thereon shall first issue against the defendant Chicago & Northwestern Railway Company, and that execution shall not be issued against this defendant, except upon application to the court and upon a showing to the effect that the plaintiff is unable to collect said judgment of the defendant Chicago & Northwestern Railway Company.

5. This defendant further alleges that if it shall be determined, as claimed by the defendant Chicago & Northwestern Railway Company, that the cause of action set forth in the complaint was not assigned, in good faith, to the

tion here is between the city and a person who in availing of the permit did so under such wrongful and unlawful conditions as to create a nuisance. Whether or not the plaintiff can recover over from the defendant depends upon whether plaintiff and defendant as between themselves were *in pari delicto*. There are undoubtedly cases in which a municipality has been held not to be entitled to recover over from a licensee for damages suffered because of an obstruction erected in the highway. * * * But the primary and efficient cause of Shea's [the deceased's] death was the explosion of fireworks undertaken to be exhibited under improper surroundings; and for the selection of the place for the exhibition and the choice of surroundings the defendant alone was responsible. The rule applicable to actions of this character does not seem to be difficult or obscure. If the municipality permits a thing to be done upon the highway which is in its very nature unlawful and will necessarily result in a dangerous nuisance, and is called upon to pay damages, it cannot recover over against its licensee, because both are *in pari delicto*. But if the permit is to do a thing which may or may not result in a dangerous nuisance, according to the manner in which and the circumstances under which the licensee acts, and he does act in such a way as to create a dangerous obstruction or nuisance, the municipality may recover over from its licensee any damages which it has been obliged to pay, because in such a case the parties are not *in pari delicto*." The judgment was therefore reversed, and a new trial was granted. City of New York v. Hearst, 142 N. Y. App. Div. 343, 126 N. Y. Supp. 917 (1911).

B. Without license.

One L purchased fireworks for a political celebration, and one of his clerks exploded them on a crowded street in the city of New York. As a result of the display, a horse attached to a cab took fright and ran away, knocking down and seriously injuring a little girl. She and her father sued the city for damages and recovered judgment, which the city paid. Later the city brought an action against L to recover over. In considering an appeal by the plaintiff from a judgment of dismissal, the court said: "The principle upon which Lloyd [the defendant] is liable to the city, if he is liable at all, is the well-established one that a municipality which has been obliged to pay a claim on account of damages sustained by an individual in consequence of a nuisance in the highway may recover over against the person who was primarily responsible for the wrong which caused the injuries. * * * To set off fireworks in a crowded city street is a public nuisance * * *, and, if damages result therefrom, the creator of the nuisance is liable for the damages irrespective of any question of negligence. The city's liability is for not preventing the creation of the nuisance, and, when it is called upon to respond in damages,

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above named plaintiff, and that said cause of action has been, in legal effect, assigned and released to this defendant, then, and in that event, it must be determined by said judgment, and this defendant alleges the fact to be, that said collision and the injuries of said Ben Schneider were proximately caused by the negligence of the defendant Chicago & Northwestern Railway Company in the same or a greater degree than by the negligence of this defendant; that the defendant Chicago & Northwestern Railway Company and this defendant were not, at the time of said collision, joint tort-feasors or engaged in any joint undertaking, nor was there any concert of action between said defendants; that if any negligence on the part of this defendant contributed to pro-

it has an action over against the active creator of the nuisance. If, therefore, the respondent Lloyd [the defendant] was an active participant in the creation of the nuisance which resulted in an injury * * *, he is liable to respond to the city for damages which it has been called upon to pay for his wrongful act." It was said further: "The judgments obtained against the city are conclusive against the respondent as to the existence of the nuisance and the amount of the damages, but it is still open to the defendant to contest his responsibility for the creation of the nuisance." City of New York v. Lloyd, 148 N. Y. App. Div. 146, 133 N. Y. Supp. 118 (1911).

IX. Municipal corporation and one repairing street under permit.

In the case of City of Grand Forks v. Paulsness, 19 N. D. 293, 40 L. R. A. (N. S.) 1158, 123 N. W. 878 (1909), the plaintiff city sought indemnity in the amount of a judgment recovered against it by a pedestrian injured as the result of tripping and falling over a loose plank forming an obstruction in a street. The plank and some manure under it had been placed by some one on top of a plank covering which the defendant had spiked down over a pipe he had placed, with the license of the city, on the surface of a street, in connection with repair work. In a decision reversing a judgment had by the plaintiff and dismissing the action, the court found the evidence to be such as to acquit the defendant of negligence, because he was not shown to have had anything to do with the placing of the manure and the loose plank on top of the secure covering which he had made over the pipe; but the court said in effect that had the defendant placed the loose portion of the obstruction on the street he would have been treated in law as the "real wrongdoer" and the city would have been entitled to indemnity. It was said also that in such an event the defendant, "if given notice * * * to defend against the [prior] judgment" was "concluded as to all matters necessary to establish a liability from the city to Allman [the person injured] and as to any matter which might have been urged as a defense by the city against such liability."

X. Public utility corporations.

A. Railroad companies.

1. Injury to passengers.

a. Collision.

A head-on collision occurred between a motor car of the M railroad company and a passenger train of the K railroad company, which resulted in the death of 43 persons on the motor car and severe injuries to several others. The M company paid the claims for death and personal injuries arising out of the collision, and sued the K company to recover the amount so paid. The K company answered by general denial, and averred specially that under the contract under which the two railroads were op-

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duce said collision and the injuries of said Ben Schneider such negligence consisted of mere inadvertence and merely concurred with the original primary and active negligence of the defendant Chicago & Northwestern Railway Company.

Wherefore, this defendant demands judgment as follows:

(a) That as to it the plaintiff's complaint be dismissed with costs;

(b) That in the event of recovery against both defendants a provision be inserted in the judgment directing that execution thereon be issued solely against the defendant Chicago & Northwestern Railway Company, and that no

erating, it was only liable for a proportional share of the loss. The M company was operating its motor cars over the track of the K company between certain points. The first section of the agreement under which the M company operated its cars over the K company's track provided that the M company should not do any local freight or passenger business on the line of the defendant's road between N and J, and intermediate towns, unless required to do so by statute or order of a railroad commission, and that in case it was required to do such local business, it should assume, without indemnity, full responsibility for all damage to or loss of property or death of or injury to persons carried, under such statute or order, the same as though that part of the road was owned and exclusively maintained and operated by the M company. Section 7 of the agreement provided that each party should, for its own account, assume all liability for any injury to person or damage to property that might be caused by it in the operation of its trains under the contract, whether resulting from collision or otherwise, over the road hereinbefore mentioned, and that the other party should not be liable to contribute any sum whatsoever on such account; that should such contribution be required of the party not at fault, by process of law, or otherwise, the party at fault should protect the other party against such liability and indemnify said party from the cost and expense that it incurred therein; and that in the event of injury to person or damage to property as the result of joint negligence of both parties, or by the negligence of a joint employee in the operation of their trains over the track covered by the agreement, whether accruing to the parties hereto or to third persons, the loss should be borne equally by the parties to such agreement. Subsequently a supplemental agreement was entered into by the two railroad companies whereby the M railroad company was allowed to carry passengers locally between N and J, subject to the provisions of section 1 of the original contract. On the day of the accident, a freight train of the K company was derailed south of N, causing a congestion of trains on each side of the wreck. The train dispatcher of the K company ordered a passenger train made up on the north side of the wreck to proceed as the first section of a fast freight train, and ordered such passenger train to meet a southbound motor car of the M company carrying passengers at T, a point north of N and intermediate between N and J. The order for the two trains to meet at T was sent by the train dispatcher to the operator at J, to be by him delivered to the conductor of the motor car of the M company, going south. A copy of this order was also sent from the dispatcher to the telegraph operator at N, to be delivered to the conductor of the K passenger train going north. The motor car of the M company did not stop at T to await the arrival

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execution issue against this defendant except by direction of the court upon a showing by the plaintiff that he is unable to collect said judgment of the defendant Chicago & Northwestern Railway Company;

(c) That in the event the defendant Chicago & Northwestern Railway Company prevail on its claim that the cause of action set forth in the complaint has been, in legal effect, assigned to this defendant, the defendant Chicago & Northwestern Railway Company be adjudged to be indebted to this defendant in an amount equal to one-half of such sum as may be determined to have been necessarily disbursed for the purchase of said cause of action.

of the northbound passenger train, but, as evidence tended to show, passed by the station J at a speed of 35 miles an hour, and the two trains met on a curve in the track, the engine of the passenger train plowing through the motor car with the result stated. Plaintiff's claim for indemnity was based upon the negligence of the telegraph operator at J, it being alleged that he, being the agent of the K company, failed to deliver the order to the conductor of the southbound motor car of the M company, directing him to hold his train at T for the arrival of the northbound passenger train of the K company. Defendant refused contribution on the ground that the collision did not occur on account of the negligence of the telegraph operator at J, and also set up as an additional ground that in no event would it be liable for more than one-half of the amount of loss on the ground that the telegraph operator at J was a joint agent of both companies. After the collision occurred, an agreement was entered into by the plaintiff and the defendant whereby the plaintiff might settle the claims of third parties without prejudice to its right to any contribution from the defendant that it might show. The testimony was conflicting as to whether the telegraph operator at J delivered the order to the conductor of the motor car. The court directed the jury, that if it found for plaintiff, to find for it in the sum paid by plaintiff as damages, with interest thereon. There was a verdict and judgment for plaintiff for the amount paid by it, with interest, from which defendant appealed. The court, in reversing the judgment and entering a judgment against defendant for one-half the amount paid by plaintiff in settlement of the claim, together with interest, held that the jury were justified in inferring that the conductor of the motor car did not receive the order to stop at T for the passage of the northbound passenger train; that there was evidence of a substantial character to support the verdict of the jury as to the negligence of the telegraph operator at J; that he was a joint employee of the two companies; that the defendant K company was not liable to the M company for the value of the property of plaintiff destroyed in the collision, but was liable to plaintiff only for one-half of the amount of the damages paid by plaintiff in settlement of death and personal injury claims. Kansas City Southern R. Co. v. Wade, 132 Ark. 551, 201 S. W. 787 (1918).

Plaintiff, while a passenger in a sleeping car, was injured when the car was struck by an engine of the C railroad company with such force that she was thrown over against the seat and onto the floor with great force and violence. She had a ticket which called for passage over the C railroad and the M railroad to S. In transferring the car to the M railroad, it was run onto a switch track and left standing there. Before the M railroad took charge of it, it was struck by an engine of the C railroad resulting in the injury complained of.

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Amendment.

It is hereby stipulated and agreed that the answer and cross-complaint of the defendant, Wisconsin Traction, Light, Heat & Power Company, interposed in the above entitled action, may be amended by inserting in lieu of the last three lines on page "5" thereof, the following:

"That said collision and the plaintiff's injury occurred as a result of a collision between the respective conveyances of this defendant and the Chicago & Northwestern Railway Company at the point of the intersection of the tracks of each of said companies; that at said intersection there is set in a separate and independent, but connected standard crossing; that the setting in of said

Plaintiff brought suit for damages against both railroads. At the close of the evidence, a peremptory instruction was given, directing a verdict in favor of the M railroad company, and plaintiff dismissed her action as to such company, to which action the C railroad company excepted. A verdict was returned in favor of plaintiff for $7,500, and on remittitur by plaintiff of $1,500, judgment was rendered for plaintiff for $6,000. The defendant C company brought error to the court of appeals. During the pendency of the suit plaintiff died, and her administrator was substituted as plaintiff. The court, in reversing the judgment on the ground that the court erred in permitting plaintiff's counsel to argue to the jury that the issue between the C company and the M company could be settled in a subsequent action, held that there could be no contribution between joint tortfeasors. Doster v. Chicago, M. & St. P. Ry. Co. (Mo. App.), 158 S. W. 440 (1913).

b. Ejection.

Plaintiff sued the M railroad company and the T railroad company to recover damages for having been wrongfully ejected from a train of the M company on the ground that she had taken the wrong train. Plaintiff had purchased a ticket from H to W by way of F. She alleged that on her arrival at the union depot at F, where the two defendant railroad companies had passenger facilities in common, among other things operating a gate system, employing a gateman to operate the gate upon the arrival and departure of trains and direct passengers to their respective cars, she was negligently directed by a gateman at said depot and by a brakeman of the M company, whereby she was caused to take a train of the M company for W instead of a train of the I railroad company over which she had transportation; that after traveling on the M company's train some two miles from F she was ejected therefrom by the auditor of the M railroad company, and was compelled to walk back to the union depot at F, where, after remaining all day, she took a night train of the I company for W. The M company answered by general denial, and pleaded contributory negligence of plaintiff, and by way of cross-action against the T company alleged that the latter owned the depot at F, and that the M and other railroad companies used the same under contract with the T company, whereby the T company retained exclusive control and management of the employees in said station, as well as the right to establish rules and regulations governing their conduct; that the gatemen were employees of the T company, and that if it should be found that plaintiff was induced to board the wrong train by reason of the negligence of a gateman, then the M company, in event of judgment against it, prayed judgment over against the T company for a like amount. The T com-

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independent crossing involves the cutting of the rails of the Chicago & Northwestern Railway Company and the connecting of the same with said standard crossing; that the said independent crossing was constructed, set in and connected by the interurban company with the consent of the Chicago & Northwestern Railway Company, and has since been maintained by the said interurban company with the consent of said Chicago & Northwestern Railway Company; that in the operation of the engines, trains and cars of the respective companies over said intersection, the operators thereof perform, or ordinarily attempt to perform the duty of keeping a lookout for the approach of engines, trains and cars of the other company, and in addition thereto the company answered by denial, and also denied its liability to the M company under the cross-action. The evidence showed that plaintiff went to the union depot at F and inquired of the ticket agent as to when her train left for W, and she was referred to the gateman for information. She made inquiry of the gateman, who informed her that the train was late, but upon its arrival he would put her on the right train. Plaintiff testified that later on she went to the gate to pass out, having her ticket in her hand, and asked the gateman what train she would take; that he declined to look at her ticket when offered, stating that it was unnecessary for him to do so, but directed her to board the train of the M railroad company; that still having the ticket in her hand, she approached a brakeman at the entrance of the train, who likewise failed to examine her ticket, and she asked if that was the W train, and, receiving an affirmative reply, boarded the train; that soon thereafter the train started, and went out about 2 miles from the depot, the auditor came around to take up tickets; that he informed her she was on the wrong train; that she explained the circumstances to the auditor, but he ordered her to get off the train, and picked up her satchel and threw it as far as he could towards the door, and came back and jerked her up by the arm, saying that he had no time to waste, and compelled her to get off the train; that she made her way back to the union station at F; that the conductor refused to take her back to the depot at F or to take her on to the next station; that she did not have sufficient money to pay her way on to W. A verdict was rendered in favor of plaintiff against the M railroad company, and the court instructed a verdict in favor of the T company, from which the M railroad company appealed. In affirming the judgment the court held that the trial court did not err in instructing a verdict in favor of the T company; that the brakeman of the M company was guilty of negligence in not examining the ticket when plaintiff was boarding the train; that the auditor of the M company was guilty of negligence in ejecting plaintiff from the train; that the gateman was the agent of the M company as well as of the T company, and that the M company was responsible for his negligence; and that both the M company and the T company being in the wrong, there could be no contribution between them. Missouri, K. & T. Ry. Co. of Texas v. Humphries, — Tex. Civ. App. —, 157 S. W. 1174 (1913). For companion case, see Missouri, K. & T. Ry. Co. of Texas v. Jackson, — Tex. Civ. App. —, 157 S. W. 1177 (1913).

2. Injury to employees.

a. Collision.

A switchman riding on the footboard of an engine which was pushing a loaded meat car in front of it on an upgrade, was injured when a loaded ice car came down the grade and collided with the meat car. The

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ductor in charge of the cars of the interurban company, in pursuance of the custom and practice, flags his car or train across said intersection; that the said sum paid to," and it is further stipulated and agreed that the demurrer of the defendant Chicago & Northwestern Railway Company shall be deemed to be interposed to said answer and cross-complaint.

In a collision between the defendant Chicago & Northwestern Railway Company, hereinafter called railway company, and the Wisconsin Traction, Light, Heat & Power Company, hereinafter called trac-

ice car belonged to a provision company. Plaintiff sued the provision company and two railroad companies, alleging that they were jointly interested as lessees, licensees and operators of a certain railroad track, known as the A-B switches, and that the employees of another railroad company so negligently handled and moved the ice car that it collided with the car in front of the engine and caused plaintiff's injuries. At the time of the accident, the ice car came down the grade at a speed of 15 to 20 miles an hour. The employees of another railroad company, after waiting several hours for an engine so that they could move a beef car down to a place occupied by the ice cars, in order to unload it, on account of the delay in getting the engine, concluded to move the car down a car's length by means of horse and tackle. A brakeman was stationed on the top of the ice car to set the brake and another employee was stationed on the ground with blocks to apply to the wheels of the car to arrest its movement down the grade, and they were proceeding on the mistaken assumption that the meat car and the two ice cars were coupled together. In thus proceeding to move the cars, it was discovered after the car began to move, that the brake on the ice car was out of order and would not work, the chain being broken. The man with the blocks was unable to check the forward movement of the ice car, and it got beyond their control and collided with the car in front of the engine, causing the injuries complained of. On examination of the ice car, an hour after the accident, the brake staff was found to have no chain on it, and there was found a distinct marking in chalk on the side of the car, plainly visible, "no brake." It further appeared that it was customary to mark cars without brakes in this manner. A statute providing for contribution declared that a defendant in a judgment founded on an action for the redress of a private wrong should be subject to contribution and all other consequences of such judgment in the same manner and to the same extent as the defendant in a judgment in an action founded on contract. At the conclusion of plaintiff's evidence, the court sustained a demurrer to the evidence, so far as it related to the railroad company. Plaintiff recovered a judgment for $5,000, which the appellate court affirmed subject to a remittitur of $1,500, and held that the statute only provided for contribution after judgment, as between the defendants, and had no application to any proceedings prior thereto. Moudy v. St. Louis Dressed Beef & Provision Co., 149 Mo. App. 413, 130 S. W. 476 (1910).

b. Cinder in eye.

The plaintiff was general yardmaster for a terminal company, handling regularly over its city tracks and in its terminal building trains carrying interstate commerce. The engine of an interstate train of the M rail-

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tion company, Al. M. Frederick and Ben Schneider were injured, and each commenced suit against both companies to recover damages. One of said suits was tried, in which a nonsuit was granted as to the railway company and verdict rendered in favor of Schneider against the traction company, for $4,200 damages. Afterwards the plaintiff took an assignment of both claims. Separate actions were commenced by plaintiff against the defendant railway

road company was derailed at a point about 1½ miles from the depot, as it was being used to haul its regular train to the depot as a preparatory step to an interstate run. The derailment of this engine caused an obstruction of traffic in the yard, the tracks affected accommodating both interstate and intrastate trains. It became the duty of the plaintiff to get the engine upon the rails again. He hitched two engines to it. The power of the derailed engine itself was needed in the process of pulling it onto the rail, and as, in concert with the action of the other engines, its full power was applied, a heavy exhaust of steam was drawn through the smokestack, and a cinder thus ejected fell so that it entered the eye of the plaintiff, injuring it. A recovery under the state law was had against the terminal company and the M company, as defendants, in the trial court, but subsequently an order was granted giving a new trial. From this order the plaintiff appealed, and on the appeal the defendants contended that the action was determinable under the Federal Employers' Liability Act, and that, under that act, the plaintiff had no case, since suit had not been brought within the 2-year period prescribed by the federal act. In holding that the federal act applied, the court said that not only was the plaintiff when injured, engaged in interstate commerce or in work so closely connected therewith as to be a part of it—referring to the transportation work of the terminal company, whose interstate business was being interfered with by the derailed engine—but that the plaintiff was also assisting in the interstate commerce carried on by M company, since the derailed engine was one regularly assigned to this particular interstate train, being used exclusively in interstate service, and since the rerailing of the engine not only removed an obstruction delaying other interstate trains but restored to the track and to service, for the use of its regularly interstate train, the derailed engine itself. It was contended, however, that the plaintiff, though clearly an employee of the terminal company, was not employed by the M railroad company, and it was therefore urged that the federal act had no application as to the latter defendant. It appeared, however, that the M company was operating its trains over the city tracks of the terminal company as a lessee for hire, and upon the point raised the court said: "It is true the liability created by the act is a liability to the employee of the carrier and not the others. * * * But, under sections 3078 and 3079, R. S. Mo. 1909, the lessor or licensor * * * is held liable for the negligent acts of the lessee or licensee. * * * And, on the other hand, the lessee or licensee * * * is held liable for the negligent acts of the lessor or licensor * * *, at least for the negligent acts of the lessor or licensor in doing those things for the lessee or licensee which the latter would have to do if it owned

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company on the claim of each of said injured persons. The original complaints were the same, except as to description of the injuries sustained by the respective assignors, and charged negligence of the defendant railway company. Several defenses to the complaints were set up. Afterwards on application of defendant railway company the defendant traction company was made a party to both actions, and the plaintiff served an amended complaint in each case,

the track. * * * The effect of such law is to make the road that owns the track and the road that uses it joint operators * * *. Consequently plaintiff is, by virtue of local law, to be regarded as the agent and employee of both roads, and as both were engaged in interstate commerce, and plaintiff was, at the time of his injury, engaged in the interstate commerce of both roads, he will be regarded by the federal law as an employee of both, and his right of action for the injury is governed and controlled exclusively by the latter law.'' The granting of a new trial was therefore affirmed. Spaw v. Kansas City Terminal R. Co., 198 Mo. App. 552, 201 S. W. 927 (1918).

3. Loss or damage to property.

A packet company was the initial carrier of a quantity of sacked rice from C to R. At R the rice had to be transferred from the boat of the packet company by means of cars operated on an incline, owned by J. The incline consisted of two tracks, and the cars were operated by cables. As a loaded car was taken up the incline, an empty car was let down. For this transfer, a uniform charge was made to all vessels, the cargoes of which were handled by J. At the bottom of the incline there was a bumper to prevent cars from going into the river. When the accident occurred, one car was resting against the bumper at the foot of the incline, and the other car was at the top of the incline. The accident was caused by the removal of a certain pin and clamp that released the cable and permitted one of the cars to run down the incline, knocking the bumper loose, and precipitating the other car into the water. Defendant contended that it was not his duty to ''start'' the cars, and that the pin was removed by one of the employees of the packet company for the purpose of ''starting'' the car. Plaintiff contended that it was the duty of defendant to ''start'' cars, and the testimony on behalf of plaintiff showed that the pin was removed by the engineer for the purpose of drawing the railroad car into position to be loaded from the incline car, and that it was the duty of defendant to do this, and that the removal of the pin was the cause of the accident. Defendant also contended that he gave instructions not to load more than 50 sacks of rice on one car at one time, and that in disregard of such instruction, plaintiff placed 96 sacks of rice on one of the incline cars, and that the overloading of the car caused the accident. The court instructed the jury that if plaintiff placed 96 sacks of rice on one of the incline cars of defendant, and they found that was in violation of instructions given by defendant, and that the overloading of the car was one of the causes of the accident, they should find for defendant. Plaintiff paid the shipper the value of the rice lost, and instituted suit against the defendant to recover the amount so paid. In affirming a judgment in

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setting up negligence on the part of the traction company as well as negligence of the railway company, and that the negligence of both defendants concurred and was a proximate cause of the collision and the injuries suffered. The railway company answered the amended complaint, and among other defenses set up that the traction company, and not the plaintiff, was the real party in interest. The traction company answered in each case, denying neg-

favor of plaintiff, the court held that plaintiff, as initial carrier, had the right to recover from the connecting carrier the amount of damages it had been required to pay the shipper by reason of the negligence of the connecting carrier. Joest v. Clarendon & Rosedale Packet Co., 122 Ark. 353, 183 S. W. 759 (1916).

Plaintiff sued the E railroad company, an intermediate carrier, in a justice of the peace court, to recover damages for injury to cattle in the course of shipment. The defendant company answered, alleging that the shipment was received from the H railroad company, over which the cattle had been shipped to L, and there delivered to the E company; that the damages to the cattle had accrued prior to such delivery; that at the time of such delivery the E company's agent at L notified the H company of the damaged condition of the cattle; that whatever damage was done to the cattle was caused by the H company, and not by the E company; and prayed that no judgment be rendered against the E company, and that judgment for the amount of the damages sustained by plaintiff be rendered against the H company. The H company answered by general denial. Judgment was rendered in the justice court in favor of plaintiff against the E company for the sum of $45, and in favor of the H company as against plaintiff. Plaintiff appealed from such judgment to the county court, and judgment was there rendered in favor of plaintiff against the E company for the amount of the claim, and in favor of the E company against the H company for the same amount. The E company having obtained, or being about to obtain an execution against the H company upon such judgment, the H company applied to the district judge for a restraining order against the execution of such judgment, on the ground that it was void. From a judgment denying relief by way of injunction, the H company appealed. In reversing the order denying the injunction, and remanding the cause with instructions to grant the injunction upon the filing of the proper bond, the court held that the prayer was in effect for a judgment in favor of plaintiff against the H company; and that as there was no pleading to support a judgment against the H company, such judgment was void. Houston, E. & W. T. R. Co. v. Eastern Texas R. Co., 57 Tex. Civ. App. 488, 122 S. W. 972 (1909).

The S railroad company, on whose line a car of rice was to be shipped to its destination, but which was then on an industrial line of the I railroad company, issued a bill of lading therefor to the shipper, the purchaser of the rice from a rice milling company, on the representation of the agent of the purchaser and shipper that notice had been given to the I company to move the car onto the tracks of the S company. The car, while still on the track of the I company, was destroyed by fire. The shipper sued in separate counts, pleading

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ligence and setting up a cross-complaint against the railway company, charging it with active negligence causing the collision and injuries, and further alleging that if any inadvertence on the part of the traction company contributed to the collision and injury, such inadvertence was secondary and passive, by reason of which affirmative primary fault of the railway company the judgment should provide for execution to first issue against the railway com-

alternatively, and seeking to recover against each defendant separately—against the S company on the bill of lading, against the I company for failing to switch the car from the industrial track after being notified by plaintiff's agent, the rice milling company, to do so, and against the rice milling company for failing to notify the I company to switch the car to the S company's track. The S company, answering, alleged that the milling company had failed to give the switching notice, but that if any railroad company was at fault, the I company was solely responsible, and asked recovery over against the I company in the event of recovery by plaintiff against the S company. The I company answered that the loading of the car, while on its industrial track, for a shipment destined to a local point on the S railroad was not only unknown to it, but was in violation of its rule prohibiting such use and loading, which was a reasonable rule, generally in force, known to all the parties to the litigation, and that it did not accept the car for shipment as loaded, nor switch the same, but that the car and its contents were destroyed while the car was standing on the industrial switch where loaded, through no fault on its part, and while the car was not in its possession; that no notice to switch the car was given to it, and that the car as loaded and billed was subject to the disposition of the S company. The milling company answered that it had duly notified the I company to switch the car, and had performed all its duties in the premises, both two days before the fire and during the fire, and that the I company was solely at fault. The court made the following findings of fact: The S company and the I company were common carriers engaged in the transportation of passengers and freight before, at and since the act complained of herein. The milling company, at the request of plaintiff, loaded 190 sacks of rice, bran and polish belonging to plaintiff into an M car then standing upon the industrial track of the I company at the warehouse of the milling company, and two days thereafter the S company executed and delivered to plaintiff a bill of lading whereby it agreed to carry the car and its contents to its usual place of delivery. The S company did not carry the car and its contents or deliver the same as agreed, but four days after the issuance of the bill of lading the car and its contents were destroyed while standing at the place where the car had been loaded. The rice mill was on a line of the I company. The S company had no track, neither main line nor switch, running into the rice mill. The I company had a rule in vogue at the time of the loading of the car that it would not receive orders to switch a car, loaded at an industry on its line, from the railroad which was to transport such shipment, but required such orders to be given by the industry loading the shipment. There was a custom in vogue at the point of ship-

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pany and not against the traction company until a showing was made of inability of the plaintiff to collect from the railway company. The answer further alleged that if the assignments to the plaintiff were not made in good faith, and that the cause of action had been in effect assigned and released to the traction company, and in such event the collision and injuries were proximately caused by the negligence of the railway company in the same or greater

ment to the effect that where shipments were loaded on an industrial track on the line of one railroad, destined to a point on the line of another railroad having no switch into such industry, it was the duty of the industry to notify the switching foreman of the railroad which had a switch running into such industry to switch the car to the railroad upon whose line the shipment was to be transported. Under this custom, the milling company, as agent of plaintiff, notified the switching foreman of the I company to move the car. It was a part of this custom for the railroad company, over whose lines such a car was to be transported, to sign a bill of lading for such a car as soon as the shipment was loaded, and prior to the actual switching of the same to its line. It was shown that after the car was loaded and the I company, through its proper agent, was notified to switch the car to the S track, it made no objection to the use of the car, but promised to switch the same. Plaintiff recovered a judgment against the S company, which appealed. The S company recovered a judgment over against the I company, which also appealed. The court, affirming both judgments, held that if the rule of the I company, prohibiting the loading of its service cars for shipment where it did not participate in the transportation service was not enforced, such rule would not be available to it as a defense; that, as under the general custom, notice that the car was loaded was given to the proper agent of the I railroad, accompanied by the demand that the car be switched to the S railroad track, and as such agent had agreed, without objection to the use of the car by the shipper, to move the same, the car thereby passed into the possession of the I company, which thereafter held possession of it as a common carrier, and was liable over to the S company for the value of the goods destroyed by fire. Gulf, C. & S. F. Ry. Co. v. D. S. Gage & Co., — Tex. Civ. App. —, 174 S. W. 855 (1915).

This was an action to recover for loss and damage done to four shipments of potatoes. As to the second shipment, defendant railway was the connecting carrier, and as to the first, third and fourth, the initial carrier. In the third shipment, the bill of lading was issued by the defendant at P in the name of the plaintiff, as consignor and consignee, destination B, for 175 barrels of potatoes, and the bill was indorsed "Shipper's load and count." The day following the arrival of the car at B, plaintiff by telegraph reconsigned it at that place to Zivi and Company, Chicago, Illinois, route Star Union. Seven barrels were damaged, and the shipment was delayed, whereby plaintiff lost $1.50 per barrel by the decline in price. Affirming judgment for plaintiff, holding the defendant, as initial carrier, liable under the Carmack Amendment, whether the damage was caused by its negligence or not, the court said: "It's remedy is one against the de-

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degree than by the negligence of the traction company, and that the railway company and traction company were not at the time of the collision joint tort-feasors, and that if any negligence on the part of the traction company contributed to produce the collision, such negligence consisted of mere inadvertence, and was a mere concurrence with the original primary and active negligence of the defendant railway company. The railway company demurred to the

faulting carrier, if it was not itself negligent.'' Produce Trading Co. v. Norfolk Southern R. Co., — N. C. —, 100 S. E. 316 (1919).

B. Railroad company and traction company.

1. Passenger injured in collision.

A passenger on a street car was injured in collision with a freight train. The collision took place about 6:30 a. m., before it was light, the weather being cloudy and drizzly. The street car was going south and the freight train was going northeast towards the intersection of the two tracks. The freight train was a long one, and was pushing two box cars ahead of the engine, which cut off the headlight so as to render it difficult to see the train from the crossing. The evidence was conflicting as to whether the operatives of the freight train gave the usual signals of the approach, or whether there was a brakeman with a light on the cars in front of the engine, and if there was, whether he kept a proper lookout. The evidence was also conflicting as to the speed of the freight train, the estimates of the witnesses ranging from 6 to 12 miles an hour. The momentum of the freight train carried the street car 59 feet from the crossing and greatly damaged the car. The street car was brilliantly lighted, and, according to the preponderance of the evidence, was stopped within a few feet of the railroad track, just before the attempt was made to cross, but the operatives failed to discover the approach of the freight train although they looked up and down the track. There was testimony to the effect that the conductor of the street car, just prior to reaching the crossing, stated that he must go to the front of the car and look out for headlights and engines and see that everything was all right at the crossing. Plaintiff made both the street car company and the railroad company defendants in his action to recover damages. The street car company by special plea sought judgment over against the railroad company, but the trial court sustained a demurrer thereto. In affirming a judgment for plaintiff, the court held that the court did not err in sustaining an exception to the traction company's plea for reimbursement by the railroad company, since the defendants were concurrent wrongdoers, neither of which was entitled to contribution or reimbursement from the other. Northern Texas Traction Co. v. Caldwell, 44 Tex. Civ. App. 374, 99 S. W. 869 (1907). For companion case, see St. Louis, S. F. & T. Ry. Co. v. Knowles (Tex. Civ. App.), 99 S. W. 867 (1906).

2. Pedestrian struck by broken trolley wire.

One who sustained personal injury by the breaking of a live trolley wire which crossed over a railroad track, by the derrick of a work train coming in contact with the trolley wire, recovered separate judgments against

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cross-complaint of the traction company in both cases, which demurrer was overruled. Afterwards the traction company amended its answer by inserting a second cause of action in its cross-complaint against the railway company in which it was alleged in substance that if it should be determined that the causes of action set forth in the complaint were not assigned in good faith to the plaintiff, but assigned and released to the traction company, and if it should

the railroad company and the street car company for different amounts. Subsequently the railroad company sued the street car company to have the whole of the damages recovered in the personal injury action charged to the street car company. It was made to appear that about 9 hours previous to the accident, about 3 o'clock in the morning, a work train had passed the crossing, and that a derrick thereon, carrying an 18-foot mast, had interfered with the trolley wire, doing considerable damage to the trolley poles and guy wires, but not breaking the main wire. About 7 o'clock on the same morning, a second work train passed the crossing while going out of the city. A 19½-foot derrick mast thereon struck the trolley wire, but the wire was lifted over the mast by the slanting boom pole, so that the wire was not broken. On the return trip of such work train, however, the derrick mast again came in contact with the trolley wire and broke it, one end of the live wire falling on plaintiff, who was standing in the street near the crossing, and so inflicting the injuries complained of. In the action for personal injuries, plaintiff alleged that the street car company was negligent in allowing the trolley wire to swing so near the railroad track as to render it unsafe and dangerous; and, as to the railroad company, he alleged that it negligently ran its train against the trolley wire and broke it, when its servants knew that it was sagged low and in a dangerous position, or when they could have known it by the exercise of ordinary care. The verdict in the action for personal injuries showed that the jury in effect found that the trolley wire was sagging, and that the street car company and the railroad company had, or were chargeable with, notice thereof. In the suit for indemnity the street car company answered and also set up a counterclaim for the expense it had been put to by reason of the accident. The evidence showed that the street car company and the railroad company had entered into an agreement as to their responsibilities and duties in relation to the crossing; such contract, among other things, providing that the crossing should be kept in repair by the railroad company, but wholly at the expense of the street car company; the railroad company to be the sole judge of the condition of the crossing and of the necessity for repairs. The agreement further provided that the trolley wire over the track of the railroad company at the crossing should be not less than 22 feet above the top of the rails, and should be so constructed and maintained by the street car company as not to interfere with the movement of any locomotives, trains or cars of any kind. The railroad company recovered a judgment and the street car company appealed. In reversing the judgment, the court held that denial of redress as between joint tort-feasors was confined to the class of cases where the person asking it knew, or in law was presumed

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further be determined that the negligence of the traction company was an active and primary cause of the collision, then the negligence of the railway company concurred with the negligence of the traction company, and that the negligence of each was inadvertent and unaccompanied by any intent to violate the law or rights of the assignors. There are some other allegations to the effect that the operators of the engines, trains, and cars of the respective

to know, that he was doing a wrongful act; that if the act which one of the parties was charged with committing was without his guilty intent or knowledge, he might recover from the one upon whom rested the primary responsibility; and that the plaintiff and the defendant were *in pari delicto*, so that neither had a valid claim upon the other for contribution. Owensboro City R. Co. v. Louisville, H. & St. L. R. Co., 165 Ky. 683, 178 S. W. 1043 (1915).

3. Property damaged by derailed car.

Plaintiff sued the defendant railroad company to recover for damage caused to his furniture and fixtures by a railroad car of defendant running into his place of business. The defendant railroad company sought to have a traction company made a party defendant, in order that it might have judgment over against it for any sum that plaintiff might recover against the railroad company. It alleged that the traction company had constructed a line of street railway upon and along the street, which intersected the defendant's railroad track near the building occupied by plaintiff; that in order to make the intersection over the track of the railroad company, the traction company put in frogs, rails and other appurtenances necessary to a proper intersection; that the traction company negligently and unskilfully constructed its switches, rails and appurtenances, and negligently failed to keep the same in proper order and repair, so that at the time of the accident in question the crossing was in an unsafe and improper condition; that if the railroad company's cars left the rails and ran against the building occupied by plaintiff, it was caused by such negligence of the traction company, for which it alone was liable. The traction company appeared and excepted to the above portion of the railroad company's answer, and asked for judgment against the railroad company. Plaintiff also excepted to that portion of the railroad company's answer. It was shown that the cause of the derailment was a defective rail in the steam railroad company's track, of which it had notice previous to the accident. It was not alleged nor shown that the traction company undertook to relieve the steam railroad company from its legal duty to assist in maintaining the crossings of the two tracks in proper condition for the safe operation of its trains. The cars of the steam railroad company were, at the time of the accident, being pushed at a moderate rate of speed, and the wheels of the derailed car, upon coming in contact with the defective rail at the crossing of the two tracks, left the track and collided with plaintiff's building. The engineer testified that he knew of the defective condition of the track, and had called it to the attention of the section foreman. The railroad company appealed from a judgment in favor of plaintiff and the traction company. The court, affirming the

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companies perform, or ordinarily attempt to perform, the duty of keeping a lookout for the engines, trains, and cars of the other company, and in addition thereto the conductor in charge of the cars of the traction company in pursuance of the custom and practice flags his car or train across the intersection of the tracks of the two companies. The railway company demurred to the cross-complaint contained in the amended answer of the traction company,

judgment, held that the court did not err in sustaining the exceptions of plaintiff and the traction company as to that portion of its answer seeking recovery over against the traction company, and that the court was justified in holding, as a matter of law, that negligence of the railroad company proximately causing the damages had been established. Texas & P. Ry. Co. v. Corr (Tex. Civ. App.), 130 S. W. 185 (1910).

C. Railroad company and electric company.

An employee of a railroad company was electrocuted by a current received from a steel cable with which he was attempting to lower a coal chute. The current had escaped to the cable from a negligently maintained wire on the property of the railroad company and belonging to a light company. The widow of the deceased sued the railroad company and recovered as for wrongful death. The railroad company then sought, in the present action, to recover over against the light company. In the course of a decision affirming a judgment of nonsuit the court of appeals summed up the main aspect of the case as follows: "When the light company installed these dangerous appliances in the defendant's switch yards, they became the instrumentalities of two businesses, the light company's business of furnishing light and the railway company's business of making up and operating trains. The decedent who was employed to work in these yards sustained such a relationship to this matter which primarily and contractually concerned only the two companies as that the law imposed upon both companies a joint and several duty owing to him to see that these wires should be kept in reasonably safe condition. As to him, the light company had no right to install these dangerous wires or to maintain them, and the railroad company had no right to allow them to be installed and maintained as part of its plant, except on the condition, applicable alike to each of the companies, that reasonable care would be taken to safeguard the decedent from injury through them. The judgment in the former case was as against the plaintiff, in the present case, a conclusive finding of one or more of the following facts: That it allowed the wires to be installed in a negligent manner in the first instance; that it was neglectful in allowing them to remain where they were, after the insulation had worn away; that it was neglectful as to inspection; and that one or more of these things was the proximate cause of the homicide. The railway company does not sue the light company in the present case for the breach of any contract on its part to install the wires in a proper manner, or to maintain them or to inspect them, but sues because that company was guilty of substantially the same tortious delinquency as it itself had committed." Thus viewed, the court said, the case fell within the general rule that between two

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which was sustained, and an order entered, directing judgment thereon in favor of the defendant railway company, with leave to the traction company to amend its cross-complaint. The answer of the traction company was not amended, and the case went to trial on the issues made. Afterwards, upon application of the plaintiff, an order was made, consolidating the actions. The case went to trial, and the following verdict was returned:

joint wrongdoers there is no right of contribution, and was not subject to the exceptional rule, sometimes applied, that a wrongdoer secondarily responsible for an injury primarily caused by another wrongdoer may enforce contribution from the latter. Within the statutory period after the rendition of this judgment, a new action was instituted by the same plaintiff against the same defendant, by a petition alleging the following supplementary facts: That the plaintiff employed the defendant to install and maintain an arc light near the plaintiff's coal chute, pointing out where the light was to be placed but leaving it with the defendant to determine how and where the wires should be strung; that the arrangement was such that the light and wires connected therewith continued to be the property of the defendant; that the wires were strung in such a way that one of them came in contact with the steel cable of the plaintiff used in operating the apron, an appliance at the chute used for coaling engines; that the steel cable was thus charged with an electric current; that an employee of the plaintiff was electrocuted when he touched the steel cable for the purpose of operating the apron in the course of his employment; that the proximate cause of the death was the negligence of the defendant in the premises; and that the plaintiff had been compelled as the result of a former suit to pay damages on account of the employee's death. The defendant interposed a general demurrer to the petition, on which the trial court gave judgment for the defendant. The supreme court, on appeal, reversed this judgment, saying in part: "While it may be true that as a general rule one of two or more joint tort-feasors has no right of action over against those connected with him in the tort for either contribution or indemnity, where he alone has been compelled to satisfy the damages resulting from the tort, yet in some cases one who is liable as a tort-feasor, because he has failed to exercise due diligence to discover a defect or danger in machinery, appliances, or place where the injured person is required to work, and has been compelled to pay damages for injuries growing out of the tort, may have a right to recovery over against another whose negligence produced or brought about the defect or dangerous condition in the machinery, appliances, or place, which defect was the proximate cause of the injury; and the present case seems to us to belong to the latter class. * * * It is clearly made to appear that the defendant maintained its wires and the circuit with which they were connected in a dangerous condition, and that this construction of the circuit and maintenance of it in a dangerous condition was the principal and moving cause resulting in the injury sustained to the employee referred to above. The improper construction and placing of the wires, or placing of them as they were without proper insulation, the grounding of the

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(1) Was Al. M. Frederick and Ben Schneider injured in a collision at the intersection of the traction company and railway company tracks on Commercial street in the city of Neenah, Wis., January 21, 1915? Answered by the court: Yes.

(2) Did the conductor of the traction company in charge of the street car, charged with the duty to exercise the highest degree of care reasonably to be expected from human vigilance and foresight in view of the mode and character of the conveyance adopted, and consistent with the practical prosecution of the business of operating the defendant traction company's street railway for the safety of its passengers in said car, fail to discharge such duty

wires, when considered in connection with the fact that the wires were placed in such close proximity to the 'apron' that it would come in contact with it while the latter was being operated, amounted to positive acts of misfeasance relatively to any one who should receive injury in consequence of the negligent construction of the circuit and its wires and the way in which it was maintained. Now, if the railroad company was guilty of the same wrong, or like wrong, if it participated in the positive act of constructing and maintaining the dangerous circuit and the wires constituting the same, then it would have no right of indemnity from the defendant, after having been required to pay damages; but under the allegations of the petition—and these allegations are to be taken as true as against the demurrer—the plaintiff was not guilty of any of these positive acts of wrongdoing and negligence. And while it had been successfully shown in the prior suit against the plaintiff that it was guilty of such negligence as rendered it liable, that liability may have grown out of negligence which may be described as of a negative character—negligence consisting in a failure to make inspection of the electric circuit and the wires connected therewith. Such negligence as this was sufficient to render it liable in damages to its injured employee, and the mere fact that the widow of an injured employee recovered a verdict for his homicide against this plaintiff in a former suit wherein negligence of both kinds was charged—that is, negligence which we have referred to as positive acts of negligence, as well as negligence consisting in omission to inspect—should not preclude this plaintiff from now showing that its liability in the other suit was based entirely upon its failure to inspect, and that no positive acts causing the injury were proven against it; that it was not as a matter of fact a participant in the positive acts of the original wrongdoer, the Macon Railway & Light Company, according to the allegations of this petition." Central of Georgia R. Co. v. Macon Ry. & Light Co., 140 Ga. 309, 78 S. E. 931 (1913); 9 Ga. App. 628, 71 S. E. 1076 (1911). The trial which followed the rendition of the opinion of the supreme court, above stated, resulted in a verdict for the plaintiff, but the trial court granted the motion of the defendant for a new trial. On appeal the judgment upon this order was affirmed [20 Ga. App. 548, 93 S. E. 170 (1917)], the court holding that, since the burden was upon the plaintiff to show that the proximate cause of the employee's injury was the positive wrong and negligence of the defendant herein, and that it, the plaintiff, had not participated in such negligence so as to be "a mere joint tort-feasor in the sense that it had been guilty with the defendant of the same or like negligence," and since the verdict set aside could not be said to have been demanded by the evidence, the judgment and order would not be interfered with. On the retrial there was a judgment of

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in ascertaining whether the train of the defendant railway company was coming on and over the crossing on the night of the collision? Answer: Yes.

(3) If you answer question No. 2 Yes, then answer this question: Was such failure the proximate cause of the injuries sustained by Al. M. Frederick and Ben Schneider? Answer: Yes.

(4) Did the motorman of the defendant traction company in charge of the street car, charged with the duty to exercise the highest degree of care reasonably to be expected from human vigilance and foresight in view of the mode and character of the conveyance adopted and consistent with the practical prosecution of the business of operating the defendant traction company's

nonsuit, which on appeal was affirmed [— Ga. App. —, 98 S. E. 406 (1919)], the court being of opinion that the evidence produced by the plaintiff, while stronger than before, still fell short of showing anything more than passive negligence on the part of each of the tort-feasors in failing to inspect the property and maintain it in proper condition.

Plaintiffs, husband and wife, sued the defendants, a railroad company and an electric company, to recover damages for the death of their son, who was killed in the course of his employment in the boiler making department of the railroad company. It was alleged that his death resulted from an electric shock communicated through the boiler on which decedent was working, by means of an electric light wire equipped with a 16-candlepower bulb. It was further alleged that the bulb was attached to a flexible extension cord about 30 feet long, so that it could be moved in the shop from place to place where it was needed; that at the time of the accidental death, the extension cord was in an unsafe condition for such use, so that electric current passed from it into the boiler and charged it with electricity, so that when decedent came in contact with the boiler he was electrocuted. The railroad company answered by general denial, and pleaded specially and by way of cross-action against the electric company, alleging that the negligence which caused the death was that of the electric company in permitting the insulation of its high voltage wires and appliances to become defective and out of repair, and to become grounded and dangerous, whereby a powerful electric current was communicated to the extension cord, and by such cord communicated to the tank or boiler in which decedent was working, and prayed that if the railroad company should be required to pay any sum in consequence thereof, it have judgment over against the electric company for any such sum and costs. Plaintiffs recovered judgment against the railroad company for $10,000, and the court rendered judgment in favor of the electric company in the cross-action on demurrer thereto. The railroad company appealed from both judgments. The court, while affirming the judgment in favor of plaintiffs on condition that they remit $2,500 thereof, reversed the judgment as between the railroad company and the electric company, and ordered a new trial as between them. It held that if the allegations of the cross-action against the electric company were true, it stated a case against the electric company that fell within the exception to the rule against contribution and indemnity as between joint wrongdoers, and showed that the electric company was the party whose active negligence was the proximate cause of decedent's death, and that if the railroad company was guilty of any negligence, it was only passive and secondary. Galveston, H. & S. A. R. Co. v. Pigott, 54 Tex. Civ. App. 367, 116 S. W. 841 (1909).

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street railway for the safety of its passengers on said car, fail to discharge such duty in ascertaining whether the train of the defendant railway company was coming on and over the crossing on the night of the collision? Answer: No.

(5) Not answered.

(6) Did the defendant railway company fail to keep a flagman stationed upon Commercial street, at said crossing, on the night of the collision, to warn all persons of the approach of the trains of the defendant railway company, contrary to the ordinance of the city of Neenah, Wis.? Answered by the Court: Yes.

D. Railroad company and express company.

1. Employee injured by defective car.

A brakeman of a railroad company was injured when a handhold on one of defendant express company's cars pulled out, precipitating him to the ground and running over him. The accident occurred while the plaintiff, in the discharge of his duties as brakeman, was descending the ladder on the express company's car. The car from which plaintiff fell belonged to, and was being used in the service of, the express company, engaged with the railway companies which were joined in the action as codefendants, in carrying fruit and perishable goods in cars owned and furnished by the express company to the railroads for carrying such traffic. The handhold which pulled out was fastened to the side of the car with lag screws, instead of with bolts and nuts. The wood in which the lag screws were embedded was rotten, thereby rendering the fastening of the handhold defective and insecure, but the surface was covered with paint so that the defect was concealed. Such defect in the fastening of the handhold existed when the express company delivered the car to the railroad company to be used in carrying on the business in which it and they were engaged, and the express company knew, or was charged with knowledge, thereof. The action as originally brought was against the express company and against several railroad companies, including the one with which plaintiff was employed. The action as to the railroad companies was dismissed, and the express company filed a cross-action against the railroad company with which plaintiff was employed when injured, charging such railroad company with failure of duty to properly inspect the car from which plaintiff fell, and prayed that in the event judgment was recovered against it, that it have judgment over against the railroad company for the amount recovered. The court sustained a demurrer to the express company's cross-action. Defendant appealed from a judgment in favor of plaintiff for $3,500, as well as from the judgment in favor of the railroad company dismissing the cross-action. In affirming the judgments the court held that if the express company was jointly interested with the railroad company in the profits of operating the defective express car which caused plaintiff's injuries, it was a joint tort-feasor with the railroad company, and was not entitled to recover over against it. Continental Fruit Exp. Co. v. Leas, 50 Tex. Civ. App. 584, 110 S. W. 129 (1908).

2. Passenger struck by misplaced truck.

An express company left a truck near the track of a railroad company and the plaintiff's intestate, a prospective passenger, in seeking to pass across the crowded platform to the train as it started to pull out after the conductor had called "All

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(7) Was the defendant railway company guilty of want of ordinary care in failing to maintain a flagman at said crossing? Answer: Yes.

(8) If you answer question No. 7 Yes, then answer this question: Was such want of ordinary care the proximate cause of the injury sustained by Al. M. Frederick and Ben Schneider? Answer: No.

(9) Was the defendant railway company's train operated at a speed in excess of 12 miles per hour when approaching Commercial street crossing and within 20 rods thereof? Answer: Yes.

(10) If you answer question No. 9 Yes, then answer this question: Was

aboard," missed his hold at the platform and was thrown against the express truck and killed. It was alleged that the train was started prematurely. The evidence was in conflict with respect to the suddenness and speed with which the train was started. On appeal from a judgment in the plaintiff's favor it was contended on behalf of the defendant that the case was subject to the ruling made in the earlier case of Gregg v. City of Wilmington, 155 N. C. 18, 70 S. E. 1070 (1911), to the effect that no man can make his own misconduct the ground for an action in his own favor; that if he suffers because of his own wrongdoing, the law will not relieve him; that the law cannot recognize equities as springing from a wrong in favor of one concerned in committing it; and that where two or more persons have participated in the commission of a wrong, the general rule is that a right to contribution or indemnity will not arise in favor of the one held responsible by the injured party. But the court affirmed the judgment, saying: "Here the express company left the truck near the track of the railroad company, and, if this was a negligent act, it would not have harmed the intestate if the defendant had not also been negligent. The two acts concurred in producing the injury, and, upon the assumption that the express company was negligent, it and the railroad company were joint tort-feasors, as to the plaintiff and as between themselves, and there is no right of indemnity or contribution. It may also be said that the defendant's wrong was the active and dominant cause of the injury, without which it would not have occurred, and it therefore has no ground whatever upon which to base a claim for compensation against its codelinquent." Doles v. Seaboard Air Line R. Co., 160 N. C. 318, 42 L. R. A. (N. S.) 67, 75 S. E. 722 (1912).

Plaintiff's decedent, a passenger, sued the railroad company to recover damages for decedent's death resulting from injuries sustained by being struck by a truck left by an express company's employees too near the track, thereby throwing decedent under the cars, and the railroad company filed a cross-action against the express company, seeking to recover over against the express company by way of indemnity. The railroad company introduced in evidence a written contract between it and the express company, authorizing the express company to use the depot grounds, but there was no clause in such contract by which an express company expressly agreed to indemnify the railroad company for loss resulting from the facts stated in this case. The railroad company contended that the express truck was left at the place where it was by the express company, and that if there was negligence in leaving the truck at such place, it was the negligence of the express company, and that for such reason the court should render judgment in favor of the railroad company and against the express company for any amount that plain-

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such excessive speed the proximate couse of the injuries sustained by Al. M. Frederick and Ben Schneider? Answer: No.

(11) Did the engineer fail to exercise ordinary care in the operation of his engine as he approached the point of collision? Answer: No.

(12) Not answered.

(13) Was the defendant railway company, or any of its officers, servants, or employees guilty of any want of ordinary care in storing or permitting the box cars to remain south of Commercial street crossing on the center track of the defendant railway company on the night of the collision? Answer: No.

(14) Not answered.

tiff recovered against the railroad company. Plaintiff recovered a judgment against the railroad company for $7,500, and judgment was rendered in favor of the express company as against both plaintiff and the railroad company. On appeal, the judgment was affirmed. Houston & T. C. R. Co. v. Wells Fargo & Co., 59 Tex. Civ. App. 241, 125 S. W. 971 (1910).

E. Railroad company and sleeping car company.

Plaintiff sued a railroad company and the Pullman Company to recover damages for injuries sustained by his wife when she was wrongfully caused to disembark from the Pullman car in the defendant's train before reaching her destination, whereby she was compelled to carry a 14-months'-old child and her baggage to the passenger depot, a distance of about one-half mile, in the dark, causing her nervous shock and physical strain, resulting in permanent injury. Plaintiff further alleged that his wife was informed that the train had reached the station, and was directed by the Pullman porter to alight therefrom, and that being unacquainted with the locality, and it being in the nighttime, she disembarked upon the representations of the porter, and when she had done so the train moved off leaving her standing in the dark, without protection or assistance; and that the negligence of the defendants' employees, in so causing plaintiff's wife to alight, was the proximate cause of her injury. The railroad company answered by general and special denials, and pleaded contributory negligence. It also alleged that it stopped its train in obedience to an interlocking switch signal, and was not guilty of any negligence by reason of such act; that while the train had so stopped, the Pullman Company's porter caused plaintiff's wife to alight at the wrong place, and that if she sustained the injuries complained of they were the result of the negligence of the Pullman Company's servant, and not of the railway company. It prayed that in the event that plaintiff recovered a judgment against the railway company that it have a judgment over against the Pullman Company. The Pullman Company answered by general denial, and pleaded specially that it was not a common carrier, nor engaged in the transportation of passengers, but merely manufactured sleeping cars and rented them to railroad companies, under whose control and management they were operated; that the porter was acting as the servant of the railway company at the time alleged; and that if the porter was mistaken in inviting passengers to alight at that place, it was by reason of the failure of the train conductor to properly superintend the discharge of passengers. Plaintiff recovered a judgment and verdict for $2,500 against both defendants, and judgment was rendered in favor of the railway company against the Pullman Company for the amount of the judgment recovered by plaintiff. From the latter judgment the Pullman

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(15) What damages did Al. M. Frederick sustain? Answer: $7,425.
(16) What damages did Ben Schneider sustain? Answer: $4,200.
(17) Was the assignment of the claims of Frederick and Schneider to the plaintiff taken by the plaintiff for and in behalf of the defendant traction company? Answer: No.
(18) Which of the following parties is the real party in interest in this action, to wit, A. K. Ellis or the Wisconsin Traction, Light, Heat & Power Company? Answer: A. K. Ellis.

After verdict all the parties filed alternative motions to change

Company appealed. The court, affirming the judgment, held that the railroad company was only passively negligent, and the Pullman Company actively negligent, in inducing the injury to plaintiff's wife. Pullman Co. v. Hoyle, 52 Tex. Civ. App. 534, 115 S. W. 315 (1909).

Plaintiff was a passenger on a Pullman car in the defendant railroad company's train. She was carried past her station and there discharged, and was compelled to walk back and carry a child and a suitcase, and alleged injury from fright, and serious physical injury as the result thereof. Her husband sued both the railroad company and the Pullman company to recover damages for her injuries. The railroad company filed a separate answer which included a general demurrer, general denial, and special answer in which it was alleged that it was not guilty of any negligence, but that its codefendant was guilty of the negligence which caused the injuries to plaintiff's wife, and prayed for judgment over against the Pullman Company for the amount of any judgment which plaintiff might recover against it. The cross-action alleged in substance that the railroad company was hauling the Pullman car under a contract with such company; that plaintiff's wife paid the Pullman Company for the use of a berth in that car; that, as between the two defendants it was the duty of the Pullman Company, and not of the railroad company, to notify plaintiff's wife when her destination was reached, and to assist her in getting off the train, which it alleged the Pullman Company negligently failed to do. The Pullman Company answered by general demurrer, general denial, and certain special pleas. Plaintiff's testimony tended to show that she was put off the car more than 2,000 feet from the station, while the testimony on behalf of the defendants tended to show that the distance was between 213 and 300 feet from the station. There was no proof showing that it was not customary to put passengers off where defendant's testimony tended to show the porter left plaintiff's wife, or even where the testimony tended to show that she got off the car. The Pullman porter testified that on discovering that plaintiff's wife had not gotten off at the station at the first stop of the train, he pulled the bell cord which caused the engineer to stop the train the second time, and that he then helped plaintiff's wife off, took her suitcase and carried it for her a part of the way back towards the station, but did not carry it all the way to the station, as the brakeman was waving a signal for the train to start. It was dark when plaintiff's wife got off the car and made her way back to the depot. Plaintiff recovered a judgment against the railroad company, but the court denied recovery over against the Pullman Company, from which judgment the railroad company appealed. The court, while affirming plaintiff's judgment against the railroad company, reversed the judgment and remanded the cause as between the railroad

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the answers to certain questions in the special verdict. The motion of the defendant railway company being: (1) For judgment upon the verdict and undisputed evidence; (2) for an order changing the answers to questions 7 and 9 in the special verdict from "Yes" to "No"; (3) for judgment notwithstanding the verdict; and (4) to change the answer to question 17 from "No" to "Yes," and the answer to question 18 from "A. K. Ellis" to "Wisconsin Traction,

company and the Pullman Company, holding that the cross-plea against the Pullman Company alleged facts bringing the case within the exception to the rule that there can be no contribution or indemnity between joint active wrongdoers; and that although there was no proof of a contract to indemnify, the railroad company had the right to recover upon the ground that the Pullman Company was the active wrongdoer, and the railroad company was merely a passive actor. Missouri, K. & T. Ry. Co. of Texas v. Maxwell, — Tex. Civ. App. —, 130 S. W. 722 (1910).

The plaintiff took passage in a car of the defendant sleeping car company in a train of the defendant railroad. The train stopped only a minute at the place where the plaintiff was to alight. As he was descending the steps, the conductor cried, "All aboard." The porter of the car and the brakeman on the ground near the steps answered "All right here." The train started with a slight jerk as the plaintiff's foot reached the last step, and as he was preparing to step onto the box which had been placed under and in front of the car steps. As he stepped onto the box it turned over and the plaintiff fell to the ground with his arm on the rail under the car. The porter jerked him out from under the car and raised him to a standing position, and then ran to overtake the train, which was moving. When the plaintiff attempted to stand, his leg gave way and he fell again to the ground, sustaining a fracture of the patella of his left leg and bruising his left hip and shoulder. It appeared that the brakeman and conductor of the train knew nothing of the accident until the train had gone some distance beyond the place of the accident, the porter having failed to give notice to the train conductor that the plaintiff had not yet alighted, as was the custom, when the train was ordered to start too soon. The railway company had a contract with the Pullman Company whereby the latter was to indemnify it against liability for injuries to persons arising from the acts or omissions, whether negligent or otherwise, of employees of the Pullman Company. The court charged that if the injuries to the plaintiff were caused by negligence of the Pullman Company's employees, the railway company was entitled to judgment on its plea over that the Pullman Company was liable for any judgment rendered against it. As the court pointed out, the railway company was entitled to its requested instruction that if the plaintiff's injuries were caused by acts or omissions in the line of employment of the Pullman Company's employees, whether such acts or omissions were negligent or not, then the Pullman Company was liable for the injuries sustained, in accordance with their contract of indemnity. "It may be," said the court, "that if the charge requested had been given the jury would have found that the acts or omissions of the porter * * * inducing and concurring with the negligence of the * * * [railway

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Light, Heat & Power Company." The court changed the answer to question No. 10 from "No" to "Yes," and also changed the answer to question No. 17 from "No" to "Yes." The court further ordered that the plaintiff was not entitled to recover, and that his rights were merged with those of the traction company, and ordered judgment in favor of the traction company and against the railway company for one-half of the amount paid by the traction company in settle-

company] in starting the train at the time it did, caused, or contributed to cause, plaintiff's injuries, though they were unwilling to find that such acts or omissions were negligent." Gulf, C. & S. F. Ry. Co. v. Scripture, — Tex. Civ. App. —, 210 S. W. 269 (1919).

The defendant railroad, over which the plaintiff was being transported in a coach of the defendant sleeping car company, ordered the plaintiff and similar passengers transferred to another car. The servants of the sleeping car company awakened the plaintiff and compelled him, in making the transfer, to walk through rain and mud, and then refused to heat the second coach or give him a berth therein. The plaintiff, compelled to ride in his wet clothing, became ill, contracted tuberculosis and was without hope of recovery. The sleeping car company filed a cross-action against the railroad giving the initial order, and from a judgment for the plaintiff in the first action and for the defendant railway company in the cross-action, the Pullman Company appealed. The court affirmed the judgment, holding that the sleeping car company was the active and direct agent concerned in the negligence which culminated in the injuries, and had no right to demand contribution from the other tort-feasor—namely, the railroad company which gave the order to make the transfer. "Let it be admitted," said the court, "that the railway company ordered the coach to be put where it was; that it ordered that the passengers be transferred from one coach to another. It did not prevent the two cars from being placed close to each other; it did not compel the passengers to walk through rain and mud and water; did not refuse to heat the second coach; and it did not refuse a berth to * * * [the plaintiff]. Both may have been guilty of negligence, but certainly * * * [the sleeping car company] was not a passive, but an active, agent in bringing about the injuries to the passenger. Certainly * * * [the sleeping car company] had no right to demand contribution from the other tort-feasor; it being the active and direct agent concerned in the negligence which culminated in the injuries." The court also pointed out that as both the railway company and the sleeping car company were joint tort-feasors, the latter could not complain that the liability of the former was not submitted to the jury, so far as the judgment rendered against it in favor of the passenger was concerned. Pullman Co. v. McGowan, — Tex. Civ. App. —, 210 S. W. 842 (1919).

F. Railroad company and car manufacturing company.

A brakeman was injured because of a defective brake, and sued the railroad company in whose service the car was at the time of the injury, and the company which manufactured and furnished the car to the railroad company. Plaintiff alleged negligence on the part of the railroad company in not properly inspecting the car, and on the part of the manufacturing

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ment of the two claims, which was the same amount assessed as damages in the special verdict. Judgment was entered accordingly, from which plaintiff and the defendant Chicago & Northwestern Railway Company appealed.

KERWIN, J. (after stating the facts as above). It is established by the verdict in this case that Frederick and Schneider were injured; that the conductor of the traction company failed to dis-

company in negligently making and delivering the car to the railroad company with a defective brake staff, when it knew, or should have known, of such defect. At the conclusion of the evidence, the court instructed the jury to find for the manufacturing company, but submitted the case to the jury as to the railroad company. The jury returned a verdict for plaintiff against the railroad company, upon which judgment was entered. The railroad company, having paid off the judgment, brought suit against the manufacturing company to recover the amount paid. It was shown that the railroad company had ordered from the manufacturing company a number of gondola cars, including the one in question; that this particular car, when received by the railroad company, had been inspected by it; and that the men who made the inspection did not discover the defect in the brake staff, which was a defective weld covered over with paint. The car, after being loaded with bricks, was again inspected by two servants of the railroad company, who did not discover any defect in the brake staff because of the paint. The car was then sent to another place, and was being shifted in the yard, preparatory to being sent out, when the brakeman, in attempting to set the brake, was thrown off the car when the brake rod parted at the defective place, which was some distance below the brake wheel. Judgment was rendered in favor of plaintiff, and on appeal by defendant the court affirmed the judgment, holding that the evidence of negligence on the part of defendant was sufficient to sustain the finding of the jury, and that the primary negligence, as to the defective brake, was in the manufacturing company, the negligence of the railroad company, in failing to discover the defect, being merely secondary, so that the railroad company was entitled to recover over against the manufacturing company. Pullman Co. v. Cincinnati, N. O. & T. P. R. Co., 147 Ky. 498, 144 S. W. 385 (1912).

G. Railroad company and its employee.

In the case of Mayberry v. Northern Pac. R. Co., 100 Minn. 270, 12 L. R. A. (N. S.) 675, 10 Ann. Cas. 754, 110 N. W. 356 (1907), in which the action, which was for wrongful death, was brought against a railway company and certain of its employees jointly, for negligent causation of the death, the principal question related to a contention of the defendant that there was an improper joinder of parties. In disposing, however, of the case, in a decision sustaining the overruling of special demurrers to the complaint, the court touched upon the subject of the present note in the following language: "There is, it is true, a general rule that the right of contribution does not exist as between joint tort-feasors; but it applies only between persons who by concert of action intentionally commit the wrong complained of. Where there is no concert of action in the commission of the wrong, the rule does not ap-

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charge his duty in ascertaining whether the train of the railway company was coming over the crossing, and that such failure was a proximate cause of the injuries sustained; that the railway company failed to keep a flagman stationed at the crossing in question at the time of the collision, contrary to an ordinance of the city of Neenah, and was guilty of want of ordinary care in failing to do so, but that such want of ordinary care was not a proximate

ply. In such cases the parties are not *in pari delicto* as to each other, and as between themselves their rights may be adjusted in accordance with the principles of law applicable to the relation in fact existing between them. The rule does not apply to torts which are the result of mere negligence."

H. Railroad company and its contractor.

1. Injury to passenger.

The plaintiff railway company sought to recover against the defendant contractor the amount of a judgment recovered against the railway company by one who had sustained injury as a result of the derailment of one of the railway company's cars caused by its running into a pile of sand which had been left on the track by the defendant in violation f certain stipulations in the latter's contract with the railway company. In the case determining the liability of the railway company to the third person it had been contended by the company that there was no negligence shown on its part, and it had been judicially determined that "The mere presence of the sand upon the track was no menace to the plaintiff. If the cars had not been moved, the plaintiff would not have been injured. It was the alleged negligent movement of the cars over the accumulated sand which caused the injury." To sustain its claim in the present action the plaintiff company contended that the defendant contractor had been negligent in leaving the sand on the track. Affirming judgment entered on a verdict directed for the defendant, the court said: "We think it * * * clearly appears and is established that the plaintiff and the defendant were joint tort-feasors. As between actual joint tort-feasors the law will not enforce contribution or indemnity." The court then expressly recognized the existence of exceptions to the general rule stated, referring to its prior decision in the case of Hart Tp. v. Noret (Mich.), V, *ante;* but adding that the instant case did not, in the court's opinion, come within any of the exceptions; the plaintiff company having been convicted in the prior suit of active negligence. Detroit, G. H. & M. R. Co. v. Boomer, 194 Mich. 52, 160 N. W. 542 (1916).

2. Locomotive engineer killed.

A locomotive engineer was killed as the result of collision of his engine with earth and rock thrown upon the track by contractors excavating preparatory to the laying of an additional track. In a suit by the administratrix of the deceased against the contractors, the trial judge instructed upon a certain hypothesis that the defendants would stand in the position of independent contractors and that the railroad company would not be liable for negligence of the contractors. In the course of a decision affirming a judgment against the contractors the supreme court of appeals, while conceding that the

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cause of the injuries; that the railway company was operating its train at a speed in excess of 12 miles per hour in approaching the crossing and within 20 rods thereof, but that such excessive speed was not a proximate cause of the injury, and that the engineer did not fail to exercise ordinary care in the operation of his engine as he approached the point of collision; that the railway company or its officers, servants or employees were not guilty of want of ordi-

trial court had erred in giving the instruction, held that the error was not prejudicial and hence not a ground for reversal, because of the rule "that joint tort-feasors are jointly and severally liable, but that no right of contribution exists among them, or remedy over by one against the other." Walton, Witten & Graham v. Miller's Adm'x, 109 Va. 210, 132 Am. St. Rep. 908, 63 S. E. 458 (1909).

3. Employee of contractor injured.

As the result of negligence on the part of subcontractors in the construction of a railroad, one of their employees was injured. He sued the railroad company and recovered. Subsequently the railroad company, having paid the judgment, brought action against the insurer of the subcontractors. In this action, by an amendment to the complaint summons, the chief contractor was made a party plaintiff. It was alleged and not denied that he had reimbursed the railroad company with respect to the payment of the judgment against it, and recovery was asked on behalf of the chief contractor, who happened to be a member also of the firm acting as subcontractors, against the defendant insurer on the policy. On appeal from a judgment in the plaintiff's favor the defendant insurer raised the point that it had not agreed in its policy to be responsible on the contract of the chief contractor to hand over the railroad to the corporation free from liability for damages to employees. The question of indemnity became material in the disposition of this part of the case, and the court held that the defendant insurer, by paying the judgment and taking the receipt of the chief contractor, would be fully protected against any action by the subcontractors, since the latter were indebted to the chief contractor for the payment made by him to the railroad corporation, and that the receipt from the railroad corporation to the chief contractor would show "a valid debt" against the subcontractors, even had the chief contractor not been a member of the partnership operating as subcontractors. The judgment rendered was affirmed. Black Mountain R. Co. v. Ocean Accident & Guarantee Corp., 175 N. C. 566, 96 S. E. 25 (1918).

4. Team frightened by pile of rails.

Plaintiff sustained personal injuries from the frightening of his horses at steel rails while at the intersection of a street and the defendant railroad, and sued the railroad company and a building company to recover damages for his injuries. The railroad company answered by way of denial, and also specially, alleging that it had contracted with a construction company to build an extension of its road, and that under the contract these steel rails were furnished; that the construction company had contracted with the building company, and the building company, under the contract had executed a bond, payable to the construction company,

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nary care in permitting box cars to remain south of Commercial street crossing on the center track of the defendant railway company at the time of the collision; that the damages sustained by Frederick were $7,425 and by Schneider $4,200; that the assignment of the claims of Frederick and Schneider were taken by the plaintiff; and that the plaintiff is the real party in interest. The court below on motion changed the answers of the jury to the effect that

with a casualty insurance company as surety thereon, and prayed that the construction company and the bonding company be made parties defendant, and asked for a judgment over against those companies. The construction company answered, praying for judgment over against the building company and the bonding company, on the contract and bond executed to it by the building company. The court found that the railroad company maintained its track intersecting the street in question, where the accident occurred; that the building company contracted with the construction company for the construction of an extension of the railroad company's line; that during the life of such contract the railroad company permitted the building company to use, and acquiesced in the use of, its old line of railway at the street intersection in question; that prior to the accident the building company, with the permission, acquiescence, and consent of the railroad company, permitted the street at the railroad intersection, and particularly the public crossing thereof, to become blockaded and in a bad and unsafe condition for travel, by piling and permitting to be piled in the street and upon the crossing large piles of steel rails, and in placing and permitting to remain in the street, in and upon the crossing, a portion of an old wagon frame; that such street and public crossing, by reason of the steel rails being piled thereon, and by reason of said wagon frame upon the same, was in an unsafe condition at the time of the accident in question; that the street and crossing was not in the condition at the time of the accident that it was prior to such obstruction by the railway; that the condition of the street before the crossing thereof by the railway was good and safe, with no obstruction in the street nor upon the crossing; that on the day of the accident plaintiff was traveling along the street in question which crossed the railway where the accident occurred; that plaintiff was riding a gentle horse, and believed that he could cross without injury to himself; that on account of the condition of the street and railroad crossing plaintiff's horse became frightened, fell with plaintiff, and becoming entangled in the wagon hounds, and being frightened at the rails, and not having sufficient room on the crossing by reason of its said condition, plaintiff was unable to control his horse and was injured by falling from the horse and into the wagon frame; that the building company and the railroad company were negligent in permitting the crossing and street to be in such condition at the time plaintiff was injured; that the negligence of such defendant was the direct and proximate cause of plaintiff's injuries, and that plaintiff was not guilty of contributory negligence. By the conditions of the bond, the bonding company was not made liable for the railroad company's or the construction company's negligence. By statute railroad companies had the right to cross streets with their

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the plaintiff was not the real party in interest and that the excessive rate of speed was a proximate cause of the injury.

The vital points in controversy in this case are: (1) Was Ellis or the traction company the real party in interest; (2) is the finding of excessive speed supported by the evidence; (3) was the court right in changing the answer of the jury on the question of proximate cause; (4) was the traction company entitled to contribution.

roads, but were charged with the duty to keep such crossings in repair, and not to impair their usefulness. The contract between the railroad company and the construction company provided that the construction company should provide all grounds for the deposit of material when not within the limit of the railroad company's land. Plaintiff recovered a judgment against the railroad company and the building company, but judgment was rendered in favor of the construction company and against the building company and the bonding company. The bonding company and the railroad company appealed. The court, in affirming a judgment for plaintiff against the railroad company, the building company and the construction company, but reversing the judgment as to the bonding company, held that the duty of the railroad company as to the street crossing could not be shifted to an independent contractor; that if the railroad company permitted, and the construction company and the building company acted with it in the matter of causing the obstruction complained of, they might be held jointly liable; that the railroad company, the construction company and the building company were joint tort-feasors, between whom there could be no contribution; and that the proximate cause of the injury was the negligence in placing the steel rails in the street, rendering it unsafe as a crossing. Quanah, A. & P. Ry. Co. v. Goodwin, — Tex. Civ. App. —, 177 S. W. 545 (1915).

5. Stone thrown upon adjoining land.

Plaintiff sued a railroad company to recover damages for stones thrown upon his premises during the construction of its line of road. The railroad company answered by general denial, and pleaded specially that the damages suffered by plaintiff, if any, were done by an independent contractor employed by the railroad company to construct its line of road, over whom the railroad company had no control, except as to the result of the work done. The court found that the injury complained of was occasioned by the contractors, who were independent contractors in the construction of the road through the premises of plaintiff. The railroad company dismissed its cross-action as to the contractor, but not as to the surety of the contractor. Plaintiff contended that wherever an independent contractor, in the prosecution of his work, must exercise in whole or in part, a franchise granted by the legislature to his employer, the company must answer for his torts, because it was bound to see to the correct execution of the powers conferred by the legislature. Judgment was rendered for plaintiff against the railroad company for $145, and in favor of the railroad company over against the surety of the contractor, from which judgment the railroad company appealed. In reversing the judgment and remanding the cause, the court held that the contractor was not exercising any franchise granted to the railroad company; that

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1. Separate suits were brought by the injured parties, Frederick and Schneider, against both the railway company and traction company. The Schneider suit was tried, a verdict rendered against the traction company, and the case afterwards discontinued, a nonsuit having been granted as to the railway company. It seems that upon the trial of the case no evidence was offered regarding the negligence of the railway company. Afterwards the plaintiff, Ellis, purchased

the railroad company was not responsible for the damages sustained by plaintiff, and that if the damages to plaintiff resulted from the wrongful acts of an independent contractor of the railroad company, the contractor was liable therefor. Stephanville, N. & S. T. R. Co. v. Couch, 56 Tex. Civ. App. 336, 121 S. W. 189 (1909). For companion case, see Stephanville, N. & S. T. R. Co. v. Carter (Tex. Civ. App.), 121 S. W. 192 (1909).

I. Railroad company and adjoining owner.

1. Flooding of land.

Plaintiff sued the defendant railroad company and the defendant cement company as joint tort-feasors in causing water to back upon his land, by means of a dam and obstructions placed in the river, which resulted in damages to plaintiff's land, crops, etc. The railroad company pleaded in defense that if plaintiff suffered damages, it was on account of the obstructions placed by the cement company, and prayed for judgment over against the cement company. The cement company answered denying generally that it did anything to cause the flooding of plaintiff's land, and that if flooded it was because of the embankment of the railroad company. The findings of fact disclosed that the defendant railroad company, for the purpose of protecting the pier of its bridge, constructed a wing dam across the channel of the river, a portion of the dam reaching into the state of Texas; that said dam was a short distance below the property of plaintiff; that the result of the construction of the dam was to change the channel of the river from the west to the east bank thereof; that the defendant cement company constructed certain fills and dams in the river opposite to the wing dam of the railroad company; that as a result of the two constructions, the water was impeded in its flow so that silt therein was permitted to settle in the bed of the river between the two obstructions, and on the land of plaintiff, and thereby to raise the bed of the river and the water level at all times, and especially at high water periods, whereby during the flood season of the river the waters of the river were caused to back up and to flow over onto plaintiff's land, injuring the same and destroying his growing trees, crops, etc. The court gave a peremptory instruction to find against the defendant railroad company on its cross-action against the cement company. Plaintiff recovered a verdict and judgment against the railroad company for $1,333.33, and against the cement company for $2,666.67, from which defendants appealed. The court, in affirming the judgment, held that it was not a case in which the doctrine of contribution between joint wrongdoers could be invoked; and that if the railroad company was guilty of such wrong as would authorize the recovery against it, it could not recover against the cement company as a joint tort-feasor. Southwestern

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the claims of Frederick and Schneider, took an assignment thereof, borrowed the money from the traction company, and gave his note therefor and paid said injured parties the amount agreed upon as consideration of the purchase.

The plaintiff was a stockholder in the traction company, and of course was interested in it. Undoubtedly the belief on the part of the plaintiff that the purpose of the injured parties was to collect

Portland Cement Co. v. Kezer, — Tex. Civ. App. —, 174 S. W. 661 (1915).

The defendant railroad company, having acquired by condemnation proceedings a right of way across a mill race belonging to the plaintiff, so conducted construction work in the building of a bridge across the mill race as to obstruct the flow of the water, with the result that it overflowed the banks and damaged property of another railroad company, the tracks of which ran parallel with the mill race and on a level some 40 feet below. The railroad company whose property was damaged sued the plaintiff herein, the owner of the mill race, and recovered in the amount of $3,870.90. This judgment the plaintiff paid in full, and subsequently brought an action against the defendant railroad company to recover over. It seems to have been alleged in the petition that the recovery in the prior suit against the plaintiff was had upon the ground of negligence on the plaintiff's part. The trial judge submitted the present case to the jury upon the theory that although ordinarily there is no right to contribution in favor of one tort-feasor against another, yet there are exceptions to this rule, and contribution may be enforced in cases presenting a situation similar to those in which "a municipality is required by law to keep its streets and public ways free from nuisance, and in proper condition for use by the public, and has been obliged to respond in damages at the suit of one injured * * * in front of the premises of a person whose duty it was primarily to keep such walk in proper repair." The trial resulted in a verdict and judgment for the plaintiff. On appeal the circuit court affirmed the judgment, holding that the case fell within such exceptions as those indicated in the instructions given by the trial court, the defendant being primarily liable for the damage done, on the principle of the case of Fletcher v. Rylands, 1 Law Rep. Exch. 265, in accordance with which principle a recovery could have been had against the defendant by the person damaged by merely showing that the defendant "had upon its property this water, which was liable to overflow, and did overflow," causing the damage, "without showing any other negligence" on the part of the defendant. Northern Ohio Ry. Co. v. Akron Canal & Hydraulic Co., 28 Ohio Cir. Ct. 51 (1905). The judgment was affirmed by the supreme court. Northern Ohio Ry. Co. v. Akron Canal & Hydraulic Co., 75 Ohio St. 620, 80 N. E. 1130 (1906).

2. Injury to railroad employee by object near track.

A switchman, while on the top of a car setting the brakes, was struck and knocked from the car and injured by a pipe constructed over the railroad track by a smelting company. He sued both the railroad company and the smelting company to recover damages for his injuries, alleging as negligence on the part of the smelting company that it erected its pipe too close to the top of the cars, and, as

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both claims out of the traction company and save the railway company harmless had an influence upon him in purchasing the claims. It is true, as conceded by counsel for the railway company, in his brief, that the evidence respecting the assignment to the plaintiff is undisputed. This evidence shows that Ellis purchased the claims in his own right and at his own risk, and without any agreement or understanding that he should be indemnified in any way by the

negligence on the part of the railroad company, that it failed to warn plaintiff of this danger. Both defendants answered by general denial and pleas of contributory negligence and assumption of risk. The smelting company pleaded by way of cross-action against the railroad company, denying any duty on its part with reference to plaintiff, denying that it was guilty of any negligence contributing to plaintiff's injury, alleging that the injury resulted through omissions of duty on the part of the railroad company, and asking for judgment over against the railroad company in case a judgment was rendered in favor of plaintiff against the smelting company. It appeared that the track in question was constructed by the railroad company through the smelting company's premises by permission of the latter and for its benefit; that the track was constructed prior to the erection of the pipe over the track which struck plaintiff; and that the railroad track could not well have been changed to adjust it to the overhead pipe; that the rails and ties in the track belonged to the railroad company; and that by agreement with the smelting company the railroad company was bound to keep the track in good condition. Plaintiff recovered a judgment for $6,500 against the defendants jointly and severally, and the smelting company alone appealed. In affirming the judgment, the court held, that it was the duty of the smelting company, after authorizing the laying of the track and the operation of trains over it, to conform its conduct to what was due regard for the safety of those operating trains thereover; that if its conduct with reference thereto did not amount to ordinary care with respect to plaintiff, it was liable for his injury, and was an active wrongdoer; that the negligence of both the smelting company and the railroad company being the proximate causes of plaintiff's injury, there could be no right of contribution as between them; that the understanding between the smelting company and the railroad company that the railroad company should keep the track in good condition and repair, did not contemplate that the railroad company should interfere or remedy structures erected by the smelting company, or change its track to avoid such structures erected after the track was constructed; that both defendants, by negligently suffering the dangerous conditions to remain, assumed full and equal responsibility for all damage proximately resulting to the plaintiff from such act, as joint tortfeasors. Consolidated Kansas City Smelting & Refining Co. v. Binkley, 45 Tex. Civ. App. 100, 99 S. W. 181 (1907).

The plaintiff railroad company brought suit for indemnification against the defendant company, operating an oil mill, for the recovery of the amount of a judgment paid by the railroad company for the death of one of its own employees. It appeared that the oil mill company maintained a dangerously low shed at a point over the private track from

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traction company, or any one else. The evidence shows that the matter of indemnity came up and was discussed between plaintiff and the attorney for the traction company, and it was distinctly stated that if plaintiff purchased the claims he must do so at his own risk. The transaction was in writing, and on its face showed a bona fide sale of the claims to the plaintiff and payment by him. True, plaintiff borrowed the money from the traction com-

the plaintiff's road to the mill, and that on a dark and rainy night while cars were being switched on such track and under the low shed, the employee was struck and killed. The railroad company provided no lights "to indicate the presence of the shed," and though having full knowledge that the shed was so dangerously low as to constitute a menace to its operatives, it gave no warning thereof to the deceased. The case was tried by agreement before the court without a jury, and judgment was rendered for the defendant, from which the plaintiff excepted. The court in sustaining the exceptions said that where one of two or more joint tort-feasors was compelled to satisfy damages arising from a jointly tortious transaction, he could not, as a general rule, maintain an action for either contribution or indemnity over against those connected with him in the tort; but that if the liability of the tort-feasor in the original suit arose merely from negative acts or omissions on his part, and the proximate cause of the injury, so far as the joint tort-feasors were concerned, was an act of positive negligence on the part of the other tort-feasor, in which the original defendant had in no way participated, then an exception to the general rule existed. The court held, however, that the act of the railroad company in voluntarily operating its train along the private track and under the low shed did not amount to mere passive acquiescence in the negligence of the defendant in maintaining the shed in a dangerous condition, but was such active, positive and negligent conduct as to be the proximate cause of the injury. Central of Georgia Ry. Co. v. Swift & Co., — Ga. App. —, 98 S. E. 256 (1919).

J. Railroad company and licensee using its car.

A mill company against which a judgment had been rendered for $3,300 under a wrongful death statute, and also for conscious suffering of the deceased, in the sum of $200, sought recovery over against the defendant railroad company, counting in part upon alleged negligence of the defendant in delivering a loaded coal car to the plaintiff, knowing that the plaintiff would move it by horses on tracks upon its premises, there to unload it and afterwards to return it to the defendant; the car being in a defective condition, as a result of which, while the plaintiff was moving it, the death involved was brought about. In an additional count the plaintiff relied upon implied assumpsit. The case came before the supreme judicial court on report from the superior court, where a demurrer to the declaration had been overruled. The court considered first the count relating to recovery for the death, and held that under the governing statute the recovery was punitive in its nature and brought the case within the established rule that as between two joint wrongdoers, chargeable with culpability, no contribution could be enforced. The court said in part: "It is an unavoidable consequence of

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pany and gave his note therefor. The evidence being undisputed and showing a valid transaction, the only question left was one of intention as to whether the transaction was bona fide, and clearly that was a question for the jury which was resolved in favor of the plaintiff. Hoff v. Hackett, 148 Wis. 32, at page 34, 134 N. W. 132; Northwestern I. Co. v. Industrial Commission, 154 Wis. 97, at page 104, 142 N. W. 271, L. R. A. 1916 A 366, Ann. Cas. 1915 B 877.

the proposition that the damages recovered for death * * * are punitive and not compensatory in character, that the employer, who has been punished by paying the amount of a verdict against him, cannot recover over from one who has contributed to the wrongful conduct on which that verdict was founded. The employer has been required to pay simply damages proportioned to his own wrong and nothing more. Plainly he has not been compelled to pay for the wrongful conduct of any one else for which he is in no way blameworthy. It would be almost a contradiction in terms to say that one could recover over from another a penalty to which he has been subjected for his own wrongdoing. It would be directly contrary to the theory on which recovery over is allowed in the cases discussed in the final branch of this opinion. The idea of a penalty or punishment excludes liability on the part of anybody except the wrongdoer. * * * The general principle of law is too well settled to require an extensive citation of authorities, that one of several wrongdoers cannot recover either proportionally or wholly from another wrongdoer, although he may have been compelled to pay all the damages for the wrong done. * * * The exception to this rule * * * permits recovery over where the tort-feasor seeking contribution from another tort-feasor as between the two is free from moral delinquency, and where damages have been assessed with reference to the injuries done to the original plaintiff by the wrong to which all the joint wrongdoers have contributed. That is a plain and simple exception to a general rule. It is easily understood and applied. To extend the exception to cases where the greater the culpability of the delinquent seeking contribution, the greater is the sum the codelinquent shall be compelled to pay, and where the degree of culpability of the former may be in inverse ratio to the culpability of the latter, would go far towards breaking down the rule, and finds no justification in any sound principle of law, and would lead to many cases of manifest injustice.'' With respect to the attempt to recover the amount paid on account of conscious suffering of the deceased, the court said: ''The plaintiff relies upon the well-recognized exception to the general rule that there can be no contribution between joint tort-feasors to the effect that a plaintiff may recover over against other joint tort-feasors, where, although he has been negligent as to third persons in failing to perform a duty cast on him by law, he nevertheless has acted in good faith and has not participated in any wrongful conduct, has shown all the caution which the defendant had a right to expect of him, and has relied upon the defendant to perform his active legal duty of due care, whose decisive and definite act of failure in this respect has exposed the plaintiff to liability to a third person arising from inference of law, without moral guilt on the plaintiff's part and without his sharing in the wrongful cause of

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Where conflicting inferences may be drawn from the facts proved the question is one for the jury. Northwestern I. Co. v. Industrial Commission, *supra*.

The learned trial judge below seems to have labored under the impression that because Ellis was interested in the traction company, and because he conferred with other officers of the company who had full knowledge of the facts that the assignments were required

the injury. * * * It is manifest, however, * * * that this principle cannot apply, because judgment has been recovered against it [the plaintiff] for causing the death of its employee, which could only have been assessed in the substantial amount alleged by reason of active culpability on its part.'' Judgment was ordered for the defendant. Boott Mills v. Boston & M. R. R., 218 Mass. 582, 106 N. E. 680 (1914).

The plaintiff's decedent, while in the employ of the N company, was directed by his superior to load a motor truck onto a car at the depot of the defendant company. While in the performance of this service, he was directed to spot a flat car on which the truck was to be loaded. In accordance with the order so received, he was attempting to move the car with pinch-bars, when without warning other cars were shunted in by the defendant railroad and the deceased met his death. The N company was charged with negligence in failing to keep a lookout and the defendant with negligence in failing to give warning of the movement of the car that was shunted in upon him, it being alleged that the joint acts of negligence were the proximate cause of the death. A peremptory instruction was given to the jury to find in favor of the N company, and on the issues submitted with reference to the liability of the railroad, a verdict and judgment were given in favor of the plaintiff. The defendant appealed, assigning as error that the N company was liable over for any judgment obtained by the plaintiff. The court reversed judgment and remanded the case for new trial on other grounds, but held that the railroad was an active tort-feasor, guilty of affirmative negligence which proximately caused the death, and consequently was not entitled to recover over against the N company. The court pointed out, however, that as the N company had placed the deceased in a dangerous place to work without taking any precautions to guard against the danger incident to the place, an issue of negligence was presented which would authorize recovery against it by the plaintiff. For this reason the court observed that the peremptory charge dismissing the liability of the N company should not be given on the new trial. Rio Grande, E. P. & S. F. R. Co. v. Guzman, — Tex. Civ. App. —, 214 S. W. 628 (1919).

K. Street car companies.

The O street railway company agreed to operate over a section of its tracks certain cars for the B street railway company. The contract substantially provided that the O company should be ultimately liable for damage caused by its negligence, if not due to faulty construction or lack of repair of the cars of the B company; the O company, agreeing upon certain conditions to indemnify the B company for damages suffered by the latter or for which it should be held responsible and which fell within the damage, negligently caused, for which the O

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for the purpose of avoiding any question of contribution, therefore Ellis took the assignments for the traction company, and that the transfer to him was a mere cover. We think the learned trial judge was in error in his conclusion in this regard. The mere fact that plaintiff was interested in the traction company and took the assignments because of such interest and with a view of aiding the traction company did not render the assignments to him void or

company had made itself liable by the contract. The O company, having settled certain damage suits founded upon injury from an accident caused by the joint negligence of the two companies, namely, negligent operation by the employees of the O company and a defective axle in a car of the B company, sought to recover over against the B company. In the course of a decision, on a report of the case from the superior court, that judgment should be entered for the defendant, the court said in part: "The accident in question was due to two causes acting together; the excessive speed of the car due to the negligence of the plaintiff's servants, and the defective condition of the axle of the defendant's car, * * * due to the negligence of the defendant. That is, the accident was due to the combined effect of the negligence of both parties, and cannot be attributed to the negligence of either one of them alone. Under these circumstances, we think it plain that upon that part of the agreement which we have stated the action cannot be maintained. The case is not covered by that clause of the agreement giving to it its broadest construction against the defendant; for at most it dealt only with accidents which were due to the fault of one party rather than of the other. Nor can there be a recovery in tort; for where, as here, both of the parties are at fault, the lot must rest where it has fallen." In the course of its decision the court held also that on account of a clause in the contract providing for the decision, by an arbitrator to be selected, of differences between the parties with respect to liability for accidents due to joint negligence, the question of contribution could not be decided in a court; since the evident intention of the parties was to select an arbitrator for his knowledge not only of the law but also of street railways, so that for the court to decide the questions contemplated in the agreement would be to make judicially a new contract, which the court would not do. Old Colony St. R. Co. v. Brockton & P. St. R. Co., 218 Mass. 84, 105 N. E. 866 (1914).

L. Street railway company and adjoining owner.

Plaintiff, a passenger on the car of a traction company, was injured by coming in contact with an obstruction erected near the street car track, while standing on the step of the car. He sued the traction company, the contractor of the adjoining property owner and the executors of the deceased adjoining property owner to recover damages for his injuries. Plaintiff alleged that the post which struck him was part of a board fence erected within 33 inches of the street car track by the contractor of the adjoining owner at the instance of such owner, the contractor being engaged in the erection of a building for the owner, and that the fence was constructed in the street in violation of an ordinance prohibiting the obstruction of streets. The traction

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ineffectual, if in fact he purchased the claims and took the assignments for himself and at his own risk, even although he might have believed that such purchase would eventually operate for the benefit of the traction company.

Counsel for the railway company refers to the assignment as being a mere cover and fictitious. That is a rather sweeping statement in a case like the present, where the evidence of a valid

company answered by general denial and a plea of contributory negligence, alleged by way of cross-action that the fence was constructed and maintained by the contractor and the adjoining property owner, of whose will two of the defendants were executors, whose negligence was the proximate cause of plaintiff's injuries, and asked that in the event of judgment against it that a judgment for a like amount be rendered in its favor over against them. The contractor answered by general denial and alleged by way of special plea that he erected the fence at the special instance and request of the adjoining property owner, and not as independent contractor; that his contract for the construction of the building did not include the erection of the fence, but he erected it at the instance of the property owner, preparatory to placing an engine in the building to be used in the operation of an electric plant which was being installed therein under another and different contract; that the fence was erected by permission of an ordinance of the city, and that if any one was responsible for plaintiff's injuries, other than himself, it was the traction company and the adjoining property owner. He prayed that the property owner's executors might be made parties defendant, and in event of judgment against him in plaintiff's favor, that he have judgment for like amount over against the traction company and the property owner's estate. The executors answered by plea of not guilty and contributory negligence, denied the erection of the fence by their testator, or under his authority or for his benefit, and alleged that the contractor was an independent contractor, who erected the fence in furtherance of, and performance of, his contract, and prayed that if any of the parties should recover against them, that they have a judgment over against the contractor for the amount so recovered. The evidence showed that the contractor erected the fence in the street and that the fence extended along the street the entire length of the building in progress of erection, and was connected with the building at each end, and inclosed all that part of the street which lay between the fence and such building. The fence was within 3 feet of the street car track, and was constructed and maintained with the knowledge and consent of the owner's agent who was in charge of all matters pertaining to the erection of the building. The material used and the work done in the construction of the fence were paid for by the property owner, through his agent. No ordinance was shown authorizing the building or maintenance of the fence. Judgment was rendered for plaintiff against the executors, and in favor of the contractor and the traction company. The court also found for the contractor under the cross-action of the executors. On appeal the court affirmed the judgments, except that in the cross-action between the executors and the contractor, which was reversed and remanded. As to this

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assignment is shown by undisputed evidence and the claim that it was fictitious based almost, if not wholly, upon the fact of the relations existing between plaintiff and the traction company, and when there is positive evidence, undisputed, that the assignment was taken by plaintiff for himself, in his own right, and at his own risk. Counsel says in looking at such transactions we must look beneath the surface. It will not do, however, in looking beneath

branch of the case the court held that in view of the contention of the executors that the fence was erected and maintained by the contractor, as an independent contractor, for his own use in the performance of his owner or his agent, and the concurrence of either the adjoining owner or his agent, and the contention of the contractor that he placed the fence there, not as an independent contractor for his own use, but in obedience to orders of the owner's agent, to be used in connection with the placing and installing of an engine and appliances in the building, not included in his contract with the owner, and in view of the fact that there was evidence tending to support either contention, the resultant issue was for the jury. If they found for the executors on this issue, said the court, they could have contribution, otherwise not. Moore & Savage v. Kopplin, — Tex. Civ. App. —, 135 S. W. 1033 (1911).

M. Street railway company and operator of vehicle.

One F brought an action against a lumber company and an elevated railway company, to recover on account of injury alleged to have been caused to him by the joint wrong of the two companies, and arising out of a collision between an automobile truck of the lumber company and a car of the railway company. He recovered a joint judgment against the two defendants, and took out execution against both. Later an assignment of the execution was taken in the name of B, an employee of the railway company. A suit in equity was then brought by the lumber company against B, his employer, F and the latter's attorney, to restrain the collection of any part of the execution from the plaintiff. The ground relied upon by the plaintiff in equity was that the assignment was a pretense, that the money for its formal assignment actually had been paid by the railway company, the joint tortfeasor with the plaintiff in equity, and that therefore the execution had in law been satisfied. In disposing of an appeal by the plaintiff from a decree entered in favor of the defendant, the court ruled, substantially, as follows: That in general "there can be no contribution enforced in the court between joint wrongdoers," and if in fact the money of the railway company was used to pay the execution, that company could not collect any part of it from the plaintiff lumber company, either directly, or indirectly through a feigned assignment to a third person; although if, on the other hand, the assignment of the execution was actually bought with the money of a third person acting in his own interest and not as the agent of the railway company, clearly the execution did not become extinguished and might be enforced against either or both of the two companies against which the recovery had been had. Whether the money for the assignment was paid by a third person in his own interest or by the elevated railway company was,

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the surface to brush aside positive, credible evidence and draw inferences contrary to the findings of the jury on such evidence.

There is no doubt but that plaintiff had a right to purchase the claims in question even though he intended to benefit the traction company by so doing. The evidence is ample to establish that he bought the claims in his own right and at his own risk, and the court below was in error in changing the answers of the jury to

the court said, "a pure question of fact" as to which the decision of the trial court would not be disturbed, there being evidence, in the court's opinion, warranting the result reached by the trial court. In concluding its opinion the court said that the decisive facts and the propriety of the decree dismissing the bill were not affected by a finding made by the judge that the prevailing motive of most of the parties connected with the assignment was to aid in avoiding such a disposition of the execution that the plaintiff should escape all liability upon it, and that the execution would be enforced against the railway company for whatever portion should not be obtained from the lumber company. "A motive to use legal means to make joint tort-feasors contribute to the payment of damages flowing from a wrong in which they have participated contravenes no policy of the law." George W. Gale Lumber Co. v. Bush, 227 Mass. 203, 116 N. E. 480 (1917).

In Forsythe v. Los Angeles R. Co., 149 Cal. 569, 87 Pac. 24 (1906), the action was by the administratrix of one who had been killed as the result of a collision between a street car and a loaded wagon belonging to a storage company. The suit was against both the street railway company and the storage company. The trial court, sitting without a jury, allowed recovery against the street railway company, but rendered judgment in favor of the storage company. In support of an appeal by the street railway company, it was in part contended that even if the judgment against that defendant could be considered correct, still the trial court erred in not rendering judgment against the storage company also, since, as it was claimed, the evidence showed that the latter defendant was also guilty of negligence contributing to the injury. On this phase of the case the court, however, in the course of a decision sustaining the judgment rendered as against the street railway company, held that that defendant was "not a party aggrieved by the refusal of the court to give judgment against the storage company, even if such refusal could be considered erroneous as against plaintiff. It is beyond doubt the well-established general rule," the court continued, "that there is no right of contribution between joint tort-feasors. Appellant contends that this rule has been changed by section 709 of the Code of Civil Procedure; but we do not think so. That section does not pretend to deal with the matter of the right of contribution between tort-feasors. Its plain intent is to simply provide that, when there is a judgment against two or more defendants who are entitled to contributions from each other and one pays the whole or more than his proportion thereof, 'the person so paying or contributing is entitled to the benefit of the judgment to enforce contribution or repayment, if within ten days after his payment he files with the clerk,' etc. It simply gives to a judgment debtor entitled to contribution the summary remedy of using the judg-

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the seventeenth and eighteenth questions of the verdict. Kroger v. Cumberland F. P. Co., 145 Wis. 433, 441, 130 N. W. 513, 35 L. R. A. (N. S.) 473; Habeck v. Chicago & N. W. R. Co., 146 Wis. 645, 652, 132 N. W. 618, Ann. Cas. 1912 C 485; Kersten v. Weichman et al., 135 Wis. 2, 4, 114 N. W. 499; Karlen et al. v. Hadinger, 147 Wis. 78, 79, 132 N. W. 591.

ment itself to enforce the contribution, and relieves him of the necessity of pursuing some more tedious and inadequate proceeding for enforcing said contribution. It is only an amendment to the law of procedure; and the general rule is that an amendment to or provision in the law of procedure does not change the substantive law, unless the language used necessarily leads to that result. And it certainly cannot be said that the legislature while enacting section 709 as a part of the law of procedure necessarily intended to change, or did change, the fundamental principle that there is no right of contribution between joint tort-feasors." A rehearing of the appeal was denied.

Plaintiff sued a street railroad company and an ice company for personal injuries sustained when a team belonging to the ice company became frightened by collision with a street car and ran into plaintiff's buggy. Plaintiff alleged negligence as to both the railroad company and the ice company; against the railroad company, in that it was operating its car at the time at a high rate of speed, and that the motorman saw, or, by the exercise of ordinary care, could have seen, that the ice wagon was going upon the track in front of the car, in time to have avoided colliding with it; and against the ice company, in that the driver of the wagon saw, or, by the exercise of ordinary care could have seen, that the street car was approaching in such close proximity that a collision would occur if he attempted to drive across the track in front of the car, in the manner that he did; and that the combined negligence of the railway company and the ice company was the proximate cause of the injuries. The street railroad company answered by general denial, and alleged that the negligence of the ice company was the proximate and sole cause of plaintiff's injuries, in that the ice wagon was being driven parallel with the track, at a safe distance therefrom, when the driver suddenly turned across the track in such close proximity to the car that it was impossible to stop the car in time to avoid colliding with it, after discovering the intention of the driver so to do; that after such discovery the motorman did all he could to stop the car; and that the car was being operated at a proper speed. The ice company answered by general denial, and alleged specially that the negligence of the railroad company was the proximate and sole cause of plaintiff's injuries, in that the driver of its wagon exercised proper care, and that the railroad company ran its cars down grade at a rapid and dangerous speed, and that the motorman, although he saw the wagon and team crossing the track in time to have avoided the collision, did not sound the gong, but ran into the wagon and team and frightened the horses, causing them to break away and run against plaintiff's buggy. The court sustained a general demurrer to the cross-action of the ice company against the railroad company. The court affirmed the judgment as to plaintiff, but re-

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2. The jury found that the defendant railway company was running at an excessive rate of speed, viz., in excess of 12 miles per hour at the time of the collision. The court below sustained this finding of the jury. There is evidence on the part of the railway company that the speed limit was not exceeded, while on the part of the plaintiff there is evidence tending to show that it was. The evidence upon this question being conflicting, under well-established

versed it as between the street railroad company and the ice company, and remanded the cause as to them, for error of the court in refusing to allow the ice company to prove that the president of the street railroad company admitted to the secretary of the ice company that it was responsible for the injury, both to plaintiff and the ice wagon, saying: "Where one party has, by his negligence, brought about a condition, and another party is guilty of negligence in not recognizing and acting upon such condition, and a third party, without negligence, is injured by reason of the joint negligence of the two parties, he may recover against both; and, as between the injured innocent party and the joint wrongdoers, there will be no inquiry as to the comparative negligence of the two, and no apportionment of damages based on such comparison. In such case, the negligence of both of the parties is the proximate cause of the injury to the innocent party. But as to the two negligent parties, if the negligence of one was merely passive, or was such as only to produce the occasion, and the other negligent party was the active perpetrator of the wrong, the former may recover over against the latter. As between the two negligent parties, the negligence of the active perpetrator of the wrong would be the proximate cause of the injury to the party whose negligence did no more than produce the condition." Austin Electric R. Co. v. Faust, 63 Tex. Civ. App. 91, 133 S. W. 449 (1911).

19 N. C. C. A.—15

N. Electric light companies.

The defendant's high tension wire crossed the plaintiff's wire over a street. The defendant negligently allowed its wire to sag and come in contact with the plaintiff's wire, so that it charged the latter wire with a high voltage, burning it in two, so that it fell upon the street, striking and killing the horse of one M. The latter sued both companies, and the plaintiff company was required to pay a judgment for damages. The present action was brought to enforce indemnity, upon the ground that the defendant's negligence was the primary cause of the damage. It was found by the jury that the negligence of the defendant caused the death of the horse, while the plaintiff was in the exercise of due care. The trial judge, however, set aside the verdict, ruling that the prior judgment established negligence on the part of both companies and that the case therefore came within the rule that one joint tort-feasor may not recover over against the other. A judgment of dismissal followed. In passing upon an appeal by the plaintiff the appellate division of the supreme court said: "If this plaintiff had sued the defendant for negligently causing and permitting its wire to fall upon the plaintiff's wire and injuring it, a recovery would have followed. Such recovery would make it clear that as between the parties the defendant's negligence caused the injury. The McMahon case only determined that he might recover against both of the

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rules we cannot disturb the finding of the jury and the court below in this regard.

3. It is further contended by counsel for the railway company that the finding of the jury on the tenth question of the special verdict, to the effect that the excessive rate of speed was not a proximate cause of the injury, should not have been changed. The court below found that the excessive rate of speed was a proximate

parties for the loss of the horse. No other question was before the court. The question here is whether both McMahon [the plaintiff in the prior suit] and the plaintiff were injured by the same negligent act of the defendant. If this defendant was negligent in allowing its wire to sag, it is evident that the plaintiff might have adopted some precautions to protect the public, and it owed some duty to the public under such circumstances; but as between it and the defendant it could rest upon its right and was not required to make structures to protect itself from defendant's negligence." The judgment and the order setting aside the verdict were therefore reversed, and judgment on the verdict of the jury was directed for the plaintiff. Hudson Valley R. Co. v. Mechanicville Electric Light & Gas Co., 180 N. Y. App. Div. 86, 167 N. Y. Supp. 428 (1917).

O. Electric light company and telephone company.

1. In general.

The plaintiff in substance alleged: That it was an electric light and power company and had for many years maintained a line of poles and wires for the transmission of electricity; that subsequent to the construction of this line the defendant erected a telephone line which at a certain point crossed the line of the plaintiff, above the wires of the latter; that the wires of the defendant were insecurely attached to the roofs of wooden buildings, instead of to poles; that one of the buildings to which the wires were attached was destroyed by fire, and at the point of crossing that has been mentioned a telephone wire of the defendant sagged and came in contact with a live wire of the plaintiff; and that a current of electricity passed into the wire of the defendant, with the result that one H was injured thereby. It was further alleged that at the time of the accident the wires of the defendant were unused and without electric connection; that the defendant had been directed by the municipal authorities to take them down, but had neglected and refused so to do; that the plaintiff was ignorant of the condition of the defendant's wires; that the injury resulted solely from the negligence of the defendant; and that H, the injured person, had recovered a judgment against the defendant and the present plaintiff, which judgment, by reason of an unjust and collusive arrangement between H and the defendant, had been collected from the plaintiff. A demurrer to the complaint interposed by the defendant was overruled, and further action, not material here, was taken. An appeal presented for decision the question whether the complaint stated a cause of action. In holding that it did, and that an interlocutory judgment entered after the overruling of the demurrer should be reversed, the court said in part: "The ground taken by the defendant is that the injury was caused by the joint negligence of the plaintiff and defend-

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cause of the injury. Counsel for the railway company criticises this finding on the ground that there is no finding as to how much such speed exceeded 12 miles per hour. A careful review of all the evidence shows that the excessive rate of speed was sufficient to cause the collision. It quite clearly appears that had the train been running 12 miles per hour only the street car would have passed the zone of danger several seconds before the engine reached the point

ant, that they were joint wrongdoers, and therefore neither is entitled to indemnity or contributions from the other. The rule that one of two joint tort-feasors cannot maintain an action against the other does not apply to a case where one does the act or creates the condition, and the other does not join therein. In such a case the parties are not *in pari delicto* as to each other, though as to third persons either may be held liable. * * * The complaint in the present case alleges that the plaintiff was not negligent, and the facts alleged show that, if it was in fault, it was a fault not actually connected with the fault or wrong for which the judgment was rendered, and that the negligence of the defendant was the prime and efficient cause of the injury. It is obvious that the plaintiff under these averments would be entitled to give the necessary evidence to establish its cause of action." Fulton County Gas & Elec. Co. v. Hudson River Tel. Co., 130 N. Y. App. Div. 343, 114 N. Y. Supp. 642 (1909), rev'g 60 N. Y. Misc. 247, 113 N. Y. Supp. 22 (1908). A motion for leave to appeal to the court of appeals was subsequently granted [131 N. Y. App. Div. 919, 115 N. Y. Supp. 1121 (1909)], and certain questions were certified. They did not, however, place properly before the court of appeals the question under present discussion, so that the decision of that court, affirming as to certain matters the decision of the appellate division of the supreme court, is not material here. Fulton County Gas & Elec. Co. v. Hudson River Tel. Co., 200 N. Y. 287, 93 N. E. 1052 (1911).

2. Telephone company employee injured or killed.

The plaintiff, an electric light company, sued defendant, a telephone company, to enforce contribution for a judgment for personal injury obtained against plaintiff and defendant by an employee of the telephone company, which judgment the plaintiff light company had paid. The action by the injured employee, in charging joint negligence against plaintiff and defendant, alleged that for many years prior to the accident plaintiff had maintained its poles and wires in a certain street; that some time before the accident, defendant had negligently and carelessly strung one of its telephone wires leading into a certain residence in such close and dangerous proximity to its heavily charged uninsulated electric wires of the light company as to cause the telephone wire to come in contact therewith and thereby transmit a current of electricity through the telephone wire, which resulted in the death of the telephone company's employee, and that the negligent acts of the telephone company and the light company were the direct, concurrent, proximate and efficient cause of the employee's death. In the personal injury action, plaintiff recovered judgment against the light company, and appealed from a judgment for the telephone company, which judgment was affirmed, on appeal, on the ground that the employee had assumed

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of collision and no collision would have occurred. Upon the established facts we hold that the excessive rate of speed, in violation of law was a proximate cause of the injury. It having been established that the railway company was violating the law (St. § 1809) in running at an unlawful rate of speed when the collision occurred, negligence *per se* on the part of the railway company was established. Ludke v. Burck, 160 Wis. 440, 152 N. W. 190, L. R. A.

the risk of the injury. Defendant, in the suit for contribution, appealed from a judgment for plaintiff, and the court, in reversing the judgment, held that the judgment of the circuit court in the action for personal injuries against the light company must be deemed conclusive of its negligence; and that it was not entitled to recover a judgment for contribution. Cumberland Telephone & Telegraph Co. v. Mayfield Water & Light Co., 166 Ky. 429, 179 S. W. 388 (1915).

Plaintiff, a lineman for a telephone company, in removing a rope which had fallen upon and become entangled with a high voltage wire of a light company beneath the wires of the telephone company, was injured by an electric shock communicated through the rope. He sued both the telephone company and the light company for such injuries. The poles of the two companies were situated on the same side of the street, and in line with each other, the wires of the telephone company being about 10 feet above the wires of the light company. At the time of the injuries complained of plaintiff had been removing a dead wire from the telephone pole, under direction of the telephone company's vice principal. The rope used by plaintiff in his work upon the telephone pole fell upon the high tension wires of the light company, and he went upon the eaves of an adjoining building to remove the rope therefrom. The rope, in use and exposure to rain had become wet, and was in contact with the light company's high tension wires at a place where the insulation had been worn off or removed, and when plaintiff took hold of the rope to remove it he received a severe electric shock which caused the injuries for which he brought suit. There was an arrangement between the light company and the telephone company whereby the light company, if so requested by the telephone company, would cut off the current from its wires while the employees of the telephone company were engaged in their work. Immediately after the accident, the foreman of the telegraph and telephone company procured the removal of the current from the light company's wires. Plaintiff recovered a judgment against the telephone company, but judgment was rendered in favor of the light company, and the defendant telephone company appealed. The court of civil appeals, in affirming the judgment, held that the telephone company had no right of recovery over against the light company, if plaintiff was not entitled to recover against the light company, and said: "According to the test stated, if the Water & Light Company had been cast in the suit, it may be that it could recover over against appellant; but no such right would have existed in behalf of the appellant against the Water & Light Company. That company in permitting the insulation upon its wire to become and remain defective merely furnished the occasion; but appellant was guilty of more direct and affirmative negligence in failing to take any steps to have the current of electricity removed from the

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1915 D 968; Riggles v. Priest, 163 Wis. 199, 157 N. W. 755. When as in the instant case the unlawful rate of speed caused or contributed to the injury, proximate cause follows as matter of law. Allen v. Voje, 114 Wis. 1, 89 N. W. 924.

4. The question of contribution between the railway company and the traction company is raised by the pleadings and discussed in this case, and while it does not seem necessary to decide it now,

electric wires before assigning the plaintiff to the work, and in so assigning him with the knowledge of the fact that the electric wires were heavily charged with electricity, and that a wet rope was a conductor of an electric current." On error by the supreme court to the court of civil appeals, the judgment in favor of the light company was affirmed, but the judgment against the telephone company in favor of plaintiff was reversed and the cause remanded for a further trial as between plaintiff and the telephone company, because of error of the court in submitting to the jury an issue of negligence not raised by the evidence. Southwestern Telegraph & Telephone Co. v. Sanders, — Tex. Civ. App. —, 138 S. W. 1181 (1911); — Tex. Civ. App. —, 173 S. W. 865 (1915).

A telephone lineman was injured when the cable of the telephone company came in contact with an uninsulated portion of the high voltage wire of an electric light company, and he sued the light company to recover damages. The light company answered by general denial, and pleaded assumption of risk and contributory negligence, and sought to implead the telephone company as the one whose negligence caused the injury, asking recovery over in the event of a judgment against the light company. The plaintiff's petition alleged that after the telephone company had constructed its system of telephones, the light company put in an electric light plant, negligently placing its poles and wires in such close proximity to the poles and wires of the telephone company, at the place of the accident, that plaintiff and other employees of the telephone company would necessarily come in close proximity thereto in ascending and descending the telephone poles, and in adjusting, repairing and fixing telephone wires; that plaintiff ascended the telephone pole at such place, and while engaged in placing a dead wire, and not knowing that defendant's high voltage wire on the side of the telephone pole at that point was uninsulated or defectively insulated, came in contact with said wire at an uninsulated place thereon, and was severely shocked and burned by a current of electricity received therefrom, rendering him helpless and senseless, and causing him to fall to the ground with great violence, a distance of about 20 to 25 feet. The petition further alleged that the light company knew, or in the exercise of ordinary care could have known, of the dangerous condition of its wire, but negligently permitted the same to remain uninsulated and in such close proximity to the telephone system at the place of the injury, with knowledge that employees of the telephone company would necessarily approach in close proximity thereto in the discharge of their duties, and were liable to come in contact therewith. It was alleged in defendant's cross-action against the telephone company, that if plaintiff was injured it was not by reason of any negligence on the part of the light company, but because of the negligence of the tele-

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since we hold that plaintiff is the real party in interest, if not decided, it will, doubtless, be raised and litigated later in this case. In our view of the case judgment must go in favor of plaintiff and against the railway company and the traction company, and may be collected from either, and the question arises whether the company paying the whole judgment may compel the other to contribute. There is much conflict of authority upon the subject. The

phone company permitting its cable to sag and come in contact with the electric light wire, and by friction therewith to cause the insulation to be worn off and the electric current therefrom transmitted to the telephone cable; that the telephone company had knowledge of such condition; and that the proximate cause of the injury was the negligence of the telephone company. The court sustained exceptions to the paragraphs of the answer setting up the cross-action, and dismissed it. Plaintiff recovered a judgment against the light company, which appealed from both judgments. The court, in affirming the judgments, held that the knowledge of the telephone company and its agents, and their negligence, could not be charged to plaintiff so as to defeat his right of recovery; that it was the duty of the light company to have its wires insulated where persons whose duties called them in proximity thereto would be exposed; that under the facts the light company was negligent in the particulars charged in the petition, and from the facts so proven the jury were warranted in finding in favor of plaintiff, and that the paragraphs of the answer setting out a cross-action against the telephone company did not state a case authorizing contribution from the telephone company. Snyder Ice, Light & Power Co. v. Bowron, — Tex. Civ. App. —, 156 S. W. 550 (1913).

The widow of a deceased employee of a defendant telephone company sued an electric light company, alleging that the electric light company negligently allowed its highly charged wire to come in contact with a telephone wire upon which decedent was working, thereby causing his death. Plaintiff alleged negligence of the light company in permitting its wire to sag and come in contact with the telephone wire; in failing to make proper inspection of its wires to discover the place of the contact, and in turning onto its wires a heavy charge of electricity when it knew that decedent was working on the telephone wires, and that it had not discovered the place of contact with the telephone wires. Defendant pleaded the general denial, assumption of risk and contributory negligence, and impleaded the telephone company, alleging that its negligence was the cause of plaintiff's injuries, and praying that if plaintiff recovered judgment against the light company, it be awarded a judgment over against the telephone company. It was shown that the telephone company had attached a drop wire from one of its poles on the east side of a street, under the wires of the light company, connecting with a telephone in a residence situated on the west side of the street; that neither the telephone drop wire nor the electric light wire was insulated; that the light company permitted its wire to sag so as to come in contact with the telephone wire; that it knew of the sagging and contact prior to the injury to decedent, and in time, by the exercise of ordinary care, to have repaired the line before decedent was injured; and

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question has not been settled by this court, although the principle recognizing contribution where there is no wilful or conscious wrong is recognized in former decisions of this court. Ryan Estate, 157 Wis. 576, 147 N. W. 993, Ann. Cas. 1916 D 840; North H. M. & L. Asso. v. Childs, 82 Wis. 460, 52 N. W. 600, 33 Am. St. Rep. 57.

Of course the rule is generally referred to in elementary law books and decisions of courts of last resort to the effect that there

that it negligently turned on its current without warning decedent of the danger to which he would thereby be exposed in his work. Judgment was rendered in favor of plaintiff, and also in favor of the telephone company. From this judgment the light company appealed. The court, while reversing the judgment in favor of plaintiff because of matters immaterial here, affirmed the judgment for the telephone company, saying: "If the electric company was guilty of negligence in either of the particulars above referred to, it cannot have indemnity from the telephone company." Cleburne Electric & Gas Co. v. McCoy, — Tex. Civ. App. —, 149 S. W. 534 (1912). For opinion on former appeals, see Cleburne Electric & Gas Co. v. McCoy, — Tex. Civ. App. —, 128 S. W. 457 (1910).

Plaintiff, a lineman in the employ of a telephone company, was injured by coming in contact with a high-voltage wire of an electric light company as he was descending a telephone pole, and sued the electric light company to recover damages. The light company answered by general denial and plea of contributory negligence, and filed a cross-bill impleading the telephone company as the party responsible for the injuries to plaintiff, alleging that there was an agreement between the light company and the telephone company whereby the light company would shut off the current of electricity upon its wires when employees of the telephone company were required to make repairs upon its wires; that upon the occasion in question the telephone company made no request for the electric light current to be shut off, and that it was negligence on the part of the telephone company for it to direct the making of repairs, without first making such request, in such close proximity to the high voltage wire. The jury found that the electric light company was negligent in the manner in which it carried its high voltage wire upon its cross-beams, and in attaching such wire to the telephone pole, and in maintaining it without insulation, and that such negligence was the proximate cause of plaintiff's injuries. Plaintiff had judgment upon the verdict against the light company, and the court also entered judgment against the light company on its cross-bill against the telephone company. Appeal was taken by the light company from both judgments. The court, while affirming the judgment as to plaintiff, reversed the judgment and remanded the cause as between the defendants, on the ground that the light company was entitled to a judgment over against the telephone company, the undisputed evidence showing, in the opinion of the court, that the telephone company, and not the light company, was the active wrongdoer, and should be held solely responsible for the injuries inflicted on plaintiff. City of Weatherford Water, Light & Ice Co. v. Veit, — Tex. Civ. App. —, 196 S. W. 986 (1917).

A telephone company negligently strung one of its wires too close to a certain wire belonging to a light com-

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can be no contribution between joint wrongdoers, or, as some courts put it, joint tort-feasors. And a general rule is laid down to that effect. But this rule, like other rules, has its exceptions, and the authorities from the English decisions down recognize the exceptions. The logic of the rule that there can be no contribution between tort-feasors is based upon the idea that the law will not imply contribu-

pany. The latter wire was improperly insulated. The telephone wire sagged so as to come into occasional contact with the wire of the light company, and the latter concern, after notice, failed to change the position of its wire, or to notify the telephone company of the conditions. The plaintiff, an employee of the telephone company, was injured as a result of the conditions described, and recovered a judgment against both companies. The defendant light company paid the judgment, and moved to have execution directed against the telephone company. The motion having been overruled, the light company appealed. The court affirmed the order denying execution, saying in part: "Both companies were liable, but appellant [the light company] insists that it was only passively guilty of a tort, and that, therefore, it comes within an exception to the general rule * * * [that there can be no enforced contribution from one of two joint tort-feasors]. With this view we cannot agree. It was the separate duty of each to take thorough precautions. Any accident due to neglect of such duty made the corporations jointly liable." Thus the general rule was applied. In the course of the opinion rendered the court also pointed out that the question involved was not affected by section 709 of the Code of Civil Procedure, which embodied a rule of procedure, and not of substantive law. Dow v. Sunset Telephone & Telegraph Co., 162 Cal. 136, 121 Pac. 379 (1912). A rehearing of the appeal was denied.

3. Light company employee injured.

An electric company used the poles of a telephone company, each concern stringing and maintaining its own wires. Ordinarily the wires were attached to the poles so securely that they would sustain the weight of a man standing on them, and employees of both companies used the wires as a footing in going up and down the poles. While using a wire of the telephone company for this purpose, an employee of the electric company fell because of a defective fastening and was injured. He sued the electric company. The telephone company was given notice of the suit, but did not defend. The employee obtained a verdict. Later the present plaintiff, as insurer of the electric company, settled the verdict at a discount, before judgment. After paying the amount of the settlement the plaintiff brought against the telephone company the present action for exoneration. The trial court gave judgment for the plaintiff for the amount paid in settlement, though not for attorney's fees and costs; and both parties appealed to the supreme court. That court affirmed the judgment, speaking in part as follows: "Generally, one of two joint tort-feasors cannot have contribution from the other. But there are exceptions to this rule. One exception arises where, although both parties are at fault and both liable to the person injured, yet, they are not in pari delicto as to each other, as where the injury results from a violation, by one, of a duty which

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tion between wrongdoers. Merryweather v. Nixon, 8 T. R. 186; Adamson v. Jarvis, 4 Bing. 66. The rule of the English cases against contribution, however, "is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." Perhaps the strongest English case against contribution is Merryweather v. Nixon, *supra,* but the general rule laid

he owes to the other, so that as between themselves, the act or omission of the one from whom indemnity is sought is the primary cause of the injury. This exception is reasonable and well recognized. * * * This case comes within this principle. The primary duty of securing the wires and cables was upon the defendant. Its neglect was the primary cause of the injury. The neglect of the electric company was, as between the parties, secondary. Defendant must respond." Fidelity & Casualty Co. of New York v. Northwestern Telephone Exch. Co., 140 Minn. 229, 167 N. W. 800 (1918).

4. Telephone company customer killed.

Plaintiff's decedent was killed by an electric shock when he attempted to cut a telephone wire which extended into his residence. The shock which caused his death was due to a highly charged electric wire of a light company coming into contact with the telephone wire. Plaintiff sued the light company and the telephone company to recover damages for the death of her husband, suing in her own behalf as widow and as next friend for her minor children. Plaintiff alleged that the light company had used inferior and dangerous wires, insufficiently insulated and fastened to poles, whereby they were caused to sag and fall across the wire of the telephone company when highly charged with electricity, and had strung its wires too close to those of the telephone company, and had not sufficiently tamped the telephone posts and secured them by means of guy wires. She alleged negligence on the part of the telephone company in maintaining its wires in a loose and careless manner and in too close proximity to the wires of electric light company. When it appeared that the telephone company had not been properly served with summons, plaintiff dismissed her action as to that company. The light company answered by general denial and by special plea denying negligence on its part and alleging contributory negligence and assumption of risk on the part of plaintiff, and alleged by way of cross-action against the telephone company that the accident was due to the negligence of the telephone company, and prayed that in event of a judgment against the light company that it have a judgment over against the telephone company, and ask for a continuance of the case in order that the telephone company might be served with summons and brought into the case. This motion the court overruled. A verdict and judgment was rendered for plaintiff in the sum of $14,000, and the light company appealed. In affirming the judgment, the court held that, even if the light company was entitled to contribution as against the telephone company, the denial of the motion for a continuance would not be ground for reversal, since the light company would still have its right of action against the telephone company to enforce contribution. Temple Electric Light Co. v. Halliburton, — Tex. Civ. App. —, 136 S. W. 584 (1911). On motion for

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down in that case was afterwards limited and explained in later cases, and it may now be regarded settled in England that there can be contribution between tort-feasors where there was no wilful or conscious wrong. Adamson v. Jarvis, *supra;* Betts v. Gibbons, 2 Ad. & Ellis 57, 65; Palmer v. Wick & P. S. Co., Ltd., [1894] App. Cases 318; Burrows v. Rhodes, [1899] 1 Q. B. 816.

In Palmer v. Wick & P. S. Co., Ltd., *supra,* where the injury was

rehearing, — Tex. —, 140 S. W. 426 (1911).

P. Steamship company and shipper.

1. Using loading equipment of shipper.

The plaintiff steamship company was transporting gypsum rock for the defendant company under a contract providing that hoisting apparatus for the lifting of the rock out of the steamer should be furnished by the defendant. The hoisting gear, bucket, tripping appliance and electric motor constituting the hoisting apparatus were operated entirely by the defendant's employees, except that the buckets were filled while in the hold of the ship, and the hook on the end of the hoisting cable attached to the bucket, by the employees of the plaintiff. While one of the buckets was being hoisted, it was prematurely dumped on account of the worn and defective condition of the tripping appliance, and the rock was thereby caused to fall back into the hold of the ship. In consequence, two of the plaintiff's employees were seriously hurt. It appeared that this was not the first time the tripping appliance had caused premature dumping. Such a dumping had occurred some 3 weeks previously while a ship of the plaintiff was being unloaded; and this was known to employees of the plaintiff, including its foreman. The plaintiff settled a claim made by the employees on account of their injuries, and then brought the present action against the defendant to recover over. The trial court granted a motion on behalf of defendant for a nonsuit, on the ground that the parties were joint wrongdoers, as between whom no right of contribution existed. The plaintiff appealed, admitting that so far as the rights of the injured persons were concerned the parties were joint wrongdoers, but contending that upon the facts in evidence the granting of a nonsuit was error, and that the question of the defendant's liability over should have been submitted to the jury. In passing upon the appeal, the court first took up the question of the relations of the two parties to each other, and held that while they were equally under a duty to guard against the use of defective hoisting appliances, so far as it endangered employees, as between themselves the primary duty of seeing to the safety of the appliances rested upon the defendant, especially in view of the fact that it retained practically the entire control over the apparatus. The court then said: "It is, however, contended by counsel for respondent that 'appellant was not relying upon any implied warranty that the hoisting gear was fit and proper for the use intended, because they had actual notice that it was not'; and this, it is argued, rendered appellant equally in the wrong with respondent, and this destroyed its right of contribution. The remarks made by the learned trial court in disposing of respondent's motion for nonsuit clearly indicate that this was the

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due to the negligence of two parties and judgment rendered against them, one party paid the judgment and sued for contribution, Lord Herschell, in delivering the opinions of the Lords, said:

"On principle I can see no reason why, when a joint judgment debt has resulted from a joint wrong, each co-debtor should not pay his share, or why if one be compelled by the creditor to pay the whole debt, the other should be enabled to go free by setting up his own wrong. * * * It is not necessary

theory upon which it granted that motion. So the principal error committed by the trial court, if it was error, was in deciding, as a matter of law, that the evidence conclusively showed that appellant did have knowledge of the defective condition of the tripping appliance at the time of the accident, and that it was then knowingly acquiescing in its use. * * * The argument of counsel for respondent, as well as the views of the trial court in granting the nonsuit, evidently rests upon the assumption that the knowledge of the defective and dangerous condition of the tripping appliance, existing on the previous occasions of the discharge of appellant's ship, points with such certainty to the existence of such knowledge and acquiescence in the use of the defective appliance at the time of this accident that the question may be decided in respondent's favor as a matter of law. That such previous knowledge on the part of appellant, and the circumstances, are somewhat persuasive in favor of the trial court's conclusions of fact may be conceded; but that such knowledge is such conclusive proof of like knowledge at the time of this accident that all reasonable men must arrive at that conclusion we cannot agree. We therefore conclude that the question could not be decided as a matter of law, but should have been left to the jury." The judgment was reversed and a new trial was granted. Alaska S. S. Co. v. Pacific Coast Gypsum Co., 71 Wash. 359, 128 Pac. 654 (1912).

2. Using dock facilities of shipper.

The defendant owned and operated a flour mill and maintained in front of its premises a dock and dolphins for the use of ships coming to its mill for shipments. One of these dolphins was situated some 10 or 12 feet from the shore, with a plank approach from the shore to the dolphin. A vessel of the plaintiff steamship had completed loading and E, an employee of the plaintiff, was sent to cast off the line from the dolphin which held it to the ship. While he was moving along the plank, the end of it slipped off the dolphin and E, falling upon the rocks below, sustained serious personal injuries. He brought suit against both plaintiff and defendant, but the latter, at the close of E's case, obtained a judgment of dismissal because of the failure of E to prove that it furnished, controlled, or was in any way responsible for the plank approach to the dolphin. The plaintiff, having paid a judgment recovered by E, brought this action to recover of the defendant the amount paid in defense of the suit and in satisfaction of the judgment. The defendant pleaded the judgment of dismissal in the E case as res adjudicata of its liability. The trial court overruled the plea and from a judgment for the plaintiff the defendant appealed, alleging as error the refusal to grant its requested instruction that the plaintiff could not recover, if its independent negligence caused or contributed to the injury. The court reversed the judgment and remanded

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in this appeal to decide whether there can be any right to contribution in the case of a delict proper when the liability has arisen from a conscious and therefore moral wrong, nor even whether in every case of quasi delict a delinquent may obtain relief against his co-delinquent, though I see, as at present advised, no reason to differ from the opinion which I gather my noble and learned friend, Lord Watson, holds, that such a right may exist. In circumstances as those with which your lordships have to deal, I cannot but think that equity and justice are in favor of the conclusion arrived at by the Inner House, and there seems to be no authority compelling a contrary decision. It was urged that the person seeking relief might be the more culpable of the delinquents;

the case for a new trial, holding the requested instructions should have been given. Though the defendant, as the court pointed out, was primarily liable if it failed to keep its premises in a reasonably safe condition for the use of persons invited on such premises, still, if the plaintiff, or the person using such premises, by some independent act of negligence, contributed to the accident, it became a joint tort-feasor and could not recover. The court further pointed out that if the plaintiff had such knowledge of the dangerous condition of the plank, and knowingly acquiesced in its use, it could not recover against the person primarily liable, as such knowledge would render the plaintiff guilty of an independent act of negligence and a joint tort-feasor. The court did, however, hold that the plea of res adjudicata of the defendant was properly overruled, as the judgment dismissing it in the personal injury suit was a judgment of nonsuit only and being given at the close of the plaintiff's evidence, was in no way binding upon the steamship company, since E entirely controlled the evidence introduced. Alaska Pac. S. S. Co. v. Sperry Flour Co., — Wash. —, 182 Pac. 634 (1919).

Q. Oil refinery and railroad company.

G refining company, engaged in the manufacture and sale of kerosene and gasoline, intended to ship to C, a retail merchant, a drum of kerosene, and to B three drums of gasoline. The kerosene bore the stock number 23937, the gasoline 9770. The bills of lading, waybills and freight bills were made out correctly. Both consignments were destined to stations on the line of G railroad, the last of two connecting carriers. Besides the stock number, a cream-colored tag bearing the address of C was to be attached to the kerosene, and a red tag bearing the address of B was to be attached to each of the drums of gasoline. Through the negligence of the refining company's employee, the cream-colored tag was attached to one of the drums containing gasoline and one of the red tags to the drum containing kerosene. With this conflict between the addresses on the tags the consignment was delivered by the initial carrier to the G railway company, which did not notice or neglected to regard the conflict, and it delivered the mislabeled drum of gasoline to C and the one drum of kerosene and two drums of gasoline to B. C, assuming that the drum he received contained kerosene, sold some of its contents, as kerosene, to Y. While being used in Y's home as kerosene, the gasoline exploded, burning Y's two daughters fatally. Suits were instituted against the refining company and C, but the refining company induced C to dismiss them and file others against the G railway as the sole defendant. In settlement of judgments against it the G railway was compelled to pay $20,000. The present action was instituted originally in the state court by the G railway for contribution against the refining company, a Pennsylvania cor-

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but it is just as likely that he should be the less culpable. In selecting from which of his co-debtors he will obtain payment, the creditor would be guided usually by considerations wholly independent of the relative culpability of those from whom he may recover it. Much reliance was placed by the learned counsel for the appellant upon the judgment in the English case of Merryweather v. Nixon. The reasons to be found in Lord Kenyon's judgment so far as reported are somewhat meager, and the statement of the facts of the case is not less so. It is now too late to question that decision in this country, but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or

poration, C and B, the latter two residents of Mississippi, but the action was removed by the refining company to the federal court. Denying a motion to remand to the state court, the court held that the facts revealed a separable controversy, wholly between the plaintiff and the defendant refining company, but no cause of action for contribution against C or B. The court declared the general rule to be that the person singled out and compelled to bear the loss cannot recover against the others equally liable; but the court admitted exceptions, and referring to them said: "In these cases, which may be called exceptions to the general rule, the principle is well recognized that, where there is no moral turpitude, the law will inquire into the real delinquency of the parties, and place the ultimate liability upon him whose fault has been the primary cause of the injury; but where the negligence of the parties has been of the same character no indemnity or contribution will be allowed." The court then, after comparing the negligence of the G railway with that of C and B, said regarding the latter two: "Their wrong was subsequent in time, of the same character, and not more culpable in degree, than that of the railroad company, which because of its fault has been held liable, and as to the resident defendants [C and B] does not come within that exceptional class which permits it to recover indemnity or contribution." Gulf & S. I. R. Co. v. Gulf Refining Co., 260 Fed. 262 (1919).

XI. Lessor and lessee.

A building belonging to the defendant warehouse company, and in which the plaintiff company was a tenant, was equipped with an electric freight elevator, which could be set in motion from any floor of the building by pulling a hand cable that hung within reach of the door opening into the elevator shaft from each floor. Adjacent to the elevator shaft was a light shaft, and the two openings were not separated by any partition, although at each floor there was an angle iron a few inches in width at a height of about 6 inches above the floor. Two employees of the plaintiff, engaged in moving boxes of salt and starch from the ground floor to the fourth floor, piled 25 boxes in tiers, one above the other, extending somewhat higher than a man's head, on a low truck without any railing, and pushed the truck onto the platform of the elevator, which seems to have been without any railing or other inclosure. The men both rode on the elevator to the fourth floor. While they were on the elevator platform and were in the act of pushing the truck off, some one from another part of the building pulled the cable, as the evidence tended to show, causing the elevator suddenly to drop about 3 feet and then to stop. In consequence, a box fell from the top of the pile on the truck, striking one of the workmen and causing him to fall backwards into the shaft and so to sustain fatal injuries. His administratrix brought an action against the

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even of public policy which justifies its extension to the jurisprudence of other countries. There has certainly been a tendency to limit its application even in England. * * *''

Coming now to authorities in this country, it must be conceded that there is lack of harmony. A review of all, or the larger portion, of the cases cited by counsel would serve no useful purpose. It is sufficient to say that, while the general rule is laid down in

present plaintiff. The defendant landlord was notified, but failed to defend the action. The plaintiff herein settled the claim out of court, and afterwards brought the present suit to compel the defendant to reimburse him. At the trial a verdict in the plaintiff's favor was set aside by the court and a judgment of dismissal was entered. This judgment was affirmed on appeal, the court saying, in part: ''Both plaintiff and defendant were negligent, and I think in quite the same manner. The defendant was negligent in furnishing its tenants with a dangerous elevator, and the plaintiff was negligent in furnishing the same elevator for the use of its employees. In this view of the case it is manifest that the plaintiff and defendant are in pari delicto. It is contended by the learned counsel for the plaintiff that his client was not equally at fault with the defendant for the reason that, as between them, the duty of maintaining the elevator rested on the defendant, and that the plaintiff was not at liberty to change it. It may well be that the plaintiff was not authorized to construct a partition between the light shaft and the elevator shaft proper; but the plaintiff was fully aware of all danger when it leased the fourth floor. It could then have exacted any condition it saw fit or have refused to lease the premises. It could have insisted upon an agreement on the part of the defendant to make such changes either in the manner of operating the elevator, or in the construction of the shaft, as would remove the dangers incident to the operation of the elevator in its then condition. If it had done this and the defendant had failed to perform its contract obligation, there would doubtless have been a right of recovery over * * *. This, however, the plaintiff failed to do.'' Larkin Co. v. Terminal Warehouse Co., 161 N. Y. App. Div. 262, 146 N. Y. Supp. 380 (1914), aff'd in 221 N. Y. 707, 117 N. E. 1074 (1917).

The lessee of the basement, first floor and third floor of a business building covenanted with the lessor to ''keep the elevator in good condition and repair.'' One of the lessee's employees, having been injured as a result of the falling of a water meter that had been attached to the sheave wheel of the elevator at the top of the shaft, sued the owner of the building, and recovered. The owner then brought an action against the lessee to recover over. At the trial he obtained a verdict and judgment. On appeal, while the judgment was reversed and the cause remanded for error in not submitting to the jury an issue as to whether the meter that fell was a part of the elevator, the court, upon the hypothesis that the meter was part of the elevator, ruled that the injury to the lessee's employee would raise a liability against the lessee and also a liability against the owner, while by virtue of the contract of the former to keep the elevator in good repair, the latter would have a right of action over for damages recovered against and paid by him. The owner's right to indemnity, the court said, was ''not

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many cases and apparently without referring to the exceptions, a large number of the courts of last resort hold that where there is no wilful or conscious wrong there may be contribution between tort-feasors.

In Jacobs v. Pollard, 10 Cush. (Mass.) 287, 57 Am. Dec. 105, the court referred to the general rule that it was the policy of the law to discountenance all actions in which a party seeks to enforce a

affected by the general doctrine that neither contribution nor indemnity will be given to one of several tort-feasors against the others. The liability of appellant [the lessee] is primary, because of his contract to assume the duty of appellee [the lessor]. They are not equally guilty, or, to express it in the language of some of the authorities, they are not in pari delicto." Trego v. Rubovits, 178 Ill. App. 127 (1913).

The defendant was the lessee of one-half of the first story of a building owned by the plaintiff, under a lease, providing that the lessee should assume "all liability and damages which may arise from any accident occurring in front of the premises." The plaintiff had an arrangement with the other tenants of the main floor whereby they were to run the fires which heated the building, while the plaintiff was to furnish the coal. C, while passing along the street in front of the store occupied by the defendant, stepped on the cover of the coalhole through which the coal was taken to heat the building, and fell down into the opening. The coalhole cover looked to be secured, it appeared, and C found it necessary to cross that part of the walk because of numerous ash cans obstructing the remainder of the way. The plaintiff settled the suit brought by C to recover $10,000 damages for the injuries so sustained, for $750, and brought this suit to recover of the defendant lessee, the amount so paid. From a judgment in favor of the plaintiff, the defendant appealed. The court, in reversing the judgment, said the recovery against the landlord by the injured third party was legally possible and that he had the right to effect a reasonable compromise in advance of trial, though assuming the burden in an action against the indemnitor of establishing the facts upon which his liability depended, as well as the reasonableness of the settlement. But in dismissing the complaint the court held that the clause in the lease attempting to make the lessee indemnitor for such damages was not intended to cover liability under all circumstances since the landlord had to make use of that part of the sidewalk to carry out heating arrangements of the building, but referred only to liability for accidents happening through the lessee's negligence. Lissner v. Haynes Automobile Co. of New York, — N. Y. App. Div. —, 173 N. Y. Supp. 491 (1918).

XII. Contractors.

A. Employee of subcontractor injured.

1. Collapse of bridge pier.

Pennsylvania Steel Co. v. Washington & Berkeley Bridge Co., 194 Fed. 1011 (1912), was an action by the steel company, a subcontractor of the bridge company, against the latter, to recover the amount of a judgment rendered against the steel company in a suit by one of its employees injured as a result of the collapse of a new pier constructed by the bridge company, while the steel company pursuant to its contract was erecting upon the pier, and other piers, a steel bridge

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demand originating in a wilful breach or violation, on his part, of the legal rights of others, and that courts will not lend their aid to those who found their claims upon illegal transactions, but further said:

"It is only when a person knows, or must be presumed to know, that his act was unlawful that the law will refuse to aid him in seeking an indemnity or contribution."

structure. The pier was alleged to have collapsed because it was "green, defective, and insufficient." In considering a demurrer to the declaration, the court said in part: "Although it may be assumed that the bridge company was also negligent * * *, the well-known rule that in pari delicto potior est conditio defendentis must be given application here. This rule is based upon the principle of public policy that there is 'no contribution between wrongdoers.'" The court pointed out, however, that "in negligence cases based not upon wilful wrongdoing, but growing out of legal duties and obligations—acts not malum in se, but malum prohibitum—a clear distinction must be drawn between the liability of the party primarily negligent and that of one secondarily so to the extent of being liable to a third party injured. In such case, * * * the second party, while he may not escape liability to the third party injured, may hold the first party primarily negligent for indemnity. * * * It is insisted by defendant that there is no allegation that this pier 10 was unsafe because of improper workmanship or materials, but that it collapsed solely because the cement in it was not given time to harden. Counsel for plaintiff insist that, while this may be true, the plaintiff in seeking to erect the superstructure on it was doing so under the direction of the defendant's engineer and agent. Per contra counsel for defendant insist that this engineer was not its agent, but an independent contractor of it under the express terms of a contract existing between it and such engineer. Without expressing any opinion as to these contentions, it seems clear that the mere statement of them is sufficient to show that these questions are purely ones of fact and cannot be determined upon demurrer." The court considered also the effect of a portion of the contract between the parties, providing that the steel company should indemnify the bridge company "against all liability or damage on account of accident, whether occasioned by the omission or negligence of itself, its agents or its workmen or otherwise," and ruled that the words "or otherwise" should be restricted, on the principle of ejusdem generis, to acts of negligence of the steel company, "its agents, its workmen or ones of like character arising in its carrying out its contract," and should not be interpreted as including the negligence of the bridge company; and that therefore the provision in question would not affect any liability otherwise arising in favor of the plaintiff from negligence on the part of the latter concern. The demurrer was thus overruled. Subsequently three trials were had, each resulting in a judgment for the plaintiff, and three appeals to the circuit court of appeals were prosecuted, resulting in each case in reversal, for error of the trial court in the handling of the evidence bearing upon the question of primary responsibility on the part of the bridge company. For the opinions rendered in the several appeals, see 131 C. C. A. 340, 215 Fed. 32 (1914);

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In Acheson v. Miller, 2 Ohio St. 203, 59 Am. Dec. 663, the court said:

"The rule that no contribution lies between trespassers, we apprehend, is not one of universal application. We suppose it only applies to cases where the persons have engaged together in doing wantonly or knowingly a wrong. The case may happen that persons may join in performing an act, which to them appears to be right and lawful, but which may turn out to be an injury to the rights of some third party, who may have a right to an action of

141 C. C. A. 167, 226 Fed. 169 (1915); 164 C. C. A. 403, 252 Fed. 487 (1918). It may be added that with respect to the effect of the judgment recovered against the steel company by its workman it was ruled by the circuit court of appeals that the judgment was conclusive as to the negligence of the steel company towards its workman and as to the latter's freedom from contributory negligence, as well as with regard to the amount of damages sustained by the workman; but that it was not conclusive as to matters not necessary to the employee's recovery, and thus left open the issue of negligence on the part of the bridge company towards the steel company.

2. Negligence in use of elevator.

An elevator company, in installing an elevator in a building under construction, furnished an elevator operator, upon a rather vague understanding which left the operator's status as an employee somewhat in doubt. An employee of a subcontractor doing painting in the building was injured as the result of negligence on the part of the elevator operator. In a suit against the building contractor the elevator company was joined as a party defendant, but was dismissed from the suit before the evidence on behalf of the building contractor was heard. The suit resulted in a judgment against the building contractor. The latter paid the amount assessed, and afterwards brought an action against the elevator company to enforce indemnity. A judgment in its favor in the trial court having been set aside by the court of appeals, the plaintiff took the case, on certiorari, to the United States Supreme Court. There the judgment of the court of appeals was reversed, and that of the trial court affirmed, in a decision resting upon grounds which appear in the following extract from the opinion rendered: "There was evidence fully sufficient to show that the respondent retained its control at the time of the accident, and the jury found a verdict for the plaintiff, but the judgment was set aside by the court of appeals on the ground that although the former judgment did not make the matter res judicata, it concluded the case: 'In view of the adjudicated facts, which were not open to the consideration of a second jury, there was no such primary liability on the part of the Otis company [the defendant elevator company] as will support an action for indemnity.' But there were no facts, whether adjudicated in the former case or not, that were not open to the consideration of the jury in this. The Otis company was joined as a party defendant, it is true, in the former action, and a verdict was directed in its favor. But even if the former verdict against the petitioner had gone on the same issue that was tried in the present case, which was not the fact, it could not have concluded the petitioner in favor of the Otis company, for the reason, if for no other, that the Otis company was dis-

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tort against them. In such case, if one of the parties * * * has been compelled to pay the amount of the damage, is it not reasonable that those who were engaged with him in doing the injury should pay their proportion? The common understanding and justice of humanity would say that it would be just and right that each of the parties to the transaction should pay his proportion of the damages done by their joint act, and we see no reason why the moral sense of a court should be shocked by such a result. And we think this view of the case is fully sustained by the cases cited by counsel for the defendant in error," quoting Adamson v. Jarvis, *supra*. "From these and other cases referred to, we think the reasonable and common-sense rule and the legal

missed from the suit before the petitioner's evidence was heard." The court added that even had the court in the former case purported to decide more than the liability of the building contractor as between it and the plaintiff in the former action, the prior decision "would not have been a precedent, because the evidence in the present case had additional details which, if meager, still made it impossible to say as matter of law that the Otis company did not retain control [of the elevator operator]." George A. Fuller Co. v. Otis Elevator Co., 245 U. S. 489, 62 L. Ed. 422, 38 Sup. Ct. 180 (1918).

B. Third person injured.

1. Falling over debris left on sidewalk.

The plaintiff bridge contractor sublet excavation and foundation work to the defendants. During the progress of the work the defendants negligently left on the sidewalk at night an unguarded heap of stones and dirt. This caused a pedestrian to fall and sustain injuries. Her husband sued the present plaintiff and obtained a judgment for $4,348.40, which the plaintiff settled by paying $4,148.40. The present action was brought to recover the amount paid, with interest, and also expenses incident to the defense. The trial court directed a verdict for the plaintiff with respect to the amount paid in settlement of the judgment, but submitted to the jury the question of the reasonableness of the estimate of trial expenses, the submission resulting in a verdict for the plaintiff for the amount of such expenses claimed, $614.57. On appeal, the principal point made for the defendant was that, there being no bond or contract of indemnity, the plaintiff was, as a joint wrongdoer, precluded from recovery. The judgment entered upon the findings above stated was, however, affirmed by the court, which stated its reasons in part as follows: "The liability which results from the mere omission of a legal duty is to be distinguished, for the purposes of this case, from that which results from personal participation in an affirmative act of negligence, or from a physical connection with an act of omission by knowledge of or acquiescence in it on the part of the original contractor, or by his failure to perform some duty in connection with it which he may have undertaken by virtue of his agreement. In other words, while both the plaintiff and the defendants were equally culpable and equally liable to the traveling public for the omission of duty which resulted in the injury, yet, as between themselves, the plaintiff was entitled to rely upon the defendants to discharge the duty because of their contractual relations, and the former could only be deprived of the right of indemnity by proof that it did in fact participate in some manner in the omission, beyond its mere failure to perform the duty imposed on both by the law." Phoenix Bridge Co. v. Creem, 102 N. Y. App. Div. 354, 92 N. Y. Supp. 855 (1905), aff'd 185 N. Y. 580, 78 N. E. 1110 (1906).

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one are the same, viz., that when parties think they are doing a legal and proper act, contribution will be had; but when the parties are conscious of doing a wrong, courts will not interfere."

In 13 Corpus Juris, pp. 829, 830, §§ 18-25, the subject is treated and many authorities cited. After stating the general rule that there can be no contribution between tort-feasors, and the reason for such rule, the doctrine is stated thus:

2. Falling into excavation left unguarded.

A mason contractor at the request of a general building contractor, procured another to do excavating work, and afterwards was asked to submit bids for mason and brick work. A definite figure was arrived at, which included the excavating. It appeared that the mason contractor, in procuring the excavation work, acted as agent of the building contractor, and that there was no absolute agreement that the mason contractor was to have the contract for the brick and mason work. A third person was injured as the result of falling into an unguarded portion of the excavation, and he recovered in an action brought jointly against the two contractors. Each of the two paid his share of the damages and costs assessed, and subsequently the building contractor brought an action against the mason contractor to obtain indemnity with respect to one-half of the judgment. In the trial court, judgment was entered against the plaintiff, and on appeal, the court, affirming the judgment, held in part that the circumstances raised no implied agreement on the part of the defendant mason contractor to indemnify the building contractor with respect to liability for injuries sustained by third persons under such circumstances as those involved. The court held also that the judgment formerly rendered against the two contractors jointly was res adjudicata on the question whether one of the contractors was an independent contractor having exclusive control of the premises; the declaration having contained allegations that the two were in joint possession of the premises at the time of the accident. Stoecker v. Thoren, 189 Ill. App. 504 (1914).

C. Building flooded by pipe left uncapped.

A builder contracted with the owner of a building for the installation of a system of plumbing. He sublet the work to one S. The latter left an offset pipe uncapped, and while the pipe was in this condition the builder turned over to the owner the job as completed. As a result of the condition in which the pipe was left, water escaped, damaging the building and merchandise of tenants therein. The owner sued the builder, who notified S of the suit, but S refused to defend. The action resulted in a judgment against the builder, which presumably was paid. Subsequently the builder brought the present suit against S to recover over. The judgment roll of the prior action was admitted in evidence. No other evidence being adduced, the trial court dismissed the complaint. The plaintiff appealed, raising the question of the effect of the prior judgment in the present case. The court held that the trial court's ruling was error, saying, in substance, that the neglect of the defendant was the primary cause of the liability which the plaintiff had been called upon to discharge; that in the previous suit the plaintiff's liability

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"The general rule that there can be no contribution among wrongdoers has many exceptions. There is not complete unanimity among the decisions regarding facts which will allow or defeat the right to contribution among tort-feasors, much of the confusion being due to a failure to differentiate between the liability of tort-feasors to third persons and for contribution among themselves. It has been stated that the principle that no right of contribution exists as between wrongdoers is confined to cases where the transaction is actually illegal or void, or where the fraud is so great that on moral grounds the court will not entertain a suit for the relief of the tort-feasor, and that in cases of quasi torts only, not involving any moral turpitude or any personal faults, or where the acts are not obviously unlawful or the parties are not pre-

had been expressly placed upon the ground of the present defendant's failure to cap the pipe, the plaintiff being liable to the owner because he had subsequently accepted the work and turned it over to the owner in its unfinished state; that that issue had been the one distinctly tendered by the plaintiff in the action against the present plaintiff; that the defendant had been served with notice to defend, and had refused; and that therefore the defendant was bound by the judgment recovered against the present plaintiff, "as if he [the present defendant] had been a party to that action." The judgment of dismissal was reversed, and a new trial was ordered. Corning v. Spelman, 130 N. Y. App. Div. 767, 115 N. Y. Supp. 366 (1909).

D. Bridge damaged by fire.

The plaintiff, a municipal bridge contractor, agreed with a subcontractor to do certain work and furnish certain materials, the subcontractor accepting the conditions and obligations of the general contract with reference to the same work. Such general contract made the principal contractor responsible for "all parts damaged during erection," and provided that complete precautions be taken against injury by fire. The subcontractor negligently caused a fire which damaged the bridge structure, and the plaintiff, the principal contractor, was held liable under its contract to make the city good for damages not only to the property covered by his contract, but to the construction work as a whole. The principal contractor then brought this action to recover from the defendant subcontractor the amount the plaintiff had been compelled to pay. From a judgment of the appellate division, setting aside a verdict in favor of the plaintiff, the latter appealed. The court, in reversing the judgment and granting a new trial, held the defendant subcontractor was bound to make good to the plaintiff any loss resulting from its negligence in causing the fire. As the court pointed out, the defendant, having accepted all the conditions of the principal contract, was liable for all damages sustained not only to the property covered by his contract, but also to other property. The judgment against the principal contractor, however, was held not to be conclusive as to the amount of the damages for which the subcontractor was liable as a result of his negligence in causing the fire, such damages to be determined on a hearing before a jury in the new trial. Lord Electric Co. v. Barber Asphalt Paving Co., — N. Y. —, 123 N. E. 756 (1919).

XIII. Retailer and manufacturer.

Defective illuminating oil exploded while a customer was using it, injuring him and certain members of his family. He recovered damages from the retailer who had sold him the oil,

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sumed to have known they were doing any wrong, or where their liability is by implication of law merely, then contribution will be enforced."

Many cases are collected, and the general rule and exceptions stated in 6 R. C. L., pp. 1054, 1055, § 17, thus:

"It may be said to be the general rule that one of several joint tort-feasors cannot enforce contribution or secure indemnity from any of the other tort-feasors. When parties are equally bound to bear a burden, and are in *æquali jure*, that is, liable from the same circumstances existing as to both, contribution is due of right, in equity, but the party who would otherwise be

the ground of the recovery being that after notice that the oil was not up to the standard, the retailer had negligently failed to have it inspected by an expert. Thereafter the retailer sought to recover over against the manufacturer. A statute provided that whoever sold for illuminating purposes, any product of petroleum that did not meet certain tests, should be liable for all damages caused thereby. The oil in question was a petroleum product and was found, when tested after the accident, to be far under the statutory standard. On appeal from a judgment entered on a verdict directed for the plaintiff at the trial, the court, while assuming that the defendant might have been made liable "on the theory that it sold plaintiff the oil which did the injury, and that it was not of the kind and test required by statute," since the case in this aspect would come within the special rule that one wrongdoer, if his wrong is secondary, may recover from another who has violated a primary duty, held, that although the present defendant had been given notice of the prior suit against the present plaintiff, and had not defended, the record and judgment in the prior suit were not, without more, conclusive upon the present defendant. The plaintiff having apparently relied entirely upon the record in the prior action, the judgment was reversed. Pfarr v. Standard Oil Co., 165 Iowa 657, L. R. A. 1915 C 336, 146 N. W. 851 (1914).

XIV. Property owner and contractor.

A. Employee of elevator construction company injured.

Plaintiff, an elevator company, doing work on the defendant trust company's building, sued the trust company to enforce contribution for a judgment for death, rendered against both plaintiff and defendant, which judgment plaintiff had paid, together with the costs of the action. In the action which resulted in a judgment against plaintiff and defendant for the death of the employee of the elevator company, it appeared that decedent was working in the elevator shaft in the building of a trust company, at about the seventh floor of the building. He had gone to work thereon with the assurance of the elevator company and the trust company that the elevator would not be operated while he was at work in that position. Another employee of the elevator company, at work in the basement of the building, asked a stranger to the elevator company to run the elevator out of his way, without giving such operator notice of the dangerous position of decedent overhead. The stranger moved the elevator as requested, but then, on his own motion, undertook to run the elevator to the seventh floor to accommodate a passenger who wished to ascend. In doing so he brought the elevator in violent contact with the platform on which decedent was at work, throwing him therefrom and injuring

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entitled to contribution forfeits such right if the joint liability arose from an act *malum in se*, a fraud or voluntary tort, in which he participated. The rule is, '*in pari delicto portior est conditio defendentis.*' These general principles are, however, subject to many exceptions, or limitations which confine the operation of the general rule within very narrow limits. If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offense. In respect to offenses in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are

him so that he died. Plaintiff's petition in its suit for contribution against the trust company alleged the rendition of the judgment for damages for the death of plaintiff's employee, set out the petition of plaintiff in the death action and, in substance, the evidence on which the verdict was given against both plaintiff and defendant, and further alleged the payment of the judgment, in the death action, by the plaintiff elevator company. A statute provided that "Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract." Plaintiff appealed from a judgment for defendant upon demurrer, and the court, reversing the judgment and remanding the cause, held that independently of the statute, both indemnity and contribution were allowable among wrongdoers under proper circumstances; that since the negligent omissions of the elevator company and the trust company were simultaneous or concurrent, each was a proximate cause of the accident which resulted in decedent's death; that the statute gave contribution among defendants in judgments, and covered such a case as this, the tort-feasors being guilty only of involuntary and passive breaches of duty which concurrently and proximately caused the damage; that when plaintiff had made out a prima facie case by proof that the judgment was rendered against both plaintiff and defendant in the present suit because of the negligence of both which caused the fatal accident, and that plaintiff had paid such judgment under compulsion, the burden rested upon the trust company to show that the elevator company was primarily responsible; and that proof of the averments in the suit for contribution by the elevator company constituted a prima facie case against the trust company for contribution. "It is true," the court said, "appellant was at work in the building as an independent contractor, and that respondent was not answerable to third persons for injuries due to appellant's negligence. But respondent was answerable for its own negligence to any one injured by it; and, if, as the petition asserts, it had promised to protect Appel [decedent] from a movement of the elevator, it was under as much obligation to prevent the elevator from being run up to the scaffold where he stood, as appellant's servant was to warn the stranger not to run it up that far." Eaton & Prince Co. v. Mississippi Valley Trust Co., 123 Mo. App. 117, 100 S. W. 551 (1906).

B. Employee of property owner injured.

A father and mother sued the employer of their deceased 18-year-old son, and an elevator company, to recover damages for his death. Both

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wrongdoers. An exception to the general rule occurs when in the beginning the co-trespassers were not in the wrong, as when they engage in a legitimate undertaking in the pursuance of which they commit a tort unintentionally. Here if one is made to pay the damages, he has an undoubted right to contribution. It has been said that the test for determining whether there shall be contribution between co-trespassers is the rule that when parties think that they are doing a legal and proper act contribution will be had, but when the parties are conscious of doing a wrong courts will not interfere. However, the true test would seem to be, Are the parties, as between themselves, wrongdoers? If they are, then they must take advantage of their own wrong in order to recover contribution; if they are not, then it is not necessary for them to allege their own wrong. Whether or not they are as between themselves wrong-

defendants answered, and the employer filed a cross-action against the elevator company, praying that in the event of a judgment against him in favor of plaintiffs, he have judgment over against the elevator company. It was made to appear that the employer was conducting an automobile garage and repair shop, where he had a force of more than five men working all the time, handling and repairing automobiles; that he was not operating under the Workmen's Compensation Act; that the elevator company, which was engaged in the manufacture and sale of passenger and freight elevators, had by a written contract agreed to furnish and erect for the employer, in the building used by him as a garage, a freight elevator capable of lifting 5,000 pounds, to be used by the employer in conveying automobiles from the first to the second floor of the garage. The written contract for the installation of the elevator contained the clause: "All material and workmanship covered by our guaranty against defect for one year." After the elevator was installed by the company, the employer signed a written instrument stating that he had looked over the elevator plant, and that so far as he could see everything appeared to be satisfactory and in accordance with the contract. On the occasion of the accident which resulted in the death of plaintiffs' decedent, decedent was taking up an automobile which weighed from 3,000 to 3,500 pounds, to the second floor of the garage, when the elevator stopped within about 12 inches of the second floor, and could not be started. Decedent went to the assistant foreman and reported the elevator had "stuck," and the two went back to the elevator. While they were standing there, looking up at the elevator, it fell without warning and caught decedent, killing him. On examination it was discovered that the large gear wheel of the elevator, made of cast iron, had broken because of a sand hole and crack in it. The jury specially found that the elevator, when installed and accepted by the employer, was composed in part of a defective gear wheel, in that it had a sand hole in it, and that such defect caused the elevator to fall; that the elevator company, in the exercise of ordinary care, could have discovered the existence of the defect in the gear wheel at the time of, or before, its installation; that a person in the exercise of ordinary care in furnishing his employees a reasonably safe place to work, would have inspected the gear wheel, by the application thereto of known ordinary tests, to discover weaknesses or defects therein, before the collapse and fall of the elevator; that decedent, to a certain extent, was guilty of contributory negligence which proximately caused his death; that plaintiffs would have received pecuniary aid from decedent, had he not been killed; that the damages recoverable by plaintiffs should be diminished on account of the contributory negligence of decedent; that the elevator company did

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doers is determined by the test whether or not they knew, or must be presumed to have known, that the act was wrongful, and the rule does not apply to a person made a wrongdoer by inference of law only."

In Herr v. Barber, 2 Mackey (13 D. C.) 545, a joint judgment was obtained against three tort-feasors, was paid by one, and contribution sought; and, while it was held that contribution in that case could not be had, as the tort consisted in a breach of trust, the court, in discussing the question, said:

not know of any defect in the elevator at the time of its final acceptance by the employer, and did not know of any defect in it at the time of the accident; that the defect in the gear wheel which broke at the time of the accident, could have been discovered by reasonable inspection; that it did not appear the elevator company made any test as to the safety of the elevator for the use for which it was sold and guaranteed, before or when it was installed, or after its installation; that the elevator, at the time of the accident, was in a structurally dangerous condition; that such condition was the proximate cause of the accident; and that the elevator company did not exercise ordinary care in installing and maintaining the elevator. Judgment was rendered for plaintiff against the employer for $3,200, and in favor of the employer over against the elevator company for the same amount. The elevator company appealed from the judgment against it, and the employer brought error from the judgment against him. In affirming the judgment the court held that neither the fact that the decedent was guilty of negligence which caused or proximately contributed to his injury and death, the fact that there was no express agreement for indemnity, nor was the fact that the elevator company did not actually know that the gear wheel was defective, was of controlling importance in determining the question of the elevator company's liability for indemnity; that the agreement to furnish and install the elevator implied, as between the employer and the elevator company, that all the parts of the elevator would be suitable and safe for the uses to which it was to be put, and that the employer was entitled to the indemnity recovered by him against the elevator company. Otis Elevator Co. v. Cameron, -- Tex. Civ. App. —, 205 S. W. 852 (1918).

C. Customer of property owner injured.

One R was injured in the fall of an elevator which the defendant had installed in the plaintiff's store. It was agreed between the parties to this action that the falling of the elevator was due "to the breaking of two certain iron straps designed and used for the support of the lifting cables of the elevator and that these straps broke because they were wrongfully designed, constructed, and installed and therefore insufficient and inadequate in strength to perform the work imposed upon them in the ordinary operation of the elevator in question." The plaintiff was compelled to pay a judgment with interest and costs amounting to $20,523.02 to such injured party, of which amount $6,903.33 was paid by the elevator insurance carrier of the plaintiff. The plaintiff then brought this suit against the defendant elevator company to recover the loss sustained, and the trial judge, a jury having been waived, directed judgment in favor of the plaintiff for

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"The principle that there can be no contribution at law enforced by one tort-feasor against the other wrongdoers is limited by the more modern authorities to cases where the transaction out of which the judgment arises involves moral turpitude."

Nickerson v. Wheeler, 118 Mass. 295, is an action involving the right of contribution between tort-feasors, and the court after referring to Merryweather v. Nixon, 8 T. R. 186, said:

"But although one may have been liable in tort, he is not necessarily deprived of contribution from another also originally liable, where the foundation

$15,684.16 and in favor of the insurance carrier for $12,577.98. The judgment in favor of the insurance carrier included the amount expended for attorney's fees and expenses and the judgment for the plaintiff, an item of costs awarded on appeal in the personal injury suit. The court affirmed the judgment on appeal by the defendant, overruling the contention that the plaintiff caused or contributed to the accident or was in pari delicto with the defendant, saying: "It is impossible to avoid the conclusion that if the cause of the accident was the breaking of the straps negligently constructed and installed by the defendant, and if the straps were never changed, altered, or interfered with in any way between the date of installation and the accident, it cannot be said that Wanamaker caused or contributed to the accident." The court further pointed out that while the plaintiff could not rely on the judgment roll in the original action, but was obliged to show that the accident was occasioned by negligence for which the defendant was primarily liable, such negligence in construction and design was by stipulation, admitted by the defendant. The court also held that if costs and expenses and counsel fees were paid by the plaintiff in defending, and prosecuting appeals were reasonable and proper, and were incurred with the consent of the defendant, as were those in the present instance, they were recoverable against such defendant as indemnitor as part of the direct consequence of its negligence in the construction of the elevator. Wanamaker v. Otis Elevator Co., — N. Y. App. Div. —, 175 N. Y. Supp. 78 (1919).

D. Pedestrian injured in fall on sidewalk.

Plaintiff sustained personal injuries by falling over a plank laid over a fresh-made cement sidewalk, and sued the property owner in front of whose premises the injury occurred, to recover damages for such injuries. Defendant filed a cross-action against the contractors who constructed the sidewalk under contract with her, and impleaded them as defendants in the main action. The defendant property owner gave no directions as to how the work should be done, or anything connected with it, except to point out the place where it was to be done. The contractors took out a section of the sidewalk, about 6 feet long, and replaced it with fresh cement and concrete, and in order to protect it from injury by persons walking over it, laid planks lengthwise upon it. The walk was one of the public highways of the city, and there were no guardrails or other protection placed around the sidewalk to prevent persons from walking upon it, nor was there any light or signal placed there to notify pedestrians of the existence of the plank on the sidewalk. Plaintiff recovered a judgment against the property owner and there was also a judgment in favor of the contractors. From the latter judgment the property

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of the action is simply negligence on the part of each in carrying on some lawful transaction."

In Mayberry v. Northern P. R. Co., 100 Minn. 79, 110 N. W. 356, 12 L. R. A. (N. S.) 675, 10 Ann. Cas. 754, the court said:

"There is, it is true, a general rule that the right of contribution does not exist as between joint tort-feasors; but it applies only between persons who by concert of action intentionally commit the wrong complained of."

In Paddock-Hawley I. Co. v. Rice, 179 Mo. 480, 78 S. W. 634, it

owner appealed to the court of civil appeals, where the judgment was affirmed. On appeal to the supreme court, the judgment in favor of the pedestrian was affirmed, but the judgment for the contractors in the cross-action was reversed, and judgment directed in favor of the property owner, the court holding that it was the duty of the contractors to guard against injuries to pedestrians by use of the sidewalk, by placing a guard around the work so as to prevent persons passing over the sidewalk from coming in contact with the obstruction, or by placing a light near by so as to notify persons who might be passing, of the existence of such obstruction; that while the property owner and the contractors were both liable to the injured pedestrian, the property owner might hold the contractors liable for any sum that she might be compelled to pay on account of injuries to plaintiff, occasioned by the negligence of the contractors in performing the work which they had undertaken to do. Kampmann v. Rothwell, 101 Tex. 535, 17 L. R. A. (N. S.) 758, 109 S. W. 1089 (1908). For opinion in the court below see (Tex. Civ. App.), 107 S. W. 120 (1908).

XV. Property owner and one delivering goods.

In the case of Furbeck v. I. Gevurtz & Son, 72 Ore. 12, 143 Pac. 654, 922 (1914), the action was against several defendants to recover on account of personal injuries sustained by the plaintiff as the result of the falling upon his leg of one of a pile of iron latticed platforms, on a sidewalk, when the pile was struck by the tongue of an ice wagon halted beside the sidewalk for the purpose of making a delivery. On appeal from a judgment for the plaintiff rendered against one of the defendants, namely, the owners of the platforms who had piled them on the sidewalk, it was in part contended that in dismissing the action as against the owner of the ice wagon, the trial judge had committed error. The brief of the appellant contained the following: "No question can be made but that there was evidence before the jury upon which they might have found that the negligence causing the accident was attributable (a) to the defendant Olsen [owner of the wagon] and the appellant concurrently, or (b) to the defendant Olsen alone. In the former case there would have been judgment against both parties, and appellant is defeated of its right of contribution from Olsen by the dismissal." The court, however, rejected this contention, holding, that since the action might originally have been maintained against either of the two defendants mentioned, at any time prior to the giving of the judgment the plaintiff might lawfully dismiss the action as to either and proceed against the other. "The wrong complained of in the case at bar," the court said, "was not intentionally committed by either [of the defendants] * * *, and in the absence

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is held that contribution may be had between tort-feasors where there was "no guilty intent in the tortious act."

In First Nat. Bk. v. Avery P. Co., 69 Neb. 329, 95 N. W. 622, 111 Am. St. Rep. 541, in referring to liability to contribution, the court said:

> "The general rule that contribution, among tort-feasors, will not be enforced does not apply where, as in this case, the parties acted in good faith, without any intention of committing a trespass."

of a purpose of that kind, the right of contribution exists between them. * * * The appellant is therefore not remediless and may maintain an action against Olsen [the owner of the wagon] for contribution." The judgment was affirmed.

Plaintiff sued the defendant association, and one engaged in delivering coal to the building of the association, for personal injuries sustained by him when the lid on a coalhole in the sidewalk tilted, causing him to fall into the hole, breaking his leg, and otherwise injuring him. Both defendants answered by general denial, and alleged contributory negligence, and each sought to recover over against the other for such an amount as might be recovered by plaintiff against him. The building of the association extended up to the sidewalk, and the hole in question, about 2 feet in diameter, provided with a metal lid, was used for delivering coal to the basement of the building which extended under the sidewalk. The association had contracted with its co-defendant to deliver a carload of coal to the building, and gave instructions to drivers of defendant's wagons in delivering coal, that they should place the lid securely on the hole, and notify the association's engineer thereof and receive a ticket for the coal delivered. The lid was provided with a rod extending below, which was intended to secure the lid on the hole so that it could not be removed from the outside. The evidence was conflicting as to whether the driver who delivered the last load of coal preceding the injury to plaintiff, performed his duty as to placing the lid and notifying the engineer of the association. The jury returned a verdict in favor of plaintiff against the association for $8,000, and against the claim of plaintiff as to the other defendant, but made no finding as to the claim of the association against the other defendant. The court rendered a judgment in favor of plaintiff against the association for the amount of the verdict, and against plaintiff and the association as to the other defendant. The association brought error as against both of the other parties. The court, in affirming the judgment as to plaintiff against the association, and reversing the judgment in favor of the other defendant and against the claim of the association, held that there was sufficient evidence to support the finding of the jury that the driver of the coal contractor was not negligent in the matter relating to the cover of the coalhole; that regardless of whether or not the servants of the coal contractor were negligent in such respect, the association, as owner of the premises, was negligent in failing to keep the sidewalk in a reasonably safe condition, and that such negligence was a proximate cause of plaintiff's injury; that plaintiff was injured substantially as charged in his petition, and that his injuries were of such a character as to justify the verdict as to the amount of damages sustained; that as the case was pre-

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The following cases also sustain the doctrine that where the element of moral turpitude is not involved and there is no wilful or conscious wrong between the parties against whom a judgment in a tort action is recovered, there may be contribution between the tort-feasors. Nashua I. & S. Co. v. W. & N. R. Co., 62 N. H. 159; Furbeck v. Gevurtz, 72 Or. 12, 143 Pac. 654, 922.

Counsel for the railway company relies strongly upon Union Stockyards Co. v. Chicago, B. & Q. R. Co., 196 U. S. 217, 25 Sup. Ct.

sented by the pleadings and evidence, the finding in favor of the coal contractor, as to the claim of plaintiff, necessarily involved and carried with it a finding that such defendant was not guilty of any negligence proximately causing or contributing to the accident, the necessary result of which finding was that he was not liable to the association; that if the acts of the coal contractor were the immediate cause of plaintiff's injury, the contractor would be considered as the active, and the association only as the passive, tort-feasor, and in such case if plaintiff recovered judgment against the association, the association would be entitled to recover over against the contractor. Young Men's Christian Ass'n v. Jasse, — Tex. Civ. App. —, 183 S. W. 867 (1912).

Employees of an ice company, in delivering ice to a corporation whose business premises included a section of city sidewalks, opened and negligently failed to close an opening in the sidewalk. A pedestrian fell into the hole and was injured. She sued the company that owned the premises, and recovered. The property owner then brought an action against the ice company to obtain reimbursement, and at the trial obtained a verdict and judgment for $1,247.13. On appeal the judgment was affirmed, on the ground that the ice company was primarily, and the plaintiff only secondarily liable for the injuries sustained by the pedestrian. The court said: "Generally speaking, it is true that one of two joint tort-feasors cannot maintain an action against the other for contribution or indemnity, but this does not apply in a case where the unlawful act is done by one person and the other does not join therein but is thereby exposed to liability. In cases of that character the parties are not equally culpable as to each other though each may be liable to third parties." Reymer v. Consolidated Ice Co., 67 Pa. Super. Ct. 468 (1917).

The plaintiff, the owner of property abutting on a street, bought from the defendants coal to be delivered through a coalhole that he maintained over his bin, in the adjacent sidewalk. After a part but not all of the coal had been delivered, the plaintiff returned to his house, and as he passed over the sidewalk he noticed that the cover of the coalhole was in place. A few minutes afterwards, and before the defendant's employees had arrived with the next load, he heard an outcry, and ascertained that a woman pedestrian had fallen into the hole. The woman sustained injuries as the result of her fall and brought an action against the present plaintiff. The plaintiff, as defendant in that action, gave notice in writing to the present defendants to defend the action, but they did not do so. When the case came on for trial the plaintiff, as defendant therein, conceded his liability. A judgment was entered against him and he, after paying it, brought the present suit to

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226, 49 L. Ed. 453, 17 Am. Neg. Rep. 760, 2 Ann. Cas. 525, while counsel for the traction company claim that this case is distinguishable from the instant case mainly on the ground that in the Stockyards case the action was for indemnity, not for contribution. The facts in that case are quite different from the facts here, but whether or not it can be distinguished from the instant case we think doubtful. If it cannot, we are not inclined to follow it, since we believe the doctrine stated in the decisions heretofore cited is

recover over. A judgment in his favor having been affirmed by the appellate division, the defendants appealed to the court of appeals. That tribunal, in considering the appeal, spoke in part as follows: "Where the liability rests upon two or more persons who are as against the person injured jointly liable for the injury, the rule invoked by the defendants that the court should not interfere as between joint tort-feasors is not applicable, where one of the two or more persons chargeable with negligence is primarily liable therefor and the others are only liable by reason of their ownership of the property, and not by reason of any negligence occurring by their active interposition or with their affirmative knowledge and assent. When an employee or independent contractor assumes the duty of performing an act which is dependent upon his personal care and attention, and an injury arises by reason of lack of such care and attention, such person is liable to the owner of the property if he is called upon to pay and does pay the damages arising from such negligence." With respect to the effect of the prior judgment the court ruled as follows: "Notwithstanding the plaintiff's admission that he was liable in the action brought by the person who fell into the coalhole, nevertheless the judgment roll established as against the defendants herein that the plaintiff therein was injured by reason of negligence in connection with the covering of said hole, * * * that her negligence did not contribute to such injury, and * * * the amount of her damages." Since, however, as the court held, it was "also incumbent upon the plaintiff to give evidence in addition to the judgment roll in that [the prior] action to show that the accident occurred by negligence for which the defendants were primarily liable," and since the plaintiff had "wholly failed" to do this, the judgment was reversed and a new trial was granted. Scott v. Curtis, 195 N. Y. 424, 40 L. R. A. (N. S.) 1147, 133 Am. St. Rep. 811, 88 N. E. 794 (1909).

XVI. Employer and employee.

The Pennsylvania court in the course of a decision rendered in a case in which the defendant was charged not as a joint tort-feasor, but as an employer to whom the negligence of his employee was imputable, referred to the subject of this note, stating the court's view upon the right to contribution from one joint negligent tort-feasor to another, and comparing the situation there with that obtaining in the case of an employer to whom the negligence of a servant is imputed, in the following language: "Where that relation [of master and servant] exists, the law imputes to the master the negligence of the servant, and the doctrine of respondeat superior applies. This does not mean that the master in such case is only secondarily liable. He is made

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the more equitable and just doctrine, and well supported by authority from the English cases down. The facts out of which the injuries in the present case arose involve no moral turpitude, wilful or conscious wrong, on the part of either the railway company or the traction company; and, under such circumstances, we think the rule allowing contribution should be followed.

It is true that in the instant case the jury found that the railway company was running at an unlawful rate of speed; therefore

primarily liable, and the injured party may sue either as he elects. So he may do when his injury results from the joint negligence of several, with this distinction, however: When the action is brought against one joint tort-feasor, and compensation is recovered from him, the one so compelled to pay may not enforce contribution from the others, notwithstanding they stand in like transgression with himself; whereas, if the party sued be the employer, chargeable only with imputed negligence, and recovery be had against him, he can maintain his action over against the servant for indemnity. It is important to observe the distinction, for, while the attempt here is to recover on what is charged in the statement filed as actual and direct negligence of the employer, it will be found that this is but the splitting up of a single cause of action, which the law will not allow.'' Betcher v. McChesney, 255 Pa. 394, 100 Atl. 124 (1917).

XVII. Miscellaneous cases.

One P was thrown from his wagon and injured as a result of the negligent driving of an automobile by a chauffeur, for whose actions both of two employers were found, in a suit brought by P, to be jointly liable as persons engaged in a joint enterprise. One of them, having paid the judgment rendered, brought the present action against the other to enforce contribution. In a decision affirming a judgment in the plaintiff's favor the court discussed the subject involved as follows: ''It is undoubtedly a general rule of law that as between joint tort-feasors, in pari delicto as to each other, there is no right of contribution. The reason of the rule is that the law will not lend its aid to him who founds his cause of action upon an immoral or illegal act. It leaves him where it finds him. The leading case is Merryweather v. Nixan, 8 T. R. 186, and this has been uniformly and consistently followed. The term 'tort-feasor,' as used here, applies to persons who by concert of action intentionally commit the wrong complained of. But an exception of this rule is equally well settled, and that is that when the parties are not intentional and wilful wrongdoers, but are made wrongdoers by legal inference or intendment, are involuntary and unintentional tort-feasors, so to speak, then the preceding rule does not apply, and contribution may be enforced. The rule ceases because the reason for it has ceased. Contribution is not contractual. It is an equitable right founded on acknowledged principles of natural justice and enforceable in a court of law. * * * It may be safely asserted that the rule denying the right of contribution as between joint tort-feasors has no application to torts which are the result of mere negligence in carrying on some lawful transaction. In such cases the parties are tort-feasors, not wilfully, but by in-

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there was a technical violation of law. It is quite clear, however, from the record that the acts of the railway company in this regard were not wilful or intentional and involved no conscious wrong. The same may be said of the traction company. So it appears from the established facts that the inadvertent acts of both companies concurred in producing the injuries; hence the case is a proper one for contribution between the railway company and the traction company.

It follows, therefore, that the judgment must be reversed on both

ference of law, and the term itself seems disproportionately harsh under such circumstances. * * * There was [in the present case] no voluntary, wilful, and intentional wrongdoing * * *. There was no community of wrong, and there could have been none. Therefore, the plaintiff having paid the entire sum for which he and his quondam partner were jointly liable, he can recover of the defendant his proportional part or one-half thereof. Any other result would be illogical and unjust." Hobbs v. Hurley, 117 Me. 449, 104 Atl. 815 (1918).

A 14-year-old boy whose father had given him a rifle and some cartridges began shooting birds in a large tree in the street, in violation of an ordinance. S, a boy who was with him, asked and was given the gun for the purpose of shooting. As he was trying to ascertain whether or not the gun was cocked, it went off, shooting and killing the 9-year-old child of the plaintiff. A statute provided: "The father, or after his decease, the mother, are [is] responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons." The plaintiffs brought their action against several defendants, including the father of the boy to whom the gun had first been given and the mother of the boy S, in whose hands the gun was when it was discharged. On appeal from a judgment had by the defendant at the trial, the supreme court, after observing that the liability of the first mentioned defendant was clear, addressed itself to the legal situation of the other defendant mentioned, the mother of the boy S. After holding that the plaintiff had made out a case against the defendant in question, under the statute, the court ruled further that, while she was liable to the plaintiff, she had a right to recover over against the other defendant as "the person who by his act brought the responsibility upon her." In setting aside the judgment appealed from and ordering judgment against the defendants, in solido, for $5,000, the amount fixed as damages, the court ordered, further, that the defendant in question, the mother of S, have judgment over against the other defendant, for any amount of the judgment which might be paid by her. Sutton v. Champagne, 141 La. 469, 75 So. 209 (1917).

The defendant put up a team of horses at the plaintiff's inn. Another driver placed in the plaintiff's stable on the same day a team that had been hired from a certain livery stable keeper. Through the mistake of the plaintiff's hostler the second team was given out to the defendant, who, without noticing the error, drove the team away. One of the horses of the latter team died the next day and the other was found to be sick and injured. The liveryman sued the

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appeals, and the cause remanded, with directions to the court below to enter judgment in favor of the plaintiff against the railway company and the traction company for the amount of both claims assigned to the plaintiff, and the plaintiff may collect the whole judgment from the railway company or the traction company and cause execution to issue against either. The company which pays the judgment may have contribution from the other.

The judgment is reversed on both appeals, and the cause remanded,

plaintiff innkeeper, on a complaint so framed as not to disclose whether the action was based upon negligence or upon the liability of the present plaintiff as an innkeeper. The present defendant was notified, but did not defend. A recovery was had, but it did not appear upon which of the alternative theories. The present suit was brought for the purpose of recovering over against the defendant as the one whose act had caused the plaintiff to be held liable in the prior action. The trial court dismissed the complaint on the ground that the judgment entered in the former suit was conclusive upon the plaintiff "as to his own contributory negligence." On appeal, the appellate division of the supreme court expressed itself as not in agreement with the trial judge as to the ground upon which the dismissal had been placed, but held that the judgment must nevertheless be sustained, because the burden of proof was upon the plaintiff to show that the precise questions at issue in the present action had been litigated and determined in the former suit, which, in view of the uncertainty as to the ground of the prior judgment, the plaintiff had not done. Reynolds v. Alderman, 130 N. Y. App. Div. 286, 114 N. Y. Supp. 463 (1909).

Plaintiff was a civil engineer engaged in establishing the grade of a street, the work of establishing the grade being done by plaintiff's employee, B, who had placed the tripod and transit in the center of the street, and had gone about 75 feet away in the prosecution of his work. Defendant's servant, M, while driving a wagon along the street, drove against the instrument and damaged it. Plaintiff sued defendant, and, at the instance of defendant, B and M were made parties defendant. There was nothing in the street to obscure M's vision, the street being 60 feet in width. B testified that M, while picking up the instrument, stated to him that he saw the instrument as he approached it, and reined his horse away from it, and, on turning to look at his load, his horse changed its course and ran against the instrument. The trial court found in favor of plaintiff, as against the original defendant, and the record showed that the case was by agreement dismissed as to M, and that judgment was rendered in favor of B. On appeal to the county court, there was a verdict and judgment for plaintiff in the sum of $82, from which defendant appealed. In affirming the judgment the court held that defendant had no right of recovery over against B, the employee of plaintiff, since the judgment in favor of plaintiff against defendant was in effect a finding that there was no negligence on the part of B. Thompson v. Field, — Tex. Civ. App. —, 164 S. W. 1115 (1914).

One E recovered a judgment for $4,000 and costs against the defendant and the M company, insured by the plaintiff, in a personal injury action. In that action it was deter-

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with instructions to enter judgment in accordance with this opinion, with costs in favor of plaintiff against the railway company.

VINJE, ROSENBERRY, and ESCHWEILER, JJ., dissent from that part of the decision holding that Ellis was a bona fide assignee of the cause of action. Upon the facts found by the court they concur in the doctrine of contribution.

mined that the defendant and the M company were guilty of coincident independent acts of negligence which resulted in the injury for which judgment was given against both companies. The plaintiff, as insurer of the M company, paid the judgment and commenced this action for contribution. From a judgment for the plaintiff in the trial court, the defendant appealed, asserting that it had acquired an equitable defense limiting the amount it was required to contribute in that it had secured, previous to trial in the personal action, the acceptance by E of a settlement for $2,400, of which it was willing to pay four-sevenths. The court affirmed the judgment, holding that the right of contribution, which did not arise until one of the joint tort-feasors discharged more than his fair share of the common liability, could not be destroyed or even modified by the antecedent conduct of the other joint tort-feasor in refusing to assume a portion of an offered settlement for a liability not conclusively established. The court also pointed out that (1) the judgment in the personal injury action holding the defendant liable was properly introduced as evidence in the present action, and though not of itself res adjudicata of the defendant's liability, became so here, through failure to offer evidence impeaching it. (2) The plaintiff, being bound to pay the judgment under its contract of insurance with the M company, was subrogated to its rights of indemnity against the defendant without assignment to it of the right of contribution. Frankfort General Ins. Co. v. Milwaukee Electric Railway & Light Co., — Wis. —, 173 N. W. 307 (1919).

J. H. M.

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JONES v. NORFOLK SOUTHERN R. CO.

[Supreme Court of North Carolina, October 23, 1918.]

176 N. C. 260, 97 S. E. 48.

1. **Trial—Verdict—Interpretation.**
It is the accepted principle in North Carolina procedure that a verdict must be interpreted and allowed significance by proper reference to the testimony and the charge of the court.

2. **Master and servant—Assumption of risk—Negligence of fellow-servant.**
At common law or under the later decisions of the common-law courts, the negligence of a fellow-servant was classed among the risks assumed by an employee engaged in a common service.

3. **Master and servant—Fellow-servants—Who are—Engineer and brakeman of freight train.**
In making a flying switch, the engineer and brakeman of a freight train are undoubtedly fellow-servants within the common-law rule, making the negligence of a fellow-servant an assumed risk.

4. **Federal Employers' Liability Act—Controlling effect in proper case.**
In a case coming under the Federal Employers' Liability Act, the act itself affords the exclusive and controlling rule of liability, and, where the question presented involves the assumption by plaintiff of the risk of a fellow-servant's negligence, such question must be determined in accord with the pro-

CASE NOTE.

Testimony of railroad engineer as to correct use and operation of locomotive, as opinion evidence; admissibility thereof and necessity of qualification as expert.

I. Conduct in general, 259-260.
A. Whether train "negligently handled," 259.
B. Whether everything possible done tc avoid accident, 259-260.
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visions of the act and applicable and authoritative federal decisions construing them.

5. **Federal Employers' Liability Act—Assumption of risk—When not defense.**
While the Federal Employers' Liability Act clearly recognizes assumption of risk as a defense in certain instances, under section 4 thereof such a position is absolutely inhibited in cases where the violation of a federal statute, enacted for the protection of the employees, contributed to the injury or death complained of, and by correct deduction from the terms and meaning of section 1, the negligence of fellow-servants is withdrawn from the class of assumed risks in cases of unusual and instant negligence and under circumstances which afforded the injured employee no opportunity to know of the conditions or appreciate the attendant dangers.

6. **Master and servant—Assumption of risk—Basis of doctrine.**
The doctrine of assumption of risk is based upon knowledge or a fair and reasonable opportunity to know, and usually this knowledge and opportunity must come in time to be of use.

7. **Federal Employers' Liability Act—Assumption of risk—Negligence of fellow-servants.**
The effect of section 1 of the Federal Employers' Liability Act is to place the conduct of fellow-servants on the same plane as the conduct of the employer as far as the matter of assumption of risk is concerned.

8. **Federal Employers' Liability Act—Assumption of risk—Negligence of employer.**
Under the Federal Employers' Liability Act, an employee does not assume the risks of his employer's negligence unless he is given fair opportunity to know and appreciate the risks to which he is thereby subjected.

* **Cross-references.** Competency of witness to testify as to distance within which train, car or vehicle could be stopped, see 17 N. C. C. A. 392-413; what evidence admissible as to speed of motor vehicles, see 13 N. C. C. A. 566-586.

I. Conduct in general.

A. Whether train "negligently handled."

The plaintiff's decedent, while walking down the tracks to light the lamps at one of the defendant's stations, was struck by an engine of the defendant and killed. The engineer saw the deceased about 300 yards away walking beside the track. Shortly before the train would have passed, however, the decedent suddenly crossed over upon the track and was struck. The trial court excluded the answer of the engineer to a question as to "whether or not the train was being negligently handled." This was alleged as error on appeal by the defendant from a judgment for the plaintiff. The court reversed the judgment and remanded the case, but held that the answer to the question was properly excluded. "The question called for the conclusion of the witness, and invaded the province of both the court and jury. The court properly excluded it." Louisville & N. R. Co. v. Bogue, 177 Ala. 349, 58 So. 392 (1912).

B. Whether everything possible done to avoid accident.

The plaintiff, while driving across the railroad tracks of the defendant, was struck by a switch engine operated only by the fireman thereof and being run backwards from a yard office, where the engineer had left it, to the roundhouse, for a supply of fuel. The engine was coasting at the time and hence running noiselessly at not exceeding 10 miles per hour without exhaust of steam or emission of smoke. The plaintiff stopped twice as he approached the main tracks in or-

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9. Federal Employers' Liability Act—Assumption of risk—When defense not available—Injuries in making flying switch.

In an action, under the Federal Employers' Liability Act, by a freight brakeman for injuries received when, in the making of a flying switch and as a result of the engineer's bringing his engine to an unnecessary, unusual and sudden stop, he was thrown from a box car upon the track in front of the car and run over, held that the court correctly ruled that the defense of assumption of risk was not available to the defendant.

10. Federal Employers' Liability Act—Damages for injuries—Instruction—"Full measure."

In a personal injury action under the Federal Employers' Liability Act, held that it was not prejudicial error for the court to charge that, in certain aspects, the plaintiff should recover the "full measure of damages," where, having charged that the damages must be proportionately reduced in case there was contributory negligence on the part of the plaintiff, the court used the term "full measure" to express correctly the rule of adjustment in case there was no negligent default on plaintiff's part.

11. Evidence—Admissibility—Portion of adversary's pleadings.

It is a settled rule of procedure in North Carolina that a party may offer in evidence a portion of his adversary's pleadings containing an allegation or admission of a distinct and separate fact relevant to the inquiry and without introducing qualifying or explanatory matter, and that, in such case, it is open to the opposing party to introduce such qualifying matter if he so desires.

12. Evidence—Admissibility—Allegations of pleading to explain portion introduced by other party.

Under the rule that, where a party offers, in evidence, a portion of his adversary's pleadings containing an allegation or admission of a distinct and

der to look and listen. The view was blocked on both sides by box cars upon side tracks, but seeing nothing to indicate the proximity of the engine and hearing no bell or whistle, plaintiff attempted to cross. At the trial of the suit for damages, the defendant asked the engineer: "Is there anything that you know of that he (the fireman) could have done that he didn't do?" Plaintiff's objection to the question was sustained. This was assigned as error by the defendant on appeal from the judgment for the plaintiff. The court held that there was no error in refusing to permit the engineer to answer the question, saying: "The answer called for the very question that the jury were to pass upon, and, if permitted, would have usurped the province of the jury. * * * Moreover, the accident occurred at a point upwards of a half mile from where the engineer left the locomotive, and, aside from the fact that he could not know, save from hearsay, what precautions the fireman had taken to avert the accident, his answer must have been a mere conclusion." Eaton v. Southern Pac. Co., 22 Cal. App. 461, 134 Pac. 801 (1913).

II. Stopping engine or train.

A. Distance necessary in general

1. Adequacy of hypothesis.

a. Equipment and grade.

The plaintiff's husband was struck and killed by one of the defendant's passenger trains at a public crossing. The deceased, if he had looked, could have seen the approach of the train for 900 feet beyond the crossing, and the engineer could have observed the deceased approaching the track for at least the same distance. Other people, from positions less advantageous than that occupied by the deceased, heard the roar of the approaching train, which was running, even according to the defendant's admission, from 45 to 50 miles an hour. The train was un-

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separate fact relevant to the inquiry and without introducing qualifying or explanatory matter, the opposing party may introduce such qualifying matter, it will not be error for the court to refuse to permit such an opposing party to introduce certain of its allegations which are, in no sense, qualifying or explanatory of the fact admitted.

13. **Appeal—Presumption—Preliminary finding as to qualification of witness as expert.**

Where the record on appeal shows that there was only a general objection to the testimony of a witness, assuming that the testimony was opinion evidence, and the record showing that the witness was fully qualified as an expert, the presumption is either that there was a preliminary finding by the court that the witness was an expert or that such a finding had been waived.

14. **Evidence—Opinion—Proper manner of making flying switches—Competency of locomotive engineer.**

In an action by a freight brakeman for injuries received when, in the making of a flying switch and as a result of the engineer's bringing his engine to an unnecessary, unusual and sudden stop, he was thrown from a box car upon the track in front of the car and run over, held that where a locomotive engineer, who was called as a witness by plaintiff and whose testimony as to the customary and proper manner of making flying switches and the use of the appliances on the engine provided for the purpose was admitted over defendant's objection, was qualified by training and experience to express an opinion calculated to aid the jury in arriving at a correct conclusion, and where he testified, to the operation and use of engines and appliances exactly similar in structure and operation to the one involved, his estimates and statement of the correct use of such appliances were facts relevant to the issue and were properly received in evidence whether, in strictness, expert evidence or not.

able to stop until it had passed 1,700 feet beyond the crossing. A witness for the plaintiff who had 22 years' experience as a locomotive engineer, but had not been such for the last 14 years, was asked the following question: "I will ask you to state to the jury how long, in your judgment, based upon your experience as a railroad man and your knowledge of the appliances—railroad appliances—would it take a train composed of an engine and three cars—passenger coaches—to make a stop in an emergency at 60 miles an hour, and in what distance?" The witness answered, in response to this question, that the train could have been stopped within 400 feet and thus in time to avert the accident after the deceased was observed. The defendant's objection to this question was overruled and this was alleged as error on appeal from a judgment for the plaintiff. The court reversed the judgment, saying: "Neither the question nor the answer was proper in this case, and when they are stricken from the record, as they should have been upon the motion to that effect by the defendant, there is nothing left to sustain the verdict. There is no evidence of the equipment and make-up of the train. There is no evidence as to the grade of the track, nor as to the condition of the track at the time. Nor is there any evidence as to how the train was loaded. In stopping a passenger train for any purpose, due regard must be had for the safety of the passengers. This element, a very material one, is left out of the question. Other material elements as to make-up and equipments of the train, and grade and condition of the tracks, are all left out." Burge v. Wabash R. Co., 244 Mo. 76, 148 S. W. 925 (1912).

b. **Safety of passengers.**

While the plaintiff's decedent was driving home from a fair in a buggy he fell asleep. At 3 o'clock in the morning, as the horse, without guidance, was crossing the defendant's

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Action under Federal Employers' Liability Act for injuries to brakeman. Judgment for plaintiff. Affirmed.

For appellant—R. N. Simms.

For appellee—Douglass & Douglass, and J. S. Manning.

The action is to recover damages for physical injuries to plaintiff caused by the alleged negligence of defendant company, and the complaint, giving in each the true place and circumstances of the occurrence, states the grievances in two causes of action, in one of which there is direct averment that plaintiff was an employee on defendant's train, engaged at the time as a common carrier of interstate commerce, and a second cause of action without such averment. Defendant having admitted in the answer that the train at the time was engaged in interstate commerce, the action was tried as one under the Federal Employers' Liability Act, and on issues presenting the defenses and pleas recognized by that statute. On the hearing, the evidence on the part of plaintiff tended to show that, on the occasion in question, he was an employee on defendant's

tracks, a train struck the vehicle and killed him. The negligence of the deceased was conceded and the plaintiff sought a recovery upon the humanitarian rule involving liability of the defendant if the engine could have been stopped after the deceased was seen and before the train reached the crossing. It appeared that the engineer could have seen that a collision was impending when he was 600 feet away. Three engineers, experienced in running and stopping trains, testified as to the time in which the train, under the conditions existing, could have been stopped. The hypothetical questions put to them took into account the elements of grade, speed of the train, extent of the curve, the amount of the equipment, and the air pressure of the brakes, but did not consider the element of safety to the passengers. The defendant made no specific objection to this omission at the time of the trial, though a general objection was made. The court, in affirming a judgment of $2,000 for the plaintiff, held that the expert evidence as to the distance in which the train could have been stopped under the circumstances stated in the hypothetical questions was properly admitted, saying: "The principal complaint is that they did not include the hypothesis of due regard to the safety of passengers. That should have been embraced in the questions * * * but defendant is in no position to complain, for the reason that, in the specific objections made to them, that is not included." Burton v. Chicago & A. R. Co., 176 Mo. App. 14, 162 S. W. 1064 (1914).

c. Foundation in evidence.

The plaintiff's decedent, while driving across the defendant's track, was struck and killed by a passenger train running from 30 to 35 miles an hour. The view of the track was obstructed and it appeared that the decedent had attempted to gain a view of the track before crossing. At the trial, the

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freight train running from Raleigh, N. C., towards Norfolk, Va., and at or near a station called Simms he was upon a box car, pursuant to orders, in the line of his duty and employment, engaged in making a flying or running switch, by means of which the car was to be placed on the siding at Simms; that the usual method is for the engine to draw the car to a speed required to run the same on the siding of its own momentum; the engine then slows down sufficiently to take up the slack and allow the coupling to be removed, when the engine speeds down the main line allowing the car to run on the side track as designed; that the proper way to do this is to slow down gradually, and there is a special appliance on the engine, called the "Johnson bar," to enable him to do this without any threatening or unusual jolt; that the engine driving the car having reached a speed 10 or 12 miles an hour, "going very fast," by plaintiff's own testimony, the engineer, by the application of direct air or the unusual manner of applying it brought his engine to a sudden, unusual, and unnecessary stop; that plaintiff, doing what he could to hold himself in place, was thereby thrown upon the track in front of the car and run over, causing the loss of one leg, seriously wound-

ergineer was asked by the defendant whether by any possibility he could have stopped the train in any shorter distance than the train was in fact stopped. Over the objection of the plaintiff, he was allowed to state that he could not. The plaintiff then sought to ask an engineer, called as a witness in his behalf, a hypothetical question as to whether a train drawing such equipment as was used at the time, and equipped with quick action triple Westinghouse brakes, could be stopped in a distance of from 202 to 268 feet. The trial court, in refusing to allow the answer to the question to be admitted in evidence, said that the hypothesis that the plaintiff was seen at that distance from the crossing was not supported by the evidence. From a verdict and judgment for the defendant, the plaintiff appealed. The court, in reversing the judgment and remanding the case, held (1) that the answer to the question of the defendant to its witness was improperly admitted, as calling for a conclusion which it was the duty of the jury to determine; (2) that as there was sufficient evidence to justify the question asked by the plaintiff of its witness, the answer thereto should have been admitted. Bruggeman v. Illinois Cent. R. Co. (Iowa), 123 N. W. 1007 (1909).

2. Qualifications of witness.

The plaintiff's intestate was struck and killed by a passenger train of the defendant. At the trial of the suit for damages, a witness who had served some 20 years before as a fireman and as a freight train engineer for a period of 5 years, though he had never operated a passenger train, was asked as to the distance in which a passenger train equipped like the one in question and running at its rate of speed, could be stopped. The defendant objected to the question on the broad grounds of illegality and immateriality. The court in affirming a judgment for the plaintiff, said: "We think * * * [the witness] quali-

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ing another, and painfully lacerating other portions of his person. A rule offered by defendants, permitting flying switches to be made, contained, among other things, the admonition: "That great care must be exercised at all times in making any flying switch or in kicking cars." In addition to the rule permitting these flying switches to be made, there was testimony on the part of defendant tending to show that this flying switch was made in the usual way without causing any sudden or unusual jolt, and that plaintiff fell from the car by reason of his own inattention and negligence. On issues submitted, the jury rendered the following verdict:

"Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"(2) Did the plaintiff by his own negligence contribute to the occurrence of his injuries as alleged in the answer? Answer: No.

"(3) Did the plaintiff assume the risk of the occurrence of the injuries which he sustained and here complained of? Answer: No.

"(4) What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: Seventeen thousand five hundred dollars ($17,500)."

Judgment on the verdict, and defendant excepted and appealed.

HOKE, J. It was chiefly objected to the validity of the trial that his honor refused to hold as a matter of law that plaintiff was

fied as an expert in the operation of engines. * * * The general similarity between locomotives used for passenger and freight service is sufficient to justify, in respect to their operation, the opinion of a person familiar with the other and without experience with the first. However that may be, there is nothing in the record tending to show that the engine drawing the train in question was not of the same type as that usually used to draw freight trains. Nor do we think the mere dissimilarity between the cars composing a freight train and those composing a passenger train necessarily renders valueless a person's opinion whose experience has been limited to the handling of the other class of trains. The relative distance in which either may be the more quickly stopped is, as appears, subject to many conditions of track, weather, and appliance; and that some conditions are present and some are absent cannot disqualify one shown to have had several years of experience in operating locomotives. The weight to be given the opinion of the expert is, in this as in all cases, a very different matter. The court properly overruled the objections to the questions." Southern Ry. Co. v. Gullatt, 158 Ala. 502, 48 So. 472 (1909).

B. Whether steam shut off promptly.

The automobile of the plaintiff's decedent was damaged as the result of a collision with a "double header" freight train of the defendant. The auto was operated by the wife of the deceased, who tried to stop the car before reaching the crossing, as the husband saw the approaching train. She was unsuccessful and the automobile engine went dead after the front wheels had passed over the first rail. The persons in the car succeeded in alighting therefrom, and even signaled in various ways for the train to stop. The deceased attempted to

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barred of recovery by reason of assumption of risk; this on the ground, first, that the making of a flying switch was one of the ordinary incidents of plaintiff's employment second, that the engineer engaged in making such switch was a fellow servant and, on the facts in evidence, his negligence, if it should be established, should be properly classed as one of the assumed risks in the course of plaintiff's employment. But, in our opinion, neither position can be sustained. The first is closed to defendant by reason of the finding of the jury on the first issue. It is the accepted principle in our procedure that a verdict must be interpreted and allowed significance by proper reference to the testimony and the charge of the court. Reynolds v. Express Co., 172 N. C. 487, 90 S. E. 510, Ann. Cas. 1918C, 1071; Donnell v. Greensboro, 164 N. C. 330, 80 S. E. 377. In the present case, while the complaint seems to specify the "making of the flying switch as a separate act of negligence, a perusal of the evidence and the charge of the court will disclose that the making of the switch itself was not allowed as a ground of liability, but that the considerations and decisions of the first issue were restricted to the question whether there was negligence in making such switch by bringing the engine to an unnecessary and

shove the car off the track, but was unsuccessful. The car was damaged and the deceased met his death. This suit was instituted for damages to the machine. On trial it appeared that the engineer of the first engine applied the brakes and shut off the steam as soon as he observed the automobile on the track. It was disputed, however, as to how soon the engineer of the second locomotive followed his example. A stationary engineer who had operated locomotive engines 25 years before, testified that the second engine did not have its steam shut off until after the accident happened. The defendant did not object to his competency to testify as an expert. From a judgment for plaintiff, the defendant brought error alleging that the testimony of this engineer was incompetent as a matter of law. The court affirmed the judgment holding that as there was no objection to the testimony of the witness in question, the credibility and weight to be given his testimony was solely for the jury; (2) that as a matter of law such witness was not incompetent to testify as an expert as to when the engineer of the second locomotive cut off his steam. Chesapeake & O. R. Co. v. Hunter's Adm'r, 120 Va. 699, 91 S. E. 181 (1917).

C. Whether everything possible done to stop quickly.

An engine of the defendant railroad ran over and killed a cow of the plaintiff, and a suit for damages was instituted. It appeared that the trainmen could not see the approach of the cow because of bushes along the right of way. At the trial, both the conductor and the engineer were allowed to state that they did all that could have been done to stop the train and avert the injury. The admission of this evidence was assigned as error on appeal by the plaintiff from a judgment for the defendant. The court, in affirming the judgment, held that as both the

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unusual stop''; the language of his honor's direct charge on the first issue being as follows:

"If you should find from the evidence and by the greater weight of the evidence that the engineer suddenly, by use of air brake, or any other appliance, suddenly and unnecessarily checked the speed of the engine in such a manner as to cause an unusual and unnecessary jar sufficient to throw the plaintiff from the car, and he was thrown by reason of that from the car and run over and hurt, you will answer the first issue, 'Yes,' but if you fail to so find you will answer it, 'No.' ''

The verdict on the first issue, therefore, having eliminated "the making of a flying switch as a ground of liability," that fact as a separate circumstance is withdrawn from consideration also on the question of assumption of risk. And this, too, is the final answer to the second ground of defendant's objection, though, as argued, this presents other questions that it may be well to consider. At common law or under the later decisions of the common-law courts, the negligence of a fellow servant was classed among the risks assumed by an employee engaged in a common service, and, on the facts of this record, the engineer and brakeman are undoubtedly fellow servants within the meaning of the principle. New England R. R. v. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181, 7 Am.

engineer and conductor were experts in respect to the matter inquired about, their testimony that they did all that could have been done to stop the train and avert the injury was admissible. Choate v. Southern Ry. Co., 119 Ala. 611, 24 So. 373 (1898).

The plaintiff, while crossing the track of the defendant's railroad in a wagon, was struck by a train and killed. At the trial, experts were allowed to testify as to the best method of stopping the train, and as to whether, on hypotheses having support in the evidence, the engineer had done everything a competent engineer could have done to stop the train. On appeal by the plaintiff from a judgment for the defendant, it was contended that the introduction of this testimony was error. The court, however, affirmed the judgment, saying: "The jury were to determine these questions [those asked the experts] for themselves and to base their verdict upon their own judgment of the facts. * * * But there would perhaps have been no adequate mode of arriving at a satisfactory conclusion on the fact in controversy, if expert opinions were rejected, and in recognition of this fact, 'the courts have adopted the rule of admitting the opinions of witness whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study in order to attain a knowledge of it.' * * * Such was the case here." Walker v. Alabama T. & N. R. Co., 194 Ala. 360, 70 So. 125 (1915).

D. Operation under "full control."

1. Explanation of term.

The plaintiff, a locomotive engineer, was running an east-bound freight train towards the city of J, at the

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Neg. Rep. 182; B. & O. Ry. v. Baugh, 149 U. S. 369, 13 Sup. Ct. 914, 37 L. Ed. 772. This cause, however, coming under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, [U. S. Comp. St. 1916, §§ 8657-8665]), it is fully established that the statute itself affords the exclusive and controlling rule of liability, and the question presented must be determined in accord with its provisions and applicable and authoritative federal decisions construing them. Belch v. Seaboard Air Line, 176 N. C. 22, 96 S. E. 640, at the present time, citing Erie R. R. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, 14 N. C. C. A. 957, Ann. Cas. 1918 B, 662; N. Y. Central v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, 14 N. C. C. A. 680, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; St. Louis, etc., R. R. v. Hesterly, Adm'r, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. Ed. 1031; Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 1 N. C. C. A. 857, 38 L. R. A. (N. S.) 44.

While the law in question clearly recognizes assumption of risk as a defense in certain instances, under section 4 (section 8660) such a position is absolutely inhibited in cases where the violation of a federal statute, enacted for the protection of the employees, con-

time of the accident; 4 miles west of J was the junction of the main line and a branch road. The plaintiff was notified by the train dispatcher that passenger trains running between J and the junction had reached the latter point. Plaintiff consequently assumed that the track was clear from the junction east to J. The dispatcher, however, had allowed an extra freight train to run between J and the junction and it had reached the junction and was crossing over to the branch line when the plaintiff's train approached. The block signal, under these circumstances, should have shown a red light. Instead, a white light signaling the plaintiff to go ahead was displayed. This he did and a collision resulted in which the plaintiff was injured. A railroad rule required all trains approaching the junction to be under "full control." The night, however, was dark, and the evidence tended to show that it was impossible for the plaintiff to see the other train in time to avert the collision. At the trial, testimony was introduced on the part of the plaintiff to show that the term "full control" meant a slow speed until it was discovered whether a white light was displayed, after which the train was allowed to proceed at its usual rate of speed. The plaintiff and others were also allowed to testify as to the purpose and meaning of the signals, switch lights, and the usual and customary manner of running trains into the junction. From a judgment for $25,000 entered on a verdict for $50,000, the defendant appealed. The court, in affirming the judgment, held that (1) an explanation of the term "full control" was proper since its use as applied to train operation was technical and possibly not within the understanding of the jury without such explanation; and (2) that the testimony of the plaintiff as to the signals, switch lights, and usual manner of running trains into the junction was admissi-

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tributed to the injury or death of employee, and, by correct deduction from the terms and meaning of section 1 (section 8657), making railroads engaged as common carriers of interstate commerce liable in damages for injuries or death caused by the negligence of their officers, agents, or employees, the negligence of fellow servants is withdrawn from the class of assumed risks, in cases of unusual and instant negligence and under circumstances which afforded the injured employee no opportunity to know of the conditions or appreciate the attendant dangers. This doctrine of assumption of risk is based upon knowledge of [or] a fair and reasonable opportunity to know, and usually this knowledge and opportunity must "come in time to be of use." 26 Cyc. p. 1202, citing Wright v. Chicago, I. & L. Ry. Co., 160 Ind. 583, 17 Am. Neg. Rep. 4367, 66 N. E. 454. This principle is very generally approved in the cases and textbooks on the subject, and in authoritative federal decisions construing the act in question, in reference to the negligence of fellow servants and the incidental assumption of risks, it has been held that the effect of this first section is to place the conduct of fellow servants on the same plane as the employer himself in such cases, and it is fully recognized that an employee does not assume the risks

ble. "The rule is well established," said the court, "that the usual and ordinary manner of operating machinery, in which we may properly include railroad trains, is a legitimate subject of expert evidence." Finnegan v. Missouri Pac. R. Co., 261 Mo. 481, 169 S. W. 969 (1914).

2. Whether train so operated.

The plaintiff was injured in a wreck of the train upon which he was riding as a passenger. The train was late at the time of the accident and was running at a higher rate of speed than usual. At the trial of the suit for damages, the defendant asked the engineer in charge of the train the following questions: "State whether or not you had your train under control to stop at the public crossing? State whether or not you could have stopped at the public crossing? State whether or not you were running at a rate of speed at which you could have stopped your train at the public crossing?" The witness had previously stated that the train was running 30 miles an hour. On appeal by the defendant from a judgment for the plaintiff, the defendant assigned as error the refusal of the trial court to allow answers to the above questions to be admitted in evidence. The court, affirming the judgment, held that the questions were properly excluded. "The conclusions which these questions called for," said the court, "were not permissible shorthand renderings of relevant collective facts, but involved, not only the rate of speed of the train, but other facts and purposes which were wholly foreign to any issue in the case." St. Louis & S. F. R. Co. v. Savage, 163 Ala. 55, 50 So. 113 (1909).

The plaintiff, an engineer, was injured in a collision with another train running a few minutes in advance, when the latter remained at a station longer than usual without giving the proper signals. The plaintiff was al-

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of his employer's negligence unless, as stated, he is given fair opportunity to know and appreciate the risks to which he is thereby subjected. Chesapeake & Ohio Ry. v. De Atley, 241 U. S. 311, 36 Sup. Ct. 564, 60 L. Ed. 1016; Yazoo, etc., Ry. v. Wright, 235 U. S. 376, 35 Sup. Ct. 130, 59 L. Ed. 277; Seaboard Air Line v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, 8 N. C. C. A. 834, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; Gila Valley, etc., Ry. v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521; Texas & Pacific Ry. v. Behymer, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. Ed. 905, 13 Am. Neg. Rep. 695; 2 Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; Grybowski v. Erie R. Co., 88 N. J. Law, 1, 95 Atl. 764; Richey on Fed. Emp. Liability Act, § 59. In Gila Valley Ry. v. Hall, the general position is stated as follows:

"An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employee has a right to assume that his employer has exercised proper care with respect to providing * * * safe * * * appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employee becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. * * * In order to charge

lowed to testify at the trial that when he entered the station limits he had his engine "under full control," as that term was used in the rules governing the operation of trains. On appeal by the defendant from a judgment for the plaintiff of $22,500, this was alleged as error. The court affirmed the judgment to the extent of $17,000, holding that the evidence was properly admitted. International & G. N. R. Co. v. Brice, — Tex. Civ. App. —, 126 S. W. 613 (1910).

III. Controlling emission of sparks.

A. Whether engine prudently handled.

In an action for damage to property by fire alleged to have been caused by sparks from one of the defendant's engines, the engineer of the train supposed to have caused the damage was asked whether or not he operated the engine in a prudent and careful manner, as it should have been handled by an experienced and competent engineer. The answer that he did so operate the engine was admitted in evidence. This was assigned as error on appeal by the plaintiff from a judgment for the defendant. The court, in reversing the judgment and remanding the case, held the testimony was inadmissible as calling for the conclusion of the witness, the conclusion or opinion not being based on disclosed facts. The court said: "In matters of science, art, or special occupations where persons inexperienced therein would be unable to reach a proper conclusion from the mere statement of the facts, the opinions and conclusions of an expert may be given. But in these instances the facts upon which the conclusion or the opinion is based must be adduced before the jury, or hypothetically assumed and stated within its hearing, before the opinion will be admitted. * * * In the case at bar the conclusion of the witness as contained in his answer included the facts as well as his

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an employee with the assumption of a risk attributable to a defect due to the employer's negligence, it must appear, not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it."

In Chesapeake & Ohio Ry. v. Atley, where an employee was injured in the endeavor to board a moving train in the course of his employment and was injured by the unusual speed of the engine, it was held as follows:

"The Employers' Liability Act abrogated the common-law fellow-servant rule by placing negligence of a coemployee upon the same basis as negligence of the employer. In saving the defense of assumption of risk in cases other than those where the carrier's violation of a statute enacted for the safety of employees contributed to the injury or death, the Employers' Liability Act places a coemployee's negligence, where it is the ground of the action, in the same relation as the employer's own negligence would stand to the question whether a plaintiff is to be deemed to have assumed the risk. A railroad employee, having voluntarily entered an employment requiring him on proper occasions to board a moving train, assumes the risk normally incident thereto other than such risk as may arise from the failure of the engineer to use due care to operate the train at a moderate rate of speed so as to enable his coemployee to board it without undue peril. Such an employee may presume the engineer will exercise due care for his safety and does not assume the risk attributable to operation at unduly high speed until made aware of danger unless the undue speed and consequent danger are so obvious that an ordinarily careful person in his situation would observe the speed and appreciate the danger.

opinion upon them. The jury was informed in a concise affirmative that his entire course of conduct * * * was that which should characterize a person of ordinary prudence under such circumstances, the very question which fell exclusively within the province of the jury to decide. His conclusion or opinion was not based upon disclosed facts so that the jury might for itself determine whether or not the facts existed and thus test the value of his opinion, but the witness was permitted to give his conclusion from details of which the court and the jury knew nothing." Bryan Press Co. v. Houston & T. C. Ry. Co. (Tex. Civ. App.), 110 S. W. 99 (1908).

In an action to recover the value of cotton destroyed by fire alleged to have been caused by a spark from one of the defendant's locomotives, the defendant introduced as a witness the engineer in charge of the engine. After testifying that he had been a locomotive engineer for 15 years, he was asked: "Do you know how to properly handle, manage, and control an engine?" and also, "Will a properly equipped engine sometimes emit sufficient sparks to set fire to cotton within five or six feet of the track?" A general objection was made by the plaintiff to these questions, but this was overruled. From a judgment for the defendant, the plaintiff appealed, alleging the ruling to be error. The court reversed the judgment and remanded the case, but held that as the objections were general, they were properly overruled, since the evidence sought was under the issues in the case, relevant and material. As the court said: "The question was whether the witness did carefully control and manage the engine at the time of the accident and it was properly ruled that he should state what he did and how he handled the engine, as the careful handling of the engine at the time was one of the questions in the case for the jury." Horton v.

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An employee is not bound to exercise care to discover extraordinary dangers arising from the negligence of the employer or of those for whose conduct the employer is responsible, but may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them."

It will be noted that, this was an action under the Employers' Liability Statute and bears with much directness on the facts of the present case. And Yazoo, etc., Ry. v. Wright, was also a case under the Employers' Liability Act, and holding that no case of assumption of risk was presented when an employee was injured by negligence of the master or fellow servant and the circumstances gave no opportunity to know the danger "in time to be of use." In Railway v. Behymer, supra, a case where an employee had recovered for injuries attributable to an unusual and sudden jerking of a freight train, Associate Justice Holmes, delivering the opinion in affirmance of the judgment below, said:

"No doubt a certain amount of bumping and jerking is to be expected on freight trains, and, under ordinary circumstances, cannot be complained of. Yet it can be avoided if necessary, and when the particular and known condition of the train makes a sudden bump, obviously dangerous to those known to be on top of the cars, we are not prepared to say that a jury would not be warranted in finding that an easy stop is a duty. If it was negligent to stop

Louisville & N. R. Co., 161 Ala. 107, 49 So. 423 (1909).

In an action for damages to property by fire alleged to have been caused by sparks from the defendant's engine, the trial court refused to allow the engineer to answer the question as to whether he handled the engine carefully as he passed the place where the fire in question occurred. This was alleged as error by the defendant, on appeal from a judgment for the plaintiff. The court, in affirming the judgment, held that the answer to the question was properly excluded, saying: "The witness should be called on to state what he did and how he handled the engine. Whether the handling was careful was one of the questions the jury had to decide, if they found the engine operated by the witness set out the fire which destroyed the plaintiff's property." Birmingham Railway, Light & Power Co. v. Martin, 148 Ala. 8, 42 So. 618 (1906).

B. Normal emission of sparks.

In a suit to recover damages for the negligent burning of the plaintiff's timber by sparks escaping from a passing engine there was much evidence offered on both sides as to whether the fire originated from a spark from an engine. The defendant called H, who testified that he reached the fire within 5 minutes after it started at a point about 8 feet from the track; that the train had passed about an hour previous; that he had operated engines, wood and coal burners, and had much experience in observing how far sparks fly from them under similar conditions. The defendant asked the witness this question: "From what you saw, how far would you say sparks would be thrown from one of these locomotives?" The question was excluded, and the defendant alleged this as error on appeal from a judgment for the plaintiff. The court, in reversing the judgment, held

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as the train did stop, the risk of it was not assumed by plaintiff''—citing Tex. Pac. Ry. v. Archibald, 170 U. S. 665-672, 18 Sup. Ct. 777, 42 L. Ed. 1188, 4 Am. Neg. Rep. 746.

The case of Boldt v. Railway, 245 U. S. 442, 38 Sup. Ct. 139, 62 L. Ed. 385, a decision very much relied on by defendant, does not antagonize the position approved and applied in the cases cited. In Boldt's case, the intestate of plaintiff, while between cars in a freight yard helping to repair a faulty coupler, was killed by the impact of a string of cars moving by gravity under the control of a brakeman. It was contended that the brakeman negligently permitted the moving cars to strike with too great violence, and that the company failed to promulgate adequate rules on the subject, with evidence to support both claims. There was also evidence tending to show that it was usual to allow the moving cars to strike others that were stationary with force sufficient to make the coupling, etc. On the trial below there was verdict for the company, and on writ of error by plaintiff the single exception insisted on was the refusal of the trial court to give the following instruction asked by him:

''The risk the employee now assumes, since the passing of the Federal Em-

that the evidence was admissible. Watkins v. Seaboard Air Line R. Co., 163 N. C. 131, 79 S. E. 273 (1913).

C. Effect of slipping of drive wheels.

The defendant's switch engine, in attempting to place a car at the door of the plaintiff's warehouse for loading, sent it down the side track with such force that it was derailed by running into a slag pile at the end. In attempting to rerail the car, the whole power of the engine was used, and it threw out of its stack large volumes of smoke and fire, and on several occasions, when the drivers slipped, the volume of smoke and fire was increased. Soon after the engine left, a fire broke out on the part of the roof under which the engine stood. As a result, the entire warehouse was consumed. A suit for damages was instituted on the ground that the fire was caused by sparks thrown from the defendant's engine because of its improper equipment and negligent operation. A witness, who qualified as an expert, testified, in answer to a hypothetical question, that in his opinion the engine was not properly managed. This testimony was subsequently stricken. The jury found the engine and fire box were properly equipped and in good working order, but that the engine was negligently operated. From a judgment for the plaintiff the defendant brought error, alleging in part that the jury should have been instructed that the engine was properly managed. The court, in affirming the judgment, held that the expert testimony was competent. ''What effect,'' said the court, ''the slipping of the drivers would have on the fire, and whether she was properly handled, having in mind the surroundings, was a proper subject of opinion evidence for those who were skilled in the operation of locomotives. * * * The testimony offered, bearing on the defendant's negligence, raised an issue

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ployers' Liability Act, is the ordinary dangers incident to his employment, which does not now include the assumption of risks incident to the negligence of the owner's officers, agents, and employees."

In overruling the exceptions, the court, adhering to its former position that the act had the effect of placing the negligence of a fellow servant in the same category as that of the employer's, held that the prayer for instruction was too broadly stated, as the employee as a rule assumed the "extraordinary risks caused by the master's negligence where they are obvious or fully known and appreciated by him"; but, as will be readily seen, the case gives no support to the position that the employee assumes the risks incident to an act of negligence by the employer or fellow servant where no opportunity was afforded to know or appreciate the conditions or its attendant dangers. This being, in our opinion, the correct principle applicable, and the jury, under the charge of the court, having, as stated, established by their verdict on the first and second issues that plaintiff was thrown from the car and run over and injured solely by reason of the sudden, unusual, and unnecessary manner in which the engine and car were stopped by the engineer, an instant act of negligence on his part, we think

for the jury." Roach & Co. v. Blair, 190 Mich. 11, 155 N. W. 696 (1916).

IV. Range of lookout towards rear of backing engine.

The plaintiff was in the act of crossing the defendant's tracks to take a train to the point where he was to begin his work as a flagman, when he was struck and injured by a backing switch engine. The plaintiff had been delayed in crossing the track by the passage of another train. After it had passed, he had glanced up and down the adjoining track, and was in the act of turning his head to look again, in the direction from which the engine came, when he was injured. At the trial of the suit for damages there was a conflict in the testimony as to whether there was a light at the rear of the engine. An experienced engineer was asked as to how far from the rear of the engine a man on the track could be seen by an engineer in the cab, if there was a street electric light at that place. The question was objected to by the defendant on the ground that it took no account of the headlight of the engine. On appeal by the defendant from a judgment for the plaintiff, the overruling of the objection was alleged as error. The court, in affirming the judgment, held that as one of the issues of the case was whether the engineer saw the plaintiff in a position of peril and at what distance from him, the question was proper. Louisville & N. R. Co. v. Johnson, 162 Ala. 665, 50 So. 300 (1909).

V. Controlling emission of steam.

The plaintiff was driving a mule hitched to a buggy along a public road immediately adjacent to and parallel with the railroad track of the defendant, when a freight train approached with cylinder cocks open and steam escaping. It was alleged by the plaintiff, in his suit for damages, that the mule became frightened as a

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defendant's motion was properly disallowed, and his honor correctly ruled that, on the facts so established, the defense of assumption of risk was not available to defendant.

It was further objected that his honor gave an erroneous definition of "assumption of risk." The court charged the jury that, if the company was accustomed to make these flying switches and plaintiff to assist in it, he assumed the risk of the incidental dangers, and his general definition of the principle seems to be in accord with the decisions on the subject; but, having restricted the fact of liability on the first issue to the single question whether the engineer made the flying switch negligently by bringing his engine to an unnecessary and unusual and sudden stop, and this having been determined in plaintiff's favor, the court, under the authorities, was justified in the ruling that there could be no assumption of risk, and his definition was without appreciable significance and should not be allowed to affect the result.

It was further insisted that his honor committed prejudicial error in his charge on the question of damages by saying, in certain aspects, the plaintiff should recover the "full measure of damages"; but this exception is without merit. It was used in

result of this noise and ran away, causing serious injuries to the plaintiff, among which was a rupture. There was evidence that the engineer saw the fright of the mule, but took no action to prevent the escape of the steam and thereby allay the fear of the animal to assist in preventing the accident. At the trial, an experienced engineer testified that it was not essential to the operation of the engine that the cylinder cocks be open all the time for the escape of water and steam, and in answer to a hypothetical question as to how long it would have taken the engineer to have closed the cylinder cocks, it was permitted by the court to state that this could have been done instantly, as the cylinder cocks were connected with the cab of the engine by a rod. The defendant, on appeal from a judgment for the plaintiff, objected, among other things, that this question was improperly allowed to be answered. The court affirmed the judgment, holding that the question and the evidence elicited thereby were entirely proper. Louisville & N. R. Co. v. Jenkins, 196 Ala. 136, 72 So. 68 (1916).

VI. Observation of switch signals.

The plaintiff and several other men were engaged in unloading a monument and markers from a flat car of the defendant railroad which was standing on a siding, two cars being in close proximity. In some unexplained way the switch from the main track was left open, and the switching engine, used in and about the yard, while being run backwards and pulling several cars upon the siding, struck one of the two box cars and drove it against the flat car upon which the plaintiff was working. The impact threw the plaintiff into a wagon standing at the side of the car and from thence to the ground, severely injuring him. The "target" at the switch which showed whether it was open or closed had been re-

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connection with his honor's instructions in reference to the effect of plaintiff's contributory negligence on the amount of damages. Having charged that the damages must be proportionately reduced in case there was contributory negligence on part of plaintiff, he used the term "full measure" to express correctly the rule of adjustment in case there was no negligent default on plaintiff's part; and it has been held that the term, in any event, does not always constitute reversible error. Texas Ry. v. McCarty, 49 Tex. Civ. App. 532, 108 S. W. 764.

Defendant excepted further to the rulings of the court on questions of evidence: First, that his honor allowed plaintiff to put in evidence a separate clause of section 5 of the answer, as follows:

> "That, in order to disconnect the said moving engine and car, it was necessary as a part of said operation to apply air to the engine so as to slow the same down."

And further that he refused to permit defendant to introduce other portions of said answer materially affecting said admissions. In this connection, his honor offered to allow defendant in reply to introduce the accompanying statements of this paragraph, as follows:

moved 18 months before. The defendant engineer testified that if there had been a target upon the switch, it would have made no difference in his running upon the siding. The trial court struck out this declaration, ruling that it was not a statement of fact, but a mere conclusion of the witness, and that while he could state all of the surrounding facts, it was for the jury to draw the conclusions therefrom. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held there was no error in striking out the statement in question. Lyke v. Lehigh Val. R. Co., 236 Pa. 38, 84 Atl. 595 (1912).

VII. Observance of rules.

The plaintiff's decedent at the time of the accident was running an engine on a test run. He was going at a speed of from 50 to 60 miles an hour and on a track which placed him against the current of traffic. Another engine going from the roundhouse had been placed on a crossover track which connected the two main line tracks. In a collision between the two, the deceased met his death. The trial court sustained general objections to the following questions asked on cross-examination of the engineer operating the engine on the crossover track: "Was the placing of this engine * * * on the crossover track a proper and regular movement for it to make? Did you violate any rules or regulations of the company in placing [the] engine * * * on that track? Was it in conformity with the rules and regulations which prevailed?" From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that an objection to the questions above stated was properly sustained. As was said: "These questions asked for conclusions it was for the jury to draw from the relevant facts in evidence. The witness might have been

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"That, pursuant to said purpose, the said engine and cars were proceeding along the track and in the usual and customary manner and the said engine was slowed down and the car uncoupled from said engine."

The defendant declined and, in addition, offered in evidence the entire remaining portion of the paragraph and excepted to the ruling excluding the additional statement.

It is the settled rule of procedure in this jurisdiction that a party may offer in evidence a portion of his adversary's pleadings containing an allegation or admission of a distinct and separate fact relevant to the inquiry and without introducing qualifying or explanatory matter, the rule being further to the effect that, in such case, it is open to the opposing party to introduce such qualifying matter if he so desires. Wade v. Contracting Co., 149 N. C. 177, 62 S. E. 919; Sawyer v. Railroad, 145 N. C. 24, 58 S. E. 598, 22 L. R. A. (N. S.) 200; Lewis v. Railroad, 132 N. C. 382, 15 Am. Neg. Rep. 442n, 43 S. E. 919. A correct application of the principle is in full support of his honor's ruling on both questions. The part of paragraph 5 admitted was of a distinct and separate fact relevant to the issue. His honor offered to allow defendant to intro-

permitted, no doubt, to state that it was in general necessary or proper to use the crossover track in the discharge of the duties of his employment * * *. But these questions seemed to be framed to draw out the witness' opinion as to the propriety of his action under the circumstances of the particular occasion. That was for the jury, and there was no error in sustaining the general objections." Louisville & N. R. Co. v. Fleming, 194 Ala. 51, 69 So. 125 (1915).

VIII. Coupling tender to engine.

The plaintiff, an engine wiper, was directed by his foreman to assist in coupling a tender, which had 3 bars, the largest being in the middle, to a locomotive. Being inexperienced in such work, the plaintiff placed his back towards the tender and with his arm under one of the side bars and the middle bar and, his head between them, guided the bars into their sockets. When they slipped into place, they were brought suddenly against the plaintiff's head, and inflicted serious injury upon him. At the trial of the suit for damages, a locomotive engineer of 17 years' experience testified that he was familiar with the coupling apparatus of 3-bar engines; that it would take three men to safely perform such coupling; and that no inexperienced man should undertake the task of coupling such an engine. On cross-examination, however, it appeared that while he had seen engines coupled thousands of times, he had only once seen a 3-bar engine coupled. Thereupon, a motion was made to strike out all of the testimony of the witness as to the proper method of coupling 3-bar engines. This was denied and the order assigned as error by the defendant on appeal from a judgment for the plaintiff. The court, in affirming the judgment, said: "The witness fully qualified himself as an expert in the coupling of trains. He was skilled in that particular trade, and he could have testified as to the dangers of the peculiar coupling of

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duce in reply any accompanying allegation which could properly be said to qualify or explain the fact, and the additional allegations of the answer insisted on by appellant, averring contributory negligence by plaintiff, were in no sense qualifying or explanatory of the fact admitted and were therefore properly excluded.

It was contended further for error that the court, over the defendant's objection, allowed in evidence the testimony of the witness S. C. Green, a locomotive engineer, as to the customary and proper manner of making these flying switches and the use of the appliances on the engine provided for the purpose. On the argument before us, the objection was urged chiefly on the ground that there had been no preliminary finding by the court that the witness was an expert; but no such objection was made on the trial, nor was the court asked or required to make a finding on the preliminary question. The record shows that there was only a general objection to the evidence of the witness, and this being true, assuming that the testimony of the witness was opinion evidence, and the record showing that the witness was fully qualified as an expert, the presumption is either that there was a preliminary finding by

the engine in question, upon a full description of it, without ever having seen it; and, if it appeared that he was fully acquainted with the mechanism and operation of the peculiar coupling, it would not matter whether he gained his knowledge by having examined it, and having seen it in operation one time or a thousand times. It was a matter pertaining to his trade or calling. The fact that the witness had seen the coupling in operation only once might go to the weight of his testimony, but not to the competency of it. The court did not err in refusing to strike out the evidence." Texas & N. O. R. Co. v. McCoy, 54 Tex. Civ. App. 278, 117 S. W. 446 (1909).

IX. Replacing dislocated sand pipe.

The plaintiff, a locomotive engineer, found that the iron pipe leading from the sand box to the point immediately above the rail, designed to scatter sand along the rail and thereby assist in regulation of the movement of the train, had become so adjusted that it distributed the sand on the ground some 4 or 5 inches outside the rail. While the engine was slowly starting, the plaintiff, in an attempt to readjust this pipe, placed his foot against the pipe, assuming that it was reasonably securely adjusted. The pipe moved more easily than he had anticipated, and in consequence the plaintiff's leg was caught under the wheels and crushed to such an extent that amputation was necessary about 9 inches below the knee. At the trial of the suit for damages, the plaintiff was allowed to testify that "from his experience and observation and knowledge of machinery, locomotive engines, etc., it was the custom and practice, when a sand pipe was out of line so as to throw the sand away from the rail, for an engineer to put his foot against it and push it around." On appeal the court, reversing the judgment and remanding the case, held that the evidence in question was improperly admitted.

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the court, or that the same had been waived. Lumber Co. v. Railroad, 151 N. C. 217, 220, 65 S. E. 920, citing Britt v. Railroad, 148 N. C. 37, 61 S. E. 601; Summerlin v. Railroad, 133 N. C. 550, 45 S. E. 898. Apart from this and under our decisions, the witness being, as the record shows, qualified by training and experience to express an opinion calculated to aid the jury to a correct conclusion and speaking to the operation and use of engines and appliances exactly similar in structure and operation to that used in the instant case, his estimates and statement of the correct use of such appliances were facts relevant to the issue and properly received in evidence, whether in strictness expert evidence or not. Tire Setter Co. v. Whitehurst, 148 N. C. 446, 62 S. E. 523; Britt v. Railroad, 148 N. C. 37, 61 S. E. 601.

There were other exceptions noted; but, while they have all been duly considered, being without appreciable bearing or significance on the results of the trial, they are not further adverted to.

We find no error in the record, and the judgment for plaintiff is affirmed.

No error.

Missouri, K. & T. Ry. Co. of Texas v. Pace, — Tex. Civ. App. —, 184 S. W. 1051 (1916).

X. Preserving adequate water supply for boiler.

The plaintiff, a brakeman, was injured by the explosion of the boiler of a locomotive engine in the cab of which he was riding. The plaintiff alleged that the explosion was due to the carelessness of the engineer in failing to keep a sufficient supply of water in the boiler. A locomotive engineer, called as a witness for the plaintiff, was asked the following questions: "Whose duty is it to keep the crown sheet covered with water in operating the engine? Whether or not any circumstances in regard to the grade or change of position of the engine changed that duty in any way? Whose duty is it to examine the glass and see if it is in proper order in the proper operation of a steam engine?" The trial court allowed the questions to be answered and the defendant excepted. A judgment for the plaintiff resulted, from which the defendant appealed. The court, in affirming the judgment, held that the answers to the above questions were properly admitted, as relating to material matters not the subject of general knowledge, but dependent on facts which, from their nature, it would be difficult to place before the jury. "The statements embodied in the answers of * * * [the witness]," said the court, "were necessarily facts drawn from his peculiar knowledge, practical experience, and skill in the operation and control of locomotive engines." Temple v. Gilbert, 86 Conn. 335, 85 Atl. 380 (1912).

O. L. C.

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FELDMAN v. CHICAGO RYS. CO.

[Supreme Court of Illinois, June 18, 1919.]

289 Ill. 25, 124 N. E. 334, rev'g 212 A. 482.

Rehearing denied October 9, 1919.

1. **Carriers—Street railroad company—Care required as to passenger.**
A street car company must use the highest degree of care to avoid injuring a passenger.

2. **Street railroads—Care required as to pedestrian.**
A street car company is required to use only ordinary care to avoid injuring a pedestrian.

3. **Carriers—Street railroad company—Existence of relation of carrier and passenger—Passenger changing cars.**
Where a street car passenger, in pursuance of a continuous journey, transfers from one car to another, the relation of carrier and passenger continues throughout the necessary acts of such transfer, and, although during the transfer the carrier can exercise no control over the passenger's movements so as to render it liable for injury received by the passenger from some source other than the carrier, such fact does not change the relation of carrier and passenger in the case of such transfer nor lessen the degree of care which the carrier is bound to use to avoid injury to such passenger through the negligence of its own servants or agencies while such passenger is engaged in the necessary acts of such transfer.

4. **Carriers—Street railroad company—Termination of relation of carrier and passenger—Passenger alighting at end of journey.**
Where a passenger alights into a public street from a street car at the end of his journey, he ceases to be a passenger.

5. **Carriers—Street railroad company—Existence of relation of carrier and passenger—Passenger changing cars—Determinative factor on question.**
The ticket of transfer given a street car passenger who must change cars in order to reach his destination is not that which establishes the relation of carrier and passenger during the time of the act of changing from one car to another, but is merely the evidence of the fact that the passenger is engaged in a continuous journey, whether he is so engaged being the determinative factor on the question of the existence of such relation during the time of transfer.

6. **Res ipsa loquitur—Doctrine defined.**
The doctrine of res ipsa loquitur may be stated thus: When a thing which has caused an injury is shown to be under the management of the party charged with negligence and the accident is such as in the ordinary course of things will not happen if those who have such management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the parties charged, that it arose from the want of proper care.

CASE NOTE.

Duty of street railway company to passenger during period of transfer from car to car.

I. At regular transfer point, 281-288.
A. Struck while in act of boarding, 281-285.
B. Run down while crossing street, 285-288.
II. Emergency transfer, 288-295.
A. Car going into car barn, 288-292.
B. Track obstructed, 292-294.
III. Alighting to interfere in quarrel, 295-297.

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7. **Res ipsa loquitur—Effect of applicability of doctrine.**
Negligence is never presumed, but the circumstances surrounding the case where the maxim of res ipsa loquitur applies, amount to evidence from which the facts of negligence may be found; that is, in a case within the maxim of res ipsa loquitur, proof of the circumstances of such case and of the injury constitutes a prima facie case of negligence, and will justify a verdict unless such prima facie case is overcome by proof showing that the party charged is not at fault.

8. **Carriers—Street railroad company—Injuries to passenger in transferring from one car to another—Res ipsa loquitur.**
In an action by a street car passenger for personal injuries sustained when, while in the act of transferring from one car to another in the course of a continuous journey, he was struck by the car, from which he had alighted, as a result of such car's splitting a switch, held that the doctrine of res ipsa loquitur applied, and that, there being no evidence to overcome the prima facie case thus made out, the jury were justified in returning a verdict for plaintiff.

9. **Damages—Evidence—Danger of operation—Harmless error.**
In an action for personal injury, wherein the permanency of the injury was not disputed, held that the fact that plaintiff was permitted to introduce evidence of the danger of a certain operation, which operation, as claimed by defendant, was not contemplated, did not, under the circumstances of the case, constitute reversible error.

10. **Appeal—Reversal of judgment of appellate court—Necessity of remand for new trial.**
On reversal of the judgment of the appellate court which reversed the trial court's judgment for plaintiff in a personal injury action, held that, under the views of the case taken by the supreme court, the contention of the defendants that the cause should be remanded for a new trial under the Practice Act could not be sustained since the judgment of the trial court was required to be affirmed.

CARTWRIGHT, J., and DUNN, C. J., dissenting.

Certiorari to the appellate court to review a judgment reversing the judgment of the circuit court in favor of the plaintiff, in an action for personal injuries to a street car passenger, without remanding the cause. Judgment of appellate court reversed and judgment of circuit court affirmed.

For plaintiff in error—Stein, Mayer & Stein (Sigmund W. David, of counsel).

For defendants in error—Harry P. Weber, George W. Miller, and Arthur J. Donovan (John R. Guilliams, and Franklin B. Hussey, of counsel).

Cross-references. Duty of carrier to passenger during period of transfer to another car or train, see 17 N. C. C. A. 642-658; liability of carrier for injuries to passengers alighting from trains and street cars, see 4 N. C. C. A. 457-478; liability for injuries to passengers while boarding trains or street cars, see 4 N. C. C. A. 532-545; negligence in directing or permitting passengers to board wrong train or vehicle, see 8 N. C. C. A. 723-733.

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The following are the pleadings in the action:

Declaration.

William Feldman, plaintiff, by Stein, Mayer & Stein, his attorneys, complains of the Chicago Surface Lines, a corporation, of the Chicago Railways Company, a corporation, and of the Chicago City Railways Company, a corporation, defendants, of a plea of trespass on the case:

I.

For that whereas, heretofore, on, to wit, the 26th day of February, A. D. 1915, the defendants were corporations, duly authorized, existing and doing business under and by virtue of the laws of the state of Illinois, and were then and there the owners of and in possession, control and management of divers lines of street railways in the city of Chicago, county of Cook and state of Illinois, and had in their possession, use, control and management, for the purpose of operating said street railways in the city of Chicago, county and state aforesaid, certain cars, machinery, power-houses, tracks, switches and other devices and instrumentalities, and were engaged in the business of a common carrier of passengers for hire.

And the plaintiff avers that upon, to wit, the 26th day of February, A. D. 1915, at a point on said defendants' line of street railways, on Cicero avenue, also known as Forty-eighth avenue, to wit, at Harrison street, in the city of Chicago, county of Cook and state of Illinois, the defendants received the plaintiff into one of their said cars, which was then and there one of the cars managed, controlled, operated and possessed by the defendants as aforesaid, and for reward and compensation then and there paid by the plaintiff to the defendants, the plaintiff was to be safely carried and conveyed as a passenger along and upon the defendants' said line of tracks on Cicero avenue, also known as Forty-eighth avenue, to Twelfth street, and thence by a certain transfer then and there given to the plaintiff by the defendants when he paid the customary fare as aforesaid, along and upon Twelfth street in an easterly direction to Turner avenue.

And the plaintiff avers that, by reason of the premises, it then and there became and was the duty of the defendants to use the highest degree of care, caution and prudence to safely carry and convey the plaintiff in their said car along and upon their said tracks to his place of destination and there deliver the plaintiff uninjured, and to that end and for that purpose to exercise and use the highest degree of care and caution in the control, operation, management and state of repair of their cars, wheels, trucks, brakes, tracks and switches; but therein the said defendants wholly failed and made default, and contrary to their duty in that behalf, and when the said car in which the plaintiff had been riding as aforesaid, as a passenger, had arrived at and in the vicinity of, to wit, Twelfth street, where said Cicero avenue, otherwise known as Forty-eighth avenue, is intersected by Twelfth street, in the said county aforesaid, and while the plaintiff was proceeding as such passenger from said car on Cicero avenue, otherwise known as Forty-eighth avenue, to the proper place near to wit, the southwest corner of Twelfth street and Cicero avenue, otherwise known as Forty-eighth avenue, there to wait for a car east-bound on Twelfth street, to proceed with his transfer, and while he was in the exercise of due care and caution for his own safety, and without fault or negligence on his part, he was struck by and run into and over by the defendants, who then and there so carelessly, negligently and improperly managed and operated said

I. At regular transfer point.

A. Struck while in act of boarding.

The plaintiff, at the time of the accident, was in the act of transferring from one of the defendant's street cars, upon which he had been a passenger, to another. To entitle him to passage upon the second car, a transfer slip had been given him. The car to which he was transferring, admitted passengers at both the front and back vestibules, but the former faced on the south side along which cars

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electric car that by reason thereof said car, so managed, then and there left the tracks and struck, collided with and ran with great force and violence into and upon the plaintiff; whereby the plaintiff was then and there thrown with great force and violence upon the ground, and was thereby greatly bruised, hurt and wounded, and his bones, tendons, ligaments and arteries were then and there broken, strained, sprained and contused, and the plaintiff became sick, sore, lame, and disordered and so remained and continued for a long time, to wit: thence hitherto, and did then and there, by reason thereof, suffer serious and permanent injury to his head, legs, thighs, ribs and back, and other parts of his body, and he has been and will be thereby permanently deprived of the use of his left arm and other parts of his body, and he has and will thereby suffer physical pain and injury and great nervous shock, and he has undergone and will undergo thereby great mental anguish and nervous prostration, and he was thereby confined to bed for a long space of time, to wit, two months, and has been thereby injured, both externally [and] internally, and both temporarily and permanently, and has been and will be hindered from following his usual occupation and employment, and has thereby lost and been deprived of and will hereafter lose and be deprived of large gains and profits, which he otherwise would have earned, and has spent and will be required to spend large sums of money for medical aid and attention in and about his said injuries, to wit: twelve hundred ($1,200) dollars.

II.

For that whereas, heretofore, on to wit, the 26th day of February, A. D. 1915, the defendants were corporations, duly authorized, existing and doing business under and by virtue of the laws of the state of Illinois, and were then and there the owners of and in possession, control and management of divers lines of street railways in the city of Chicago, county of Cook and state of Illinois, and had in their possession, use, control and management, for the purpose of operating said street railways in the city of Chicago, county and state aforesaid, certain cars, machinery, power-houses, tracks, switches and other devices and instrumentalities, and were engaged in the business of a common carrier of passengers for hire.

And the plaintiff avers that it thereupon became and was then and there the duty of said defendants in so operating their cars over and along said public street to exercise due care and caution so as not to collide with or run into pedestrians then and there rightfully upon said public highway in the city of Chicago, county of cook and state of Illinois; but the plaintiff avers that the defendants did not regard their duty in that behalf, but that, to wit, on the day aforesaid, while the said plaintiff was then and there standing and walking along said Cicero avenue, also known as Forty-eighth avenue, going in a southerly direction, near the intersection of said street with Twelfth street, another public highway in the city of Chicago, county of Cook and state of Illinois, and while the plaintiff was then and there in the exercise of ordinary care and caution for his own safety, the said defendants, through their servants in charge of one certain car managed and controlled by them, then and there bound in a southerly direction on said Cicero avenue, otherwise known as Forty-eighth avenue, near the intersection of that street with Twelfth street, another highway, as aforesaid, disregarding their said duty to exercise due care and caution so as not to collide with or run into pedestrians then and there rightfully standing upon and walking along said public street so carelessly, negligently and improperly managed and operated said electric car that by reason thereof said car, so managed, then and there struck, collided with and ran with great force and violence against and upon the plaintiff, as aforesaid, whereby

going in the opposite direction passed. The plaintiff stepped upon the bottom step of the front vestibule and attempted to enter, but could enter no further because of the crowd of persons ahead of him. He waited a brief period for the people to get settled, and then attempted to place his foot upon the next higher step when a car going east on the south track passed and struck him, causing the injuries in suit. It was daylight at the time of the accident and there was nothing to obstruct the view of

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the plaintiff was then and there thrown with great force and violence upon the ground, and was thereby greatly bruised, hurt and wounded, and his bones, tendons, ligaments and arteries were then and there broken, strained, sprained and contused, and the plaintiff became sick, sore, lame and disordered and so remained and continued for a long time, to wit, thence hitherto, and did then and there, by reason thereof, suffer serious and permanent injury to his head, legs, thighs, ribs and back, and other parts of his body, and he has been and will be thereby permanently deprived of the use of his left arm and other parts of his body, and he has and will thereby suffer physical pain and injury and great nervous shock, and he has undergone and will undergo thereby great mental anguish and nervous prostration, and he was thereby confined to bed for a long space of time, to wit, two months, and he has been thereby injured, both externally and internally, and both temporarily and permanently, and has been and will be hindered from following his usual occupation and employment, and has thereby lost and been deprived of and will hereafter lose and be deprived of large gains and profits, which he otherwise would have earned, and has spent and will be required to spend large sums of money for medical aid and attention in and about his said injuries, to wit: twelve hundred ($1,200) dollars.

III.

For that whereas, heretofore, on to wit, the 26th day of February, A. D. 1915, the defendants were corporations, duly authorized, existing and doing business under and by virtue of the laws of the state of Illinois, and were then and there the owners of and in possession, control and management of divers lines of street railways in the city of Chicago, county of Cook and state of Illinois, and had in their possession, use, control and management, for the purpose of operating said street railways in the city of Chicago, county and state aforesaid, certain cars, machinery, power-houses, tracks, switches and other devices and instrumentalities, and were engaged in the business of a common carrier of passengers for hire.

And the plaintiff avers that it thereupon became and was then and there the duty of said defendants to have and keep said car and all the parts thereof, including the wheels, trucks, brakes, and trolleys, in good and safe repair and condition, and to operate said car and all parts thereof with due skill, care and caution for the safety of others; yet the defendants, not mindful of their duty in this regard, on to wit, the day aforesaid, carelessly and negligently had and kept said car and various parts thereof in a bad and dangerous condition and state of repair, and more particularly had and kept said wheels, trucks, brakes and trolleys in a bad and dangerous condition and out of order, so that the same did not work properly, and the defendants then and there so negligently, carelessly and improperly operated said car that by reason thereof, and by reason of the premises, the said car collided with and ran with great force and violence into and upon the plaintiff, whereby the plaintiff was then and there thrown with great force and violence upon the ground, and was thereby greatly bruised, hurt and wounded, and his bones, tendons, ligaments and arteries were then and there broken, strained, sprained and contused, and the plaintiff became sick, sore, lame and disordered and so remained and continued for a long time, to wit, thence hitherto, and did then and there, by reason thereof, suffer serious and permanent injury to his head, legs, thighs, ribs and back, and other parts of his body, and he has been and will be thereby permanently deprived of the use of his left arm and other parts of his body, and he has and will thereby suffer physical pain and injury and great nervous shock, and he has undergone and will undergo thereby great mental

the motorman of the eastbound car, causing the injuries. From a judgment for the plaintiff, the defendant appealed, alleging that the court erred in refusing to direct a verdict in its favor, since the plaintiff was to be considered as only a traveler, and not a passenger, at the time of the accident. The court, in affirming the judgment, said: "There is no doubt that the plaintiff was a passenger * * *. It was the business of the westbound car to take on persons transferring from the Packard street line. Appa-

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anguish and nervous prostration, and he was thereby confined to bed for a long space of time, to wit, two months, and he has been thereby injured, both externally and internally, and both temporarily and permanently, and has been and will be hindered from following his usual occupation and employment, and has thereby lost and been deprived of and will hereafter lose and be deprived of large gains and profits, which he otherwise would have earned, and has spent and will be required to spend large sums of money for medical aid and attention in and about his said injuries, to wit: twelve hundred ($1,200) dollars.

IV.

For that whereas, heretofore, on to wit, the 26th day of February, A. D. 1915, the defendants were corporations, duly authorized, existing and doing business under and by virtue of the laws of the state of Illinois, and were then and there the owners of and in possession, control and management of divers lines of street railways in the city of Chicago, county of Cook and state of Illinois, and had in their possession, use, control and management, for the purpose of operating said street railways in the city of Chicago, county and state aforesaid, certain cars, machinery, power-houses, tracks, switches and other devices and instrumentalities, and were engaged in the business of a common carrier of passengers for hire.

And the plaintiff avers that it thereupon became and was then and there the duty of said defendants to have and keep their tracks and switches and all parts thereof in good and safe repair and condition, and to operate said switches skilfully and with due care and caution for the safety of others; but the plaintiff avers that the defendants did not regard their duty in that behalf, but that, on to wit, the day aforesaid, they carelessly and negligently had and kept said tracks and switches in bad and dangerous condition and repair and out of order, so that the same would not work properly, and carelessly and negligently operated and controlled said switches, and that by reason thereof, and by reason of the premises, said car of the defendants, bound in a southerly direction on Cicero avenue, otherwise known as Forty-eighth avenue, as aforesaid, left the tracks and struck, collided with and ran with great force and violence into and upon the plaintiff, whereby the plaintiff was then and there thrown with great force and violence upon the ground, and was thereby greatly bruised, hurt and wounded, and his bones, tendons, ligaments and arteries were then and there broken, strained, sprained and contused, and the plaintiff became sick, sore, lame and disordered, and so remained and continued for a long time, to wit, thence hitherto, and did then and there, by reason thereof, suffer serious and permanent injury to his head, legs, thighs, ribs and back, and other parts of his body, and he has been and will be thereby permanently deprived of the use of his left arm and other parts of his body, and he has and will thereby suffer physical pain and injury and great nervous shock, and he has undergone and will undergo thereby great mental anguish and nervous prostration, and he was thereby confined to bed for a long space of time, to wit, two months, and he has been thereby injured, both externally and internally, and both temporarily and permanently, and has been and will be hindered from following his usual occupation and employment, and has thereby lost and been deprived of and will hereafter lose and be deprived of large gains and profits, which he otherwise would have earned, and has spent and will be required to spend large sums of money for medical aid and attention in and about his said injuries, to wit: twelve hundred ($1,200) dollars.

And the plaintiff further avers that prior to the time of said injury he was a strong, healthy and robust man, engaged in the business and occupation of painting, paper-hanging, decorating and calcimining, and in and about such

rently to facilitate the business, both vestibules were opened for the reception of such persons, and the plaintiff had the right to believe that he would be received at the open entrance at the south side of the forward end of the car. Others ahead of the plaintiff were taken on there, * * * and he was in fact received there. * * * He had paid his fare and had received a transfer slip entitling him to ride, and he had left the ground, mounted the step of the car, and was in the act of entering it

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business and by means whereof he was able to and did earn large sums of money, to wit, the sum of one thousand ($1,000) dollars a month, but that by reason of the injuries received as aforesaid and of the premises, the plaintiff has become and is unable to longer perform and carry on the said business:

To the damage of the plaintiff in the sum of twenty thousand ($20,000) dollars, and therefore he brings his suit.

Plea of general issue interposed.

MR. JUSTICE STONE delivered the opinion of the court.

This cause comes to this court by certiorari to the appellate court for the First District, which court heard the cause on appeal and reversed the judgment of the circuit court of Cook county without remanding the cause.

The declaration filed consisted of four counts. The first count alleged that on February 26, 1915, the defendants, the Chicago Railways Company and others, were then and there the owners of and in possession, control and management of divers lines of street railways in Chicago, and had in their possession, use, control and management, for the purpose of operating the street railways, certain cars, machinery, power houses, tracks, switches and other devices and instrumentalities, and were engaged in the business of common carriers of passengers for hire; that on said date, at a point on the line of the street railway owned by the defendants on Cicero avenue, to-wit, at Harrison street, the plaintiff boarded one of the cars, paid his fare and received a transfer coupon for transfer at the intersection of Cicero avenue and Twelfth street; that by reason of the premises it then and there became the duty of defendants to use the highest degree of care to carry safely plaintiff in their cars to his place of destination and there deliver him uninjured, and to that end and for that purpose to exercise and use the highest degree of care and caution in the control, operation, management and state of repair of their cars, wheels, tracks, brakes, trucks and switches, but therein the defendants wholly failed; that after the car in which plaintiff had been riding as a passenger arrived at the intersection of Twelfth street and Cicero avenue, and while he was proceeding as such passenger from said car to the proper place near the southwest corner of Twelfth street and Cicero avenue, there to wait for a car east-bound on Twelfth street to

when he was injured. It is difficult to perceive that anything more was required to constitute the plaintiff a passenger." Koran v. Metropolitan St. R. Co., 85 Kan. 707, 118 Pac. 875 (1911).

B. Run down while crossing street.

The plaintiff, a blind man, wished to transfer from one of the defendant's street cars, upon which he was a passenger, to another at a point

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proceed on his journey, and while he was in the exercise of due care and caution for his own safety and without fault or negligence on his part, he was struck by, run into and over by the defendants, who then and there so carelessly, negligently and improperly managed and operated said electric car that by reason thereof the car then and there left the track and struck and collided with and ran with great force and violence into and upon the plaintiff, whereby he was then and there thrown with great force and violence upon the ground and was thereby greatly bruised, etc. Following the foregoing are allegations of injuries and damage.

The second count, after alleging ownership and control as in the first count and the duty of the defendants to exercise due care and caution in operating their cars so as not to collide with or run into pedestrians then and there rightfully upon the public highway, charges that while the plaintiff was then and there standing upon and walking on Cicero avenue, going in a southeasterly direction at the intersection of said street with Twelfth street, in the public highway in Chicago, and while he was then and there in exercise of ordinary care and caution for his own safety, the defendants, through their servants in charge of one of said cars, so carelessly, negligently and improperly managed and operated the electric car that by reason thereof said car then and there struck, collided with and ran with great force and violence against and upon the plaintiff, etc.

The third count alleges ownership, etc., as set forth in the first count, and that it was the duty of the defendants to keep said car and all the parts thereof, including the wheels, trucks, brakes and trolleys, in good and safe repair and condition, and to operate said car, and all parts thereof, with due skill, care and caution for the safety of others, yet defendants carelessly and negligently failed to keep said car in repair, so that the same did not work properly, and the defendants then and there so negligently, carelessly and improperly operated said car that by reason thereof and by reason of the premises the car collided with plaintiff.

The fourth count charges a defective track and that the switches and tracks were out of repair, and that by reason of the negligence

where three street car lines intersected. Upon being assured by the conductor of the car upon which he was riding that the "road was clear," the plaintiff started to cross the street to the other car. While so doing, he was struck by a car going in the opposite direction, but upon the line to which he wished to transfer, sustaining as a result of the accident the fracture of two bones of his left leg above the ankle. It appeared that the plaintiff was familiar with the locality and knew the traffic was very

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of defendants in not keeping the same in repair, and the careless operation of the car, the plaintiff was injured.

To the four counts of the declaration the defendants in error filed the general issue, to which a replication was filed by the plaintiff in error.

It is conceded and admitted by the plaintiff in error and the defendants in error that there is no contradiction in the testimony relative to the facts and circumstances surrounding the happening of the accident in question. On the morning of the accident the plaintiff in error took the south-bound car of defendants in error on Cicero avenue, entering the same at Harrison street. His journey was to Douglas boulevard and Turner avenue, which necessitated his transfer to another car of defendants in error going east, at the corner of Twelfth street and Cicero avenue. Upon boarding the car he paid his fare and called for and received from the conductor in charge a transfer which would entitle him to a continuous ride by transferring at Twelfth street and Cicero avenue to Douglas boulevard and Turner avenue. The car upon which he was riding came to a complete stop on the north side of Twelfth street. At this point the north and south-bound tracks of defendants in error on Cicero avenue intersected with their east and west tracks on Twelfth street. A switch extended from the west side of the south-bound track on Cicero avenue to the north side of the west-bound track on Twelfth street, connecting said tracks. The front trucks of the car passed south over the switch before the car stopped. The plaintiff in error thereupon left the car, alighting at the rear end thereof, and started toward the southwest corner of the intersection, which was the usual and customary place for passengers to wait for cars going east, one of which cars would take him to his journey's end. When he reached a point five or six feet west of the car and in the neighborhood of the north curb or crosswalk of Twelfth street the car from which he had alighted was started by the motorman, but instead of going south the rear end of the car suddenly swung around to the west, completely out of its course of travel, so that the end of the car almost touched the west curb of Cicero avenue, striking plaintiff in error and

heavy at that hour of the day. The court, in affirming a judgment for the defendant, held that the plaintiff was guilty of contributory negligence in not making a particular effort to listen for the car which struck him. The court said, however: "The relation of passenger and carrier continues while the passenger is transferring from one car to another, he having been furnished a ticket enabling him to do so, when a transfer from one street car to another is part of a continuous trip. * * * We do

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knocking him down. It is apparent from the evidence that after the front trucks had passed over the switch, for some reason not found in the evidence the switch had changed its position so as to guide the rear trucks onto the switch in a southwesterly direction, thereby throwing the car around, as above described, to such an extent that at the time of the injury to the plaintiff in error the car was in a position extending almost east and west. The plaintiff in error was removed to a hospital, where an examination disclosed a fracture of the clavicle or collar bone into three parts, one part of which (a little triangular piece) was directed downward and entirely out of line of the fractured ends. After being operated upon it was found that the plaintiff in error had developed an enlargement of the artery extending from the heart into the region of the collar bone.

The jury returned a verdict for the plaintiff in error in the sum of $5,500. Motions for new trial and in arrest of judgment were overruled and an appeal was prayed and perfected to the appellate court for the First District by the defendants in error. The appellate court held as a matter of law that the plaintiff in error at the time of the accident was not a passenger of the defendants in error; that when the plaintiff in error alighted from the Cicero avenue car upon which he had been traveling the relation of passenger and carrier ceased. That court also held that the doctrine of res ipsa loquitur was not applicable under the pleadings in this case; that each count of the declaration alleged negligence in special and not in general terms; that the plaintiff in error had failed to support his cause of action with evidence of special negligence, as charged in the declaration; that the evidence in the record is not sufficient to support the third and fourth counts of the declaration. For those reasons the judgment was reversed and the cause remanded by the appellate court. The plaintiff in error thereupon stated by affidavit that he had relied upon the doctrine of res ipsa loquitur and would be unable to produce further evidence of special negligence upon the second trial. Thereupon the appellate court, upon motion, changed its original judgment, reversed the case without remanding and gave judgment of nil capiat

not understand that any of the cases hold that the railway company would be liable for the bad condition of a public street used in making the transfer, so long as it had furnished a reasonably safe place to alight from one car and board the other." Wilson v. Detroit United Ry. Co., 167 Mich. 107, 132 N. W. 762 (1911).

II. Emergency transfer.

A. Car going into car barn.

The plaintiff was at the time of the

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in favor of the defendants in error, from which judgment the cause is brought to this court on writ of certiorari.

It is contended by the plaintiff in error that the judgment of the trial court was correct and should have been affirmed; that the plaintiff in error was at the time of the accident a passenger of the defendants in error; that if he was not such a passenger, such fact affects only the degree of care which it was the duty of defendants in error to exercise toward the plaintiff in error; that the pleadings and the facts in evidence bring this case within the doctrine of res ipsa loquitur under the first and second counts of the declaration. It is contended by defendants in error that plaintiff in error was not a passenger at the time of the accident; that the doctrine of res ipsa loquitur cannot be invoked under the pleadings in this case; that the trial court committed reversible error by submitting the cause to the jury on the second, third and fourth counts of the declaration. Errors were also assigned on the ruling of the trial court as to instructions and admission of evidence.

The principal questions involved in this case are: First, was plaintiff in error a passenger at the time of the injury? If he was, defendants in error owed him the highest degree of care. If, on the other hand, he was not, but was a pedestrian, defendants in error owed him but ordinary care. Second, does the doctrine of res ipsa loquitur apply in this case? It is not contended that that doctrine applies under the pleadings of the third and fourth counts, nor is it contended by plaintiff in error that the special negligence charged in the third and fourth counts has been sustained by the proof, therefore that question will be considered with its relation to the first and second counts of the declaration.

As we have seen, the first count charges that plaintiff in error was a passenger. While the decisions of the courts of the various states have not been uniform as to this rule, it has been before this court in earlier cases. In Chicago City Railway Co. v. Carroll, 206 Ill. 318, 17 Am. Neg. Rep. 323; the appellee, Carroll, was a passenger on a street car of appellant. He took the car at Sixty-third street and Wentworth avenue and rode to Thirty-fifth street, where

accident transferring from one car of the defendant company to another. The car from which she had just alighted struck her as it entered the car barn around a sharp curve, and while she was proceeding towards the other car. It appeared that the plaintiff was familiar with the locality and knew that the curve from the street to the barn was a sharp one. The question as to whether the plaintiff was, under the facts shown, a passenger at the time of the accident was left to the jury. A verdict for the

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appellant had a line crossing the line on which appellee was riding. Appellee, upon reaching Thirty-fifth street, alighted from the Wentworth avenue car to go to the Thirty-fifth street car. The trolley pole from the Wentworth car, from which he had just alighted or was alighting, fell and struck him on the head and knocked him down. This court held that the appellee was a passenger on both lines of appellant while making a continuous journey to his destination. It is urged that the court there based its decision on other grounds and that the only reference to the relation of carrier and passenger was incidental and not necessary to the decision; also that the court's treatment of the subject of the relation of carrier and passenger was based on the evidence in that case that appellee was just alighting from the car. A reading of the opinion in that case discloses that these contentions cannot be sustained. While there were other features in the case and while the relation of the parties was not discussed at length, the court in its opinion makes no distinction between circumstances where the person claiming to be a passenger is alighting or has alighted from the car, but holds that by reason of the fact that appellee was on a continuous journey the relation of carrier and passenger existed. Nor is it true that such holding was not necessary to the determination of the case. Instructions were given in that case based on the theory that appellee was a passenger, and the opinion sustains those instructions. We think it clear from the decision in that case that the doctrine is there laid down that where a passenger, in pursuance of a continuous journey, transfers from one car to another under circumstances such as shown in this record, the relation of carrier and passenger continues throughout the necessary acts of such transfer. To the same effect is North Chicago Street Railroad Co. v. Kaspers, 186 Ill. 246, 8 Am. Neg. Rep. 28. In that case the appellee had alighted from one street car, had crossed over the street and was in the act of taking another car to which he was to transfer, when the same started up and threw him to the ground. It was there held that he was a passenger. In Chicago and Alton Railroad Co. v. Winters, 175 Ill. 293, the appellee was a passenger on a stock train. When that train stopped at one of

plaintiff resulted. The defendant excepted to the ruling of the trial court submitting this question to the jury, and the court in sustaining the exception, said: "The plaintiff when injured was not on the defendant's premises, nor at a station or platform in use for the purpose of transferring passengers and within the control of the carrier; neither was she under its direction and within its care. She was upon a public highway where she was exposed to dangers not caused by the defendant. In passing from one

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its stations appellee was obliged to alight from the caboose in which he was riding in order to get into another caboose which was to be attached to a new train more than a block north of the point where the train on which he was riding had stopped. When he alighted and was on his way to a lunch counter to get lunch and thereafter to take the other caboose he was struck by another train and injured. It does not appear that he was walking upon a platform or any part of the appellant's premises provided for passengers to alight from trains, but it was nevertheless held that the relation of carrier and passenger continued.

While the holdings of the courts of this country have not been uniform upon this question, notably those of Massachusetts and Tennessee, holding that the relation of carrier and passenger ceases where one alights from a car in a public street for the purpose of transfer (Creamer v. West End Railway Co., 166 [156] Mass. 320, 9 Am. Neg. Cas. 448, 16 L. R. A. 490, 32 Am. St. Rep. 456; Chattanooga Railway Co. v. Boddy, 105 Tenn. 666, 8 Am. Neg. Rep. 555, 57 L. R. A. 885), we are of the opinion that the weight of authority in this country sustains the view that where, as here, a passenger who is making a continuous journey alights from a street car for the purpose of making a transfer, the relation of carrier and passenger continues while he is in the necessary act of making said transfer, and that if he be injured through the negligence of the carrier while making such transfer the carrier is liable. Keator v. Scranton Traction Co., 191 Pa. St. 102, 6 Am. Neg. Rep. 187, 44 L. R. A. 546, 71 Am. St. Rep. 758; Wilson v. United Railway Co., 167 Mich. 107; Colorado Springs and Canon City Railway Co. v. Pettit, 37 Colo. 326, 20 Am. Neg. Rep. 496; Whilt v. Public Service Corp., 76 N. J. L. 729, 21 Am. Neg. Rep. 612n; 10 Corpus Juris, 630.

It is urged by defendants in error that plaintiff in error was no more a passenger than was another man named Burke, who had alighted from the front end of the car and was injured at the same time. This contention, however, overlooks the fact, as appears from the record, that Burke had finished his journey and had left the car. There is no doubt, under all the authorities, that where

car to the other she could choose her own way and her movements were entirely under her own guidance. While so walking on a public highway and in transferring from one car to the other, as a matter of law, she was not a passenger. There may be cases where there is evidence to show that the carrier assumes to direct the movements of persons while upon the highway, or where such a duty rests upon it and where the facts justify the finding that although upon the highway, they are in the care of the

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a passenger alights into the public street from a street car at the end of his journey he ceases to be a passenger. The distinction between Burke and plaintiff in error lies in the fact that the plaintiff in error was engaged in a continuous journey, while Burke's journey, so far as the carrier was concerned, had ended. As was held in Chicago City Railway Co. v. Carroll, supra, the ticket of transfer itself was not what established the relation of carrier and passenger, but was merely the evidence of the fact that plaintiff in error was engaged in a continuous journey. This fact affords the test whether or not plaintiff in error was a passenger, and while it is true that during such transfer the carrier could exercise no control over the movements of the passenger, so as to render the carrier liable in case of injury received from some other source than the carrier, still that fact does not change the relation of carrier and passenger in the case of such transfer, nor lessen the degree of care which the carrier was bound to use to avoid injury to such passenger, through the negligence of its own servants or agencies, while such passenger is engaged in the necessary acts of such transfer.

The next question involved here is whether or not the doctrine of res ipsa loquitur applies. It is admitted by the plaintiff in error that it does not apply as to the third and fourth counts, in that they contain special charges of negligence, but it is earnestly urged by him that this doctrine does apply to the first and second counts. The doctrine of res ipsa loquitur may be stated thus: When a thing which has caused an injury is shown to be under the management of the party charged with negligence and the accident is such as in the ordinary course of things will not happen if those who have such management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the parties charged, that it arose from the want of proper care. (Chicago Union Traction Co. v. Giese, 229 Ill. 260.) In the case just cited the first and second counts of the declaration charged that the defendant, by its servants, carelessly, improperly and negligently drove and managed a train consisting of two coaches so that the

carrier and the relation of passenger and carrier exists. But there are no such facts in the case at bar.'' Niles v. Boston Elevated R. Co., 225 Mass. 570, 114 N. E. 730 (1917).

B. Track obstructed.

The plaintiff was compelled to alight from one of the defendant's street cars, upon which she was a passenger, and take passage on another in order to reach her destination. This was due to the fact that the track was obstructed by other cars loaded with material to improve the track. At the point where she was compelled to

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rear car struck the wagon of the plaintiff in which he was riding and thereby he received the injury complained of. In those two counts the charges of negligence were held to be general and it was held that the doctrine of res ipsa loquitur applied. The same rule is laid down in O'Callaghan v. Dellwood Park Co., 242 Ill. 336, 26 L. R. A. (N. S.) 1054, 134 Am. St. Rep. 331, 17 Ann. Cas. 407. The charges of negligence in the first two counts in the case at bar are in substantially the same language as those in Chicago Union Traction Co. v. Giese, supra. It is charged by the first count that plaintiff, without fault or negligence on his part, was struck by and run into and over by defendants, who then and there so carelessly, negligently and improperly managed and operated said car that by reason thereof the car left the track and struck and collided with the plaintiff. The second count charges that the defendants so carelessly, negligently and improperly managed and operated the electric car that by reason thereof the car then and there collided, struck and ran against the plaintiff. The charges of negligence in these counts were general and the doctrine of res ipsa loquitur applies. The rule is that negligence is never presumed, but that the circumstances surrounding the case where the maxim of res ipsa loquitur applies, amount to evidence from which the facts of negligence may be found; that is, in a case within the maxim of res ipsa loquitur, proof of the circumstances of such case and of the injury constitutes a prima facie case of negligence, and will justify a verdict unless such prima facie case is overcome by proof showing that the party charged is not at fault. (Chicago Union Traction Co. v. Giese, supra; Chicago Union Traction Co. v. Newmiller, 215 Ill. 383, 18 Am. Neg. Rep. 380; Chicago City Railway Co. v. Rood, 163 id. 477, 9 Am. Neg. Cas. 240, 54 Am. St. Rep. 478; New York, Chicago and St. Louis Railroad Co. v. Blumenthal, 160 id. 40, 9 Am. Neg. Cas. 258n; Hart v. Washington Park Club, 157 id. 9, 29 L. R. A. 492, 48 Am. St. Rep. 298.) The burden rested upon defendants in error to overcome the presumption of negligence arising from the circumstances in this case. The record contains no evidence explaining the cause of the accident or overcoming the presumption of negligence. We are of the

alight, the street was being repaired, and loose stones and dirt were immediately under the car step. In alighting she stepped upon a loose stone, turned her foot and sprained her ankle. Though it was late in the afternoon when the accident occurred, it was still daylight and there was nothing to prevent the plaintiff from seeing the condition of the street and the distance which she must step. The court, in affirming the judgment, held there was not sufficient evidence of contributory negligence to over-

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opinion, therefore, that the plaintiff in error was at the time of the injury a passenger, to whom defendants in error owed the highest degree of care, and that under the first and second counts of the declaration and the circumstances in this case a prima facie case of negligence was made out under the doctrine of res ipsa loquitur. There was no explanation of why the injury occurred. It follows that there was no evidence on the part of the defendants in error to overcome this presumption, and the jury were therefore justified in returning a verdict finding defendants in error guilty of negligence.

Defendants in error also complain of the admission of testimony offered by plaintiff in error concerning the danger of a certain operation, upon the ground that such operation was not contemplated, urging that under the rule recognized in this state the dangers of an operation not contemplated are not elements of damages. We are of the opinion, however, that in view of the fact that the permanency of the plaintiff's injury is not disputed the testimony could only affect the amount of the verdict, and that under the circumstances of this case the error complained of should not, of itself, reverse the judgment.

It is also urged by defendants in error that even though the judgment of the appellate court be reversed, the cause should be remanded for a new trial under the Practice act. Under the views of this case as here expressed, however, the contention of the defendants in error is not applicable, as the judgment of the trial court must be affirmed.

Objections are also urged as to instructions given to the jury, but these objections appear to be based principally upon the theory that plaintiff in error was not a passenger. Under the rule as stated here the instructions are not open to this objection.

The appellate court erred in holding that the doctrine of res ipsa loquitur does not apply and that plaintiff in error was not a passenger upon defendants in error's railway.

The judgment of the appellate court will therefore be reversed and the judgment of the circuit court of Cook county affirmed.

Judgment of appellate court reversed.
Judgment of circuit court affirmed.

come a general verdict for the plaintiff. As the court pointed out, the plaintiff had not completed the trip on which the defendant was carrying her, and being still its passenger, it owed a duty involving a high degree of care for her safety. Louisville & S. I. Traction Co. v. Walker, 177 Ind. 38, 97 N. E. 151 (1912).

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CARTWRIGHT, J., and DUNN, C. J., dissenting:

We do not agree with the conclusion that the plaintiff, as a matter of law, was a passenger while walking on the public street. The rule of law as to what will constitute the relation of passenger and carrier has been firmly established by text books and decisions, which were carefully reviewed and considered in the case of Chicago and Eastern Illinois Railroad Co. v. Jennings, 190 Ill. 478, 54 L. R. A. 827. Upon such review and consideration it was said to be uniformly held that the condition must be such that the passenger is under the care of the carrier and must be at some place under the control of the carrier provided for passengers, so that it may exercise the high degree of care exacted from it. The plaintiff having safely alighted from the defendant's car started to the place where he expected to take another car, and while walking on the street was not under the care of the defendant nor on any place provided for passengers or using any of the facilities furnished for passengers, but was exercising his right as one of the general public by crossing the street, as he lawfully might. In the Jennings case the doctrine of the Massachusetts court, which is now abandoned, was indorsed and adopted. This court has never decided that the relation of carrier and passenger existed under the facts of this case. In Chicago and Alton Railroad Co. v. Winters, 175 Ill. 293, the plaintiff was accompanying his car-load of sheep to Chicago and at Bloomington the car was placed in another train being made up for Chicago. The plaintiff was walking on the east side of the freight train toward the switch yards on the grounds of the railroad company, intending to continue his journey in the caboose of the new train. There is no resemblance between this case and that of North Chicago Street Railroad Co. v. Kaspers, 186 Ill. 246, 8 Am. Neg. Rep. 28, except that the plaintiff had a transfer ticket. That ticket entitled him to ride on the cable-car line to his destination, and he had got on the step at the front end of the car and was stepping up on the front platform when the speed of the train was increased and he fell off and suffered the injury for which he sued. In Chicago City Railway Co. v. Carroll, 206 Ill. 318, a trolley pole on the Wentworth avenue car, from

III. Alighting to interfere in quarrel.

The conductor of the car upon which the plaintiff was a passenger quarreled with another passenger, a friend of the plaintiff, about the payment of fare. After being ejected from the car this other passenger and the conductor engaged in a fight upon the ground, the car being stopped at the time. The plaintiff, who did not know what the fight was about, attempted to stop it, whereupon the motorman knocked him down. From an

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which the plaintiff had alighted or was alighting, fell from that car and struck him on the head. He had not got away in safety from the car as the plaintiff had in this case, in which the plaintiff was not within the care or control of the defendant or on a place provided for passengers and therefore was not a passenger. Illinois Central Railroad Co. v. O'Keefe, 168 Ill. 115, 4 Am. Neg. Rep. 48, 39 L. R. A. 148, 61 Am. St. Rep. 68.

Upon the trial of an issue of fact the plaintiff obtained a verdict and judgment for $5,500, and the defendant appealed to the appellate court, which held that the plaintiff was not a passenger; that the doctrine of res ipsa loquitur was not applicable to the pleadings in the case, and that the trial court committed errors of law as to both those questions. For such errors the judgment was reversed and the cause remanded to the circuit court for a new trial. The plaintiff then stated that he had relied upon the doctrine of res ipsa loquitur and would be unable to produce further evidence of the special negligence upon another trial, and moved the court to reverse the cause without remanding, which was done. If the appellate court was wrong both upon the question whether the plaintiff was a passenger and also whether the doctrine of res ipsa loquitur applied that fact does not justify an affirmance of the judgment of the trial court. If plaintiff was a passenger, that fact would not entitle him to a verdict for every injury sustained, but would only affect the degree of care exacted by law from the defendant. The doctrine of res ipsa loquitur is, that when a thing which has caused an injury is shown to be under the management of the party charged with negligence, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation of the party charged, that it arose from the want of proper care. It is but a rule of evidence, under which a charge of negligence is established prima facie by proof of facts within the rule, and which will justify a verdict unless the prima facie case is met by proof showing that the carrier was not at fault. (Chicago Union Traction Co. v. Giese, 229 Ill. 260.) On the trial the defendant introduced evidence that

order of the appellate division, reversing a judgment entered on a nonsuit, the defendant appealed. The court in reversing the order and affirming the judgment said: "A carrier is an absolute guarantor of the safety of its passengers * * * while it is performing its contract of carriage. * * * It is also true that a passenger, during his journey, may alight from the car without losing his status as passenger. * * * In this case, however, the wrongs for which the plaintiff seeks redress were suffered

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the switch which carried the rear trucks around to the west was in proper condition; that there had never been any trouble with it and that an examination immediately after the accident showed nothing the matter with it. The fact that the front trucks passed over the switch in the usual way tended to prove that the rear trucks swinging around was caused by some condition which the defendant was not bound to anticipate. The defendant also offered evidence that the running apparatus and equipment of the car were all in good condition and not defective and had been running since 5:30 that morning without any indication of anything wrong. If the appellate court was right in holding that the trial court misapplied the law it was the duty of the appellate court to remand the cause for another trial, at which such errors could be corrected. The plaintiff could not deprive the defendant of the right to present on another trial any evidence it might have to relieve itself from the charge of negligence, by stating to the appellate court that he would be unable to produce further evidence of special negligence upon such trial. This court cannot decide questions of fact in controversy, and on a review of the judgment of the appellate court has merely held that that court was wrong in its rulings on questions of law.

when the plaintiff entered upon an enterprise totally disconnected with the carriage. * * * His injuries were occasioned during his voluntary intervention in a quarrel, as to which the defendant owed him no duty. He, doubtless, should recover from the person who inflicted the wrong; but he cannot hold the defendant liable." Zeccardi v. Yonkers R. Co., 190 N. Y. 389, 17 L. R. A. (N. S.) 770, 83 N. E. 31 (1907). O. L. C.

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PERRY v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

PACIFIC GAS & ELECTRIC CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

[Supreme Court of California, June 5, 1919.]

— Cal. —, 181 Pac. 788.

1. **Workmen's compensation—Proceeding for compensation—Hearsay evidence—Weight.**

Conceding that hearsay evidence is admissible, under Stats. 1917, sec. 60a, in a proceeding under Workmen's Compensation, Insurance and Safety Act, it follows that the weight of the evidence is to be determined by the industrial accident commission.

2. **Workmen's compensation—Proceeding for compensation—Testimony as to conversations with deceased employee—Admissibility.**

In a proceeding under the Workmen's Compensation, Insurance and Safety Act for compensation for the death of an "employee," held that the testimony of the "employer" and his wife as to conversations with the deceased, upon which testimony the "employer" relied to establish a partnership between him and the deceased instead of an employment by him of the deceased, although permitted by statute, was inadmissible under the common law because of the interest of the witnesses in the controversy.

3. **Workmen's compensation—Proceeding for compensation—Finding of existence of relationship of employer and employee—Conclusiveness.**

The finding of the industrial accident commission, in a proceeding under the Workmen's Compensation, Insurance and Safety Act for the death of an employee, that the relationship between one against whom the award was made and the deceased was that of employer and employee, is binding on the supreme court.

CASE NOTE.

Liability under the compensation acts of owner, "principal employer" or general contractor, for injury to employee of subcontractor.

I. Joint control by owner and contractor, 298-302.
II. Employee hired and paid by owner and turned over to independent contractor, 302-304.
III. Engineer loaned with locomotive crane to subcontractor, 304-306.
IV. Employee of one cutting wood at agreed price per cord, 306.
V. Failure of general contractor to appeal from award to employee of subcontractor, 306-308.

Cross-references. Duty and liability of independent contractor to employees of the common employer, see 3 N. C. C. A. 553-555; when relationship that of employer and employee and when that of independent contractor in proceedings under compensation acts, see 7 N. C. C. A. 1076-1097, 10 N. C. C. A. 835-852, 15 N. C. C. A. 486-501, 17 N. C. C. A. 682-703.

I. Joint control by owner and contractor.

A company engaged in manufacturing cement found it necessary to overhaul its plant and install new machinery, and therefore made an arrangement with a partnership which was engaged in installing machinery and

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4. **Constitution—Amendment—Meaning of terms—Legislative definition.**
The terms "employers," "employees," and "employment," as used in section 21, article 20, of the Constitution, as amended in October, 1911, must be construed in the light of their meaning at the time of the adoption of the amendment, and cannot be extended by legislative definition, since such an extension would, in effect, be an amendment of the Constitution, if accepted as authoritative.

5. **Workmen's compensation—California act—Constitutionality.**
Section 25 of the Workmen's Compensation, Insurance and Safety Act of 1917 (Stats. 1917, p. 853), relating to "the liability of principal employers and contracting employers, general or intermediate, for compensation * * * when other than the immediate employer of the injured employee," is unconstitutional in so far as it attempts to authorize the awarding of compensation against a third person not an employer, and such section was not ratified and rendered valid by the amendment of section 21, article 20, of the Constitution, adopted in 1918.

Petitions to review order of Industrial Accident Commission awarding compensation for death of employee. Order affirmed as to one petitioner and annulled as to other.

For petitioner Pacific Gas & Electric Co.—William B. Bosley and John Coghlan.

For petitioner Perry—Gilbert D. Ferrell.

For respondents—Christopher M. Bradley.

WILBUR, J. Two petitions are filed to review the same order of the industrial accident commission, awarding compensation for the death of Robert E. Kendall. The award was made under the

had a number of employees skilled in such work, whereby the partnership was to furnish the cement company with some of its employees, including a foreman, to perform the services required on the premises of the cement company, the partnership to receive as compensation a sum equal to 10 per cent of the payroll of the employees and foreman so furnished. The cement company was to furnish all materials and was to, and did, in fact, give and exercise direction and control over such employees, including the foreman. No plans and specifications were entered into for doing the work nor were the nature and extent of the work to be done, closely defined to the partnership nor any specific sum of money agreed upon except the 10 per cent of the payroll. An account of the time of the employees was kept by the cement company, they being required to use its time clock, and a check for their total wages, plus 10 per cent, was sent to the partnership which, in turn, paid such employees' wages. The cement company reserved the right to require the furnishing of such additional employees as it should deem necessary and to cause the discharge of any employees whom it might regard as undesirable. The industrial accident commission found the above facts on sufficient evidence and, further, that deceased was employed by the partnership specifically for the work in question and

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provisions of section 25 of the Workmen's Compensation, Insurance and Safety Act of 1917 (Stats. 1917, p. 831), against C. E. Perry as the immediate employer, and against the Pacific Gas & Electric Company as the principal employer.

Both petitioners claim that the evidence is insufficient to show that the relation of employer and employee existed between Perry and the deceased. The only question of fact in the case is whether the relation between Perry and the deceased was that of employer and employee, or that of a copartnership. It appears from the evidence that Perry, as an independent contractor, entered into a contract with the petitioner Pacific Gas & Electric Company to furnish for $20 a day, a five-ton road roller, with a man and necessary gasoline and supplies, for the purpose of rolling the earth that had been filled into a trench in which the gas mains of the petitioning company had been laid. After the making of this contract Perry entered into an arrangement with the deceased by which the deceased operated the roller in question. The deceased was crushed between a heavy automobile truck and the road roller while so engaged, and so injured that he died. In the absence of other evidence the law would imply a contract of employment. That a proposition was made by Perry to the deceased by which the latter was to operate the road roller upon a "fifty-fifty basis" is established by the testimony of Perry and others, and is found by the commission to be a fact. The commission also found that the proposition was never accepted, but was still under consideration at the time of the fatal accident. Perry and his wife testified

had not been a regular employee prior to such employment; that the contract of hire was made between such employee and the partnership, and the former looked to and received his pay from the latter, which had the immediate power to discharge him and whose foreman he was obliged to take instructions from; that the partnership was in fact participating in the performance of the labor upon which the employee was engaged and that, at the time of his injury, such employee was employed jointly by the partnership and the cement company, who were jointly associated in carrying on the work. The controversy in the case arose over which of three insurance carriers was liable on the award made by the commission. The Ocean company and the Employers' Liability company were insurers of the partnership, while the Aetna company insured the cement company. The court held that the definitions of "employer" and "employee" in the compensation act were broad enough to include both the general and special employer and, as such contracts of employment were recognized before the adoption of the constitutional amendment authorizing the compensation act, there was no reason why either or both general and special employments might not give jurisdiction to the accident commission, although, under former holdings, an independent contractor is not entitled

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to conversations with the deceased tending to show an acceptance of Perry's proposition. To rebut this evidence the testimony of decedent's wife, his sister, and other witnesses was received to prove declarations of the deceased made from time to time and up to the day before the accident, to the effect that the deal between Perry and himself had not been consummated. This was hearsay, and petitioner Perry, conceding its admissibility under the express provisions of the statute (Stats. 1917, § 60a), states:

"It may be said that it is for the commission alone to say as to the weight or credibility to be given to this evidence. If so, then the commission may, arbitrarily or otherwise, as in the present case, disregard in toto all evidence heretofore considered by the law and the courts as admissible and entitled to any consideration at all, and base its findings on the sandy foundations of some hearsay evidence, giving to such hearsay as great or greater weight than it would be entitled if it were concededly of the most competent character, without limitation on the commission of any sort, or redress on the part of one aggrieved thereby."

It being granted that the testimony was admissible, it follows, of course, that the weight of the evidence is to be determined by the commission. It is true that, when we depart from well-recognized principles of law concerning the admissibility of evidence, we embark upon a sea of difficulty. This was pointed out in August, 1915, in Englebretson v. Industrial Accident Commission, 170 Cal. 793, 151 Pac. 421, concerning hearsay evidence. The legislature, however, has since expressly provided that neither the commission nor its referees—

"shall be bound by the common law or statutory rules of evidence or procedure,

to compensation. Accordingly the decision of the commission, that the insurers of both the partnership and the cement company were liable, based upon their joint control, was affirmed. A special question as to the liability of the Ocean insurance company arose out of a claim that the work of the partnership at the cement plant was included by mutual mistake in the policy which was intended to cover only work of the partnership at a different point. After the accident in question a rider was attached to the policy by the parties amending it so it covered only the work originally intended. It was held that, while the parties to the contract of insurance could not amend it after an accident to defeat rights of compensation that had accrued and, if the addition was in fact an amendment of the policy by mutual consent, the rights of the claimant could not be affected, nevertheless, if the policy issued differed from that contracted for, there was no reason why the parties could not correct it unless, for some reason, they were estopped from doing so. As there was no showing that any of the parties whose rights were involved knew of the existence of the policy before the accident no grounds of estoppel existed and the award, as against such insurance company, was annulled and the awards against the other insurers of the partnership and cement company were affirmed. It

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* * * nor shall any order, award, rule or regulation be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the said common law or statutory rules of evidence and procedure." Stats. 1917, p. 871, sec. 60a.

Similar provisions of the law of 1915 have been considered by this court and upheld. Stats. 1915, p. 1102, § 77a; Western Indemnity Co. v. Industrial Accident Com'n, 174 Cal. 315, 163 Pac. 60; Employers' Liability Ass'n Co. v. Industrial Accident Com'n, 177 Pac. 273.

It may be remarked, however, in this connection that the testimony of both Perry and his wife, upon which he relies to establish the fact of acceptance by deceased, although permitted by our statute, was inadmissible under the common law, on the ground of their interest in the controversy. 1 Greenleaf on Ev., §§ 326, 328c, 333b, 334, 335, 341; Dawley v. Ayers, 23 Cal. 108. The finding of the commission that the relationship between Perry and the deceased was that of employer and employee is binding upon this court.

The Pacific Gas & Electric Company asks for a review on the additional ground that section 25 of the act of 1917 is unconstitutional, and that therefore the commission had no jurisdiction to entertain the proceeding or to make the award against it. It has been held that the state Constitution did not contemplate a law authorizing an award of compensation by the Industrial Accident Commission against some person other than the employer. Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218; Sturdivant v. Pillsbury, 172 Cal. 581, 158 Pac. 222; Western Metal Supply Co. v. Pillsbury,

was contended that the evidence that the death of decedent arose out of his employment was insufficient because it consisted in part of his hearsay declarations. This evidence was held sufficient under the amendment of 1915, which expressly permitted such testimony. Employers' Liability Assur. Corp. v. Industrial Acc. Commission, — Cal. —, 177 Pac. 273 (1918). Rehearing denied Jan. 23, 1919.

II. Employee hired and paid by owner and turned over to independent contractor.

A blowpipe company contracted with a wheel company to install in the latter's plant, a dust collecting system. The blowpipe company was to furnish the skilled mechanics for doing the work and the wheel company was to furnish such common laborers as were needed to assist the mechanics. The wheel company, in addition to the price for the materials and machinery furnished, was to pay 60 cents per hour for the skilled mechanics and to pay their railroad fare and board while on the job. In accordance with this arrangement, the wheel company furnished a helper for each skilled mechanic furnished by the blowpipe company and during the progress of the work an explosion occurred, killing one of the mechanics and his helper. The arbitration committee to which was referred the

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172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390. It was therefore held that section 30 of the Workmen's Compensation, etc., Act of 1913 (Stats. 1913, c. 176, p. 294), was violative of article 20, § 21, of the Constitution. The Workmen's Compensation, etc., Act of 1917 changes the language of the corresponding section (25), so that instead of using the word "principals" the words "principal employers" are used, and instead of the word "contractors" the words "contracting employers, general or intermediate," are used (section 30, Stats. 1917, p. 853); but the change does not meet the constitutional difficulty, for the reason that the terms "employers," "employees" and "employment," as used in section 21, art. 20, of the Constitution, as amended in October, 1911, must be construed in the light of their meaning at the time of the adoption of the amendment, and cannot be extended by legislative definition, for such extension would, in effect, be an amendment of the Constitution, if accepted as authoritative. See Employers' Liability Assurance Co. v. Industrial Accident Com'n, 177 Pac. 273, and cases there cited. It would follow, therefore, that the reasons for holding section 30 of the Workmen's Compensation Act of 1913 unconstitutional would apply with equal force to section 25 of the Act of 1917. Carstens v. Pillsbury and other cases, supra. Respondent, however, contends that the legislative power was enlarged by the addition of section 17½, art. 20, to the Constitution by an amendment adopted November 3, 1914, and that such amendment authorizes the legislation in question. This amendment was in force at the time of the decision in Carstens v. Pillsbury, supra, decided in 1916, and no

claim of the helper's widow found that she was entitled to an award against the blowpipe company and its insurer. Upon appeal the industrial accident board affirmed the finding that plaintiff was entitled to an award, but reversed the finding that the blowpipe company was liable and held the wheel company liable. The matter was taken to the supreme court on certiorari, the sole question being as to which company was liable. The court found that after the laborers were employed and turned over to the blowpipe company nothing was left to be done by the wheel company but to pay them, as they worked with the servants of the blowpipe company, used its tools upon its materials, obeyed its orders, worked the number of hours designated by that company and obtained its consent if they desired to absent themselves for a time. The blowpipe company was supposed to know the safe and unsafe method of doing the work, and the wheel company did not reserve the right to direct or interfere with the work and, so far as the record shows, did not do so, but simply contracted for results and had little interest in the details leading up to a fulfillment of the contract. Under these circumstances the court found that the blowpipe company was the master and deceased its temporary servant, vacated the award against the wheel company and ordered that one be entered

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contention was then made by respondents that it authorized the legislation in question. It provides that:

"The legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employees. No provision of this Constitution shall be construed as a limitation upon the authority of the legislature to confer upon any commission now or hereafter created, such power and authority as the legislature may deem requisite to carry out the provisions of this section."

It is contended that the language "and may provide for the comfort, health, safety and general welfare of any and all employees" and the last sentence of the amendment "gives unlimited scope to the legislature in conferring jurisdiction upon respondent commission." The Workmen's Compensation Act of 1917 provides in section 1:

"This act and each and every part thereof is an expression of the police power and is also intended to make effective and apply to a complete system of workmen's compensation the provisions of section seventeen and one-half of article twenty and section twenty-one of article twenty of the Constitution of the state of California. A complete system of workmen's compensation includes adequate provision for the comfort, health, safety and general welfare of any and all employees and those dependent upon them for support to the extent of relieving from the consequences of any injury incurred by employees in the course of their employment, irrespective of the fault of any party," etc.

These recitals in the legislative act by which it is sought to designate the source of constitutional power to enact the statute have no weight other than as an expression of the legislative opinion that the law is constitutional—an inference which arises with equal force from the fact of its enactment. It is sufficient for

against the blowpipe company, the wheel company and plaintiff to recover costs in the supreme court and tax them against the blowpipe company. Arnett v. Hayes Wheel Co., 201 Mich. 67, 166 N. W. 957 (1918).

III. Engineer loaned with locomotive crane to subcontractor.

Deceased was the engineer in charge of a locomotive crane belonging to a construction company which was put at the disposal of a subcontractor, the employees in charge being instructed by the master mechanic of the construction company to do absolutely as they were told by the construction company. The crane was sent to lift an engine from a lighter to a flat car. Before attempting the lift, the employees in charge inquired the weight of the engine and the radius and figured that the crane could do the work, so that the jacks and rail clamps furnished to support and fasten the crane were not used. When the crane was started it tipped and deceased was scalded so that he died in a few hours. Both the construction company and the subcontractor were insured under the compensation act and the accident board awarded compensation against the insurer of the construction company in favor of the widow and she appealed to protect her rights against the subcontractor in case it should be found that the

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the purposes of this case to say that section 17½ only purports, so far as here involved, to authorize legislation with reference to "employees," and its application, therefore, must be based upon the existence of an employment. The same considerations that led this court to hold unconstitutional the effort of the legislature to extend the provisions of the Workmen's Compensation Act to relations other than those of employer and employee would apply with equal force to legislation under this section. It is not, therefore, necessary for us, in this action, to further construe section 17½. It is not improper to observe, however, that the printed arguments for and against that amendment, submitted with the proposed amendment, to the people at the election in 1914, are wholly confined to a consideration of the law as affecting the establishment of a minimum wage for women and minors. It is true, of course, that this fact would not limit the plain language of the constitutional provision in question. But, in view of its broad general terms, that fact is worthy of consideration in ascertaining the intent of the people in adopting the amendment. From these considerations it is manifest that no authority is thereby given to impose liability upon third persons for injuries to employees.

Respondent calls our attention to an amendment of section 21, art. 20, adopted at the general election in November, 1918. This amendment completely revises that section. As it was adopted long after the accident in question, it is conceded that it has no application, save, as is contended, that the last paragraph of the amendment has—

board was in error and the insurer of the construction company also appealed. The court said that when one in the general employment of a contractor assists with a machine belonging to the contractor in the work of an employer to whom the servant is lent the servant may become, with his consent, the servant of the special employer, but in such case it will be presumed that, in the management of the machine, the employee in charge remains the servant of the general employer and does not become the servant of the special employer which presumption may, however, be overcome by evidence to the contrary. It was held that, while the industrial board might well have found that deceased became the servant of the subcontractor, there was evidence to justify a finding that the crane was a complicated piece of machinery and that its control was left entirely with deceased, with no direction for its management from the subcontractor, and that if deceased was directed to lift a greater load than the crane would stand he would be supposed to refuse to undertake it for the protection of the crane, and that deceased, in the management of the crane, remained the employee of the construction company, the general employer. As the question was one of fact and there was evidence to support the finding, the court held it could not be set aside and the decree

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"swept away any technical defect which might have existed to hamper the full exercise of jurisdiction by the industrial accident commission under the statute which was in force when the amendment was adopted. The portion of the amendment thus relied upon is as follows: 'Nothing contained herein shall be taken or construed to hamper or render ineffectual in any measure the creation and existence of the industrial accident commission of this state, or the state compensation insurance fund, the creation and existence of which, *with all the functions vested in them*, are hereby ratified and confirmed.'" (Italics ours.)

For the purposes of this case it is sufficient to notice that, so far as the amendment in effect ratifies and confirms existing legislation purporting to vest power in the commission to award compensation against persons other than the employer, such power never was vested in the commission, for the reason that the legislative attempt to vest such power was unconstitutional and void. Carstens v. Pillsbury, supra. The amendment does not attempt to ratify this futile legislation, but only to ratify in the commission "functions vested in them." This amendment did not, therefore, purport to extend the power of the commission beyond that which had theretofore been lawfully vested in them. The fact, if it be a fact, that the commission was exercising the functions provided by the law of 1917 (section 25), that is, that they were in fact awarding compensation to employees against others than their employers, does not "vest" such functions within the meaning of the amendment, which must obviously refer to legal authority. It should be observed that the amendment did not attempt to ratify the Workmen's Compensation Act of 1917, but merely to confirm

was affirmed. Emach's Case, — Mass. —, 123 N. E. 86 (1919).

IV. Employee of one cutting wood at agreed price per cord.

One Smith contracted with a lumber company to cut certain standing timber for which he was to receive $1.35 per cord and he subcontracted the job to several others, who in turn hired laborers. Among such subcontractors was one R, who was to be paid $1.20 per cord, and he hired deceased, who was killed by a falling tree. The industrial commission made an award against Smith and his insurance carrier, and on appeal the court held that there was no evidence whatever that Smith ever entered into a contract for the employment of deceased and without such evidence there was nothing for the compensation law to operate upon and the determination of the commission was without effect. The award was reversed and the claim dismissed. Tsangournos v. Smith, 183 N. Y. App. Div. 751, 171 N. Y. Supp. 256 (1918).

V. Failure of general contractor to appeal from award to employee of subcontractor.

Thaxter v. Finn, — Cal. —, 173 Pac. 163 (1918), in which a rehearing was denied June 10, 1918, was a proceeding against a sheriff to require him to enforce against one Janssen and his insurer an execution issued upon a judgment entered upon an award of the industrial accident commission in

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powers already lawfully vested in the commission. This distinction can be best emphasized, perhaps, by calling attention to the difference between the language under consideration and that of the constitutional amendment of October 10, 1911, with relation to the Railroad Commission and the Railroad Commission Act (Const. art. 12, § 22), wherein it was provided as follows:

"The provisions of this section shall not be construed to repeal in whole or in part any existing law not inconsistent herewith, and the 'Railroad Commission Act' of this state approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. And the said act shall have the same force and effect as if the same had been passed after the adoption of this provision. * * *"

In the latter case the legislation was expressly ratified and the method of its interpretation pointed out in the constitutional amendment, while the amendment under consideration merely purports to ratify powers and functions already vested in the commission. If it was proposed to ratify and confirm legislation otherwise unconstitutional, that purpose should have been clearly expressed.

It follows, then, that section 25 of the Workmen's Compensation Act of 1917 (Stats. 1917, p. 853), is unconstitutional in so far as it attempts to authorize the awarding of compensation against a third person not an employer, for the same reason that the previous statute was unconstitutional, and that the amendment to section 21 of article 20 of the Constitution does not ratify the legislation condemned as unconstitutional in Carstens v. Pillsbury, supra.

favor of petitioner. The work upon which petitioner was engaged at the time of the accident was the erection of a building for which Janssen was the general contractor and petitioner's employer, a subcontractor. When the award was made no objection thereto was made by any of the defendants and payments were made thereon for some time when further payments were refused, doubtless due to a decision of the supreme court that the legislature was not empowered to authorize the commission to enforce liabilities in favor of an employee against persons other than his immediate employer. The court held that while, if an application for review had been made by Janssen and his insurer for a writ of review within the time allowed by the act, the award would have been annulled as to them, such relief would not now be granted because the sole judicial review contemplated by the act can be had only when a proceeding is instituted in the proper court within the time specified by the act. It was urged that upon the face of the record the award and judgment as to Janssen and the carrier were absolutely void and open to collateral attack for want of jurisdiction of the subject-matter so that the writ issued on the judgment was a mere nullity affording no justification to the sheriff to make a levy. It was held, however, that the clear intent of the legislature was to render awards free from review or attack of any kind except as prescribed in the act

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Petitioner Perry also complains that the award was excessive, but, upon the basis of his own testimony that one could work at the business 260 days in a year at $6 to $7 a day, the award was not excessive.

The order awarding compensation against petitioner C. E. Perry is affirmed, and that portion of the order seeking to award compensation against the Pacific Gas & Electric Company is annulled.

LAWLOR, J. (concurring). I concur specially in the judgment and in what is said on the question whether the relationship of employer and employee existed between C. E. Perry and the deceased. I also concur in the judgment on the constitutional question. This I would not be prepared to do, however, if the questions decided in Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218, and Sturdivant v. Pillsbury, 172 Cal. 581, 158 Pac. 222, were now presented for the first time. I dissented in those cases principally for the reason that, in my opinion, the grant of power to the legislature (section 21, art. 20, Const.), authorized that body, in order to more fully realize the fundamental objects of the new order of rights and liabilities, to create and enforce a liability against the owner, the general contractor, and the subcontractor as well as the immediate employer of the injured workman. To this view I still adhere, but, the contrary opinion having become the settled law of the state, I think the decision reached herein must be accepted.

and that there was no absolute lack of jurisdiction in the commission over the matter, such as is generally regarded as ground for collateral attack, but that the proceeding was of the class confided to the jurisdiction of the commission and there was, in substance, only a lack of any sufficient evidence on which to sustain the award against Janssen and the insurance company so that the award became absolutely final against them when they failed to ask for any rehearing before the commission or for any review by the supreme court or district court of appeal within the time allowed by the act.

R. L. S.

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CHELENTIS v. LUCKENBACH STEAMSHIP COMPANY, INC.

[Supreme Court of the United States, June 3, 1918.]

247 U. S. 372, 62 L. Ed. 1171, 38 Sup. Ct. 372, aff'g 156 C. C. A. 234, 243 Fed. 536.

1. **Admiralty—Jurisdiction—Injuries to seaman.**

Where the employment of a seaman was a maritime contract, the work about which he was engaged when injured was maritime in its nature, and the injuries received were also maritime, the rights and liabilities of such seaman and the shipowner were matters clearly within admiralty jurisdiction.

CASE NOTE.

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Cross-references. Conflict between admiralty law and workmen's compensation acts, see 13 N. C. C. A. 782-799, 10 N. C. C. A. 688-699; application of workmen's compensation acts to cases within admiralty jurisdiction, see 14 N. C. C. A. 597-601.

I. Personal injuries.

A. Workmen's compensation acts.

1. California.

The libelant, a seaman, was injured by a blow on the head while on board a vessel of the respondent. Upon making a request for payment of the injury sustained, he was sent to the insurance company of the respondent and during four weeks was paid the compensation due under the Workmen's Compensation Act, each time signing a receipt for the sum received. While the last receipt contained a

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2. **Admiralty—Injuries to seaman—Measure of recovery.**
Under maritime law, an injured seaman can properly demand only wages, maintenance and cure.

3. **Admiralty—Injuries to seaman—Power of state to grant full indemnity.**
No state has power to abolish the well-recognized maritime rule concerning a seaman's measure of recovery for injuries and substitute therefor the full indemnity rule of the common law; such a substitution would distinctly and definitely change or add to the settled maritime law and would be destructive of the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.

4. **Words and phrases—"Right."**
A "right" is a well-founded or acknowledged claim.

clause releasing the owners of the steamer from all further liability, it appeared the libelant did not know the clause was inserted and presumed he was simply signing a receipt for the money received. The respondent contended that the libelant having accepted compensation under the California statute could not claim damages of his right of action in the admiralty court. The court, however, awarded the sum of $1,200 for the injuries sustained and $9.16 for wages, less the payments already received. As the court said: "I am of the opinion * * * that this act (Workmen's Compensation Act of California) cannot and does not deprive the seaman of his right of action in the admiralty court for damages for injuries caused by the negligence of the shipowner in providing defective appliances. But if the injured seaman shall, as he may, subject himself to the state tribunals, and claim and receive the amount awarded under the act, or if by agreement, fairly entered into, the amount to be paid under the act is fixed, and he accepts it with full knowledge of the extent of his injuries, he should not later be permitted to maintain an action for the same injuries. But where, as here, the amount has been fixed by the employer, and not by any tribunal or agreement, and is not adequate, the seaman may pursue his remedy in the admiralty, and, if successful, the amount already received by him will be credited upon the amount of the judgment entered." Riegel v. Higgins, 241 Fed. 718 (1917).

The plaintiff, a barber on one of the defendant's lines used in foreign commerce, had been ashore on leave while the vessel was in a foreign port. At the place in question vessels were compelled to lie in midstream and crews and passengers were transferred to and from the shore in a launch operated by another company under a contract of hire for that purpose. On his return to the ship and while attempting to board it, the sea being somewhat choppy, he was thrown down and injured, sustaining a broken leg. The fracture was imperfectly reduced and he was brought home in charge of the ship's doctor without any resetting of the limb, resulting in a partial knitting. Consequently, upon his arrival in this country, the bones had to be rebroken and he was unfit for work for 3 or 4 months. The court found that the plaintiff's injury resulted from the negligent handling of the boat, in which the plaintiff was not contributorily negligent. The plaintiff contended that his claim was within the Workmen's Compensation Act of California. The court gave judgment for the plaintiff for $1,400 for wages and medical treatment, but held that the provisions of the federal judicial code saving to suitors the right of a common-law remedy where

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5. Words and phrases—"Remedy."
A "remedy" is the means employed to enforce a right or redress an injury.

6. Admiralty—Injuries to seaman—Effect of Judiciary Act.
Under the saving clause of section 9, Judiciary Act of 1789, 1 Stat. 76, 77, whereby District Courts of the United States were given exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it" (Judicial Code, secs. 24, 256), a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law, but there is nothing therein which reveals an intention to give an injured seaman, whose rights are those recognized by the law of the sea, an election to determine whether the shipowner's liability for his injury shall be measured by common-law standards rather than by those of the maritime law.

the common law was competent to give it, did not include a remedy under a compensation statute in the present case, especially since such compensation statute had been held by the state supreme court not to cover injuries sustained outside the territorial limits of the state. Hartman v. Toyo Kisen Kaisha S. S. Co., 244 Fed. 567 (1917).

The claimant, a seaman, was injured while his vessel, owned by citizens of the state, was upon the high seas. The proceeding under the Workmen's Compensation Act resulted in an award for the claimant. The employer then sued out a writ of review to have the award reviewed by the state supreme court, contending that the industrial commission had no jurisdiction and that the case was within the admiralty jurisdiction of the district court. The court discharged the writ and affirmed the award, holding that while the case presented was within the cognizance of admiralty the words "common law remedy" as used in the saving clause of the judiciary act respecting jurisdiction referred to any remedy with or without jury trial, which was a substitute for a suit at law whereby liability was imposed after due process of law and consequently included a remedy under a state Workmen's Compensation Act, though the common law knew no right of action for death without a tort, since the saving clause not being limited to remedies at common law then existing included rights subsequently created by statute. As the court pointed out: "Neither Congress nor the Legislatures of the states can strip the courts of admiralty of any part of the jurisdiction which was theirs under the substantive law of admiralty at the time the constitution was adopted. * * * [But] while the state legislature cannot in terms enlarge the jurisdiction of admiralty, they may pass laws creating new rights over matters within the jurisdiction of admiralty, and may enforce those rights in the state courts, upon the theory that Congress has been remiss in its failure to pass similar enactments covering the same subject-matter. And, furthermore, since these state statutes are thus valid, it is within the power, and seemingly it is the duty, of admiralty to enlarge its own jurisdiction by acquiescing in and taking cognizance of the rights and remedies thus created by the state legislatures." North Pac. S. S. Co. v. Industrial Accident Commission of California, 174 Cal. 346, 163 Pac. 199 (1917).

2. Louisiana.

The petitioner, a longshoreman, was injured by falling through the hatch of a vessel of the defendant upon which he was working. Suit was brought for compensation under the Workmen's Compensation Law of Louisiana. From a judgment in favor

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7. **Admiralty—Injuries to seaman—Effect of Seamen's Act.**
Section 20 of the Act to Promote the Welfare of American Seamen, approved March 4, 1915, ch. 153, 38 Stat. 1164, 1185, which provides "that in any suit to recover damages for any injury sustained on board vessel or in its service, seamen having command shall not be held to be fellow-servants with those under their authority," does not disclose any intention to impose upon shipowners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employees on shore.

8. **Admiralty—Injuries to seaman—Right to maintain common-law action.**
A seaman, injured at sea, cannot maintain a common-law action for full indemnity for the injuries sustained.

PITNEY, BRANDEIS and CLARKE, JJ., dissenting.

of the plaintiff, the defendant appealed. The court reversed judgment holding that while the employment of the plaintiff was maritime and that a right of action existed in admiralty and an action for damages in the state court, the state compensation law had no application and that a suit for compensation like the present, instead of a suit for damages, must be dismissed whether brought in the federal or state courts. Upon a rehearing, however, the court reversed this decision and affirmed the award deciding that the congressional amendment to the judicial code saving to claimants from the exclusive jurisdiction of the federal courts the rights and remedies under the compensation law of any state should be given a retroactive effect as applied to the compensation statute in question and that taking such into consideration, the proceeding for compensation for the maritime injury was properly maintainable. Veasey v. Peters, 142 La. 1012, 77 So. 948 (1917).

3. Massachusetts.

The plaintiff was engaged to work in the hold of a schooner tied at the defendant's wharf. While unloading coal therefrom, a tub fell upon him, as the result of the hoisting rope breaking, and produced the injury in suit. A common-law action for damages resulted in a verdict for the plaintiff from which the defendant excepted, contending that as it was a subscriber under the Workmen's Compensation Act of Massachusetts, the plaintiff's remedies were confined to that action. The court overruled the exceptions, holding (1) that the work of the plaintiff in discharging a cargo of coal from a vessel engaged in interstate commerce while lying in navigable waters was maritime in its nature; (2) that though the Massachusetts act was broad enough in its terms to include an injury like that in suit, and was elective, not compulsory in its provision, still it did not apply, as being beyond the jurisdiction of the state to enact so far as it related to admiralty and maritime affairs, despite the saving clause of the Judicial Code. As the court said: "A statute which in its nature is outside the jurisdiction of the state, because within the exclusive domain of the federal government, cannot confer rights or be a bar to the enforcement of common-law obligations. * * * We feel constrained * * * to hold that * * * [the Workmen's Compensation Act] does not apply to injuries having a maritime origin." Duart v. Simmons, 231 Mass. 313, 121 N. E. 10 (1918).

4. New York.

The libelant, while in the employ of the claimant and while on board a lighter as a longshoreman, was hit by a falling bolt which had worked

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Common-law action by seaman for personal injuries sustained while at sea. Judgment of circuit court of appeals affirming judgment of district court on directed verdict for respondent, affirmed.

For petitioner—Silas B. Axtell (Arthur L. Burchell, on the brief).

For respondent—Peter S. Carter.

MR. JUSTICE McREYNOLDS delivered the opinion of the court. In December, 1915, petitioner was employed by respondent, a

loose from a shackle used in discharging her. The claimant had complied with the Workmen's Compensation Law of New York under section 11 of which its liability was confined to the compensation fixed by that statute, to the exclusion of any general liability arising from its duty as master to its servants. The court dismissed by libel, holding that the amendment by Act of October 6, 1917, §§ 1 and 2 (Com. St. 1918, §§ 991, 1233 to Judicial Code, § 24(3) and § 256(3)), "saving * * * to claimants the rights and remedies under the Workmen's Compensation law of any state," were constitutional and made impossible a remedy in admiralty either in personam or in rem, since the Workmen's Compensation Law of New York made its remedy thereunder exclusive. The Howell, 257 Fed. 578 (1919).

Claimant, a longshoreman, was in the employ of a company having a contract to load a vessel in navigable waters. While thus engaged, he was injured as a result of slipping on a pier from which the cargo was being taken. The industrial commission allowed an award, which the appellate division reversed. The court of appeals in affirming the order held the claimant at the time he was injured was engaged in performing a maritime contract, and that as a result, the industrial commission had no jurisdiction to make the award. Anderson v. Johnson Lighterage, 224 N. Y. 539, 120 N. E. 55 (1918). Certiorari denied 248 U. S. 574, 63 L. Ed. 428, 39 Sup. Ct. 11 (1918).

The claimant's decedent, an employee of a plaster manufacturing company, while in charge of the unloading of rock from vessels lying alongside a pier in a navigable river, was struck by a load of rock being hoisted from the vessel to the dock and killed. From an order of the appellate division reversing an award of the industrial commission, the latter appealed. The court, in affirming the order which was later affirmed by the United States Supreme Court held (1) the deceased was engaged in the performance of a maritime contract at the time of his death; (2) that the industrial commission had no jurisdiction of the claim for injuries received in such work. Keator v. Rock Plaster Mfg. Co., 224 N. Y. 540, 120 N. E. 56 (1918). Certiorari denied 248 U. S. 574, 63 L. Ed. 428, 39 Sup. Ct. 12 (1918).

The claimant, a stevedore, while at work on a ship of the defendant in New York harbor, slipped on the deck fracturing the distal end of the radius of his right wrist. The Workmen's Compensation Law of New York, under which the proceeding was instituted, specified, "longshore work, including the loading and unloading of cargoes," as one of the hazardous occupations. Subsequent to such enact-

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Delaware corporation, as fireman on board the steamship "J. L. Luckenbach" which it then operated and controlled. While at sea, twenty-four hours out from New York, the port of destination, petitioner undertook to perform certain duties on deck during a heavy wind; a wave came aboard, knocked him down and broke his leg. He received due care immediately; when the vessel arrived at destination he was taken to the marine hospital where he remained for three months; during that time it became necessary to amputate his leg. After discharge from the hospital, claiming

ment, congress amended sections 24 and 256 of the Judicial Code, saving from the jurisdiction of the federal courts the right of a common-law remedy where the common law was competent to give it and to claimants the rights and remedies under the compensation law of any state. The court in affirming an award of the industrial commission held that the work of loading and unloading a ship was maritime and that while the Workmen's Compensation Law making it applicable to such work was unconstitutional when originally enacted, it became effective without reenactment when congress adopted the last mentioned amendment. Cimmino v. John T. Clark & Son, 184 N. Y. App. Div. 745, 172 N. Y. Supp. 478 (1918).

5. Rhode Island.

The plaintiff was employed by the defendant, a Rhode Island corporation, upon its fishing boat and was injured by a heavy net and hook which fell upon him while being swung aloft by fellow employees. The declaration alleged the defendant failed to accept the provisions of the Rhode Island Workmen's Compensation Act in reference to payments. The defendant, on the other hand, contended that the act in question did not apply to a seaman engaged on board a vessel upon the navigable waters of the United States and filed a demurrer. The court sustained the demurrer, holding that the plaintiff's employment was maritime and the case clearly within the admiralty jurisdiction. As the court said: "The extent of the obligation of the defendant was fixed by the maritime law, which controlled, not only any suit in the admiralty court, but any action in a common-law court; the right being the same in both courts. * * * It will appear that by the maritime law the ordinary negligence of the seaman or of others of the ship's company, and the doctrine of assumption of risk, do not debar him from the rights given by the maritime law, to be cured at the ship's expense, and to his wages. Upon the question of the principle of liability there would seem to be little difference between rights afforded by the maritime law and those afforded by section 1 of the Workmen's Compensation Act of Rhode Island. In respect to the extent of recovery, however, the rules are substantially different, being limited by the maritime law to wages and to being cured at the ship's expense. * * * It seems to follow * * * that the state is without power to deprive either the seaman or the vessel owner of the respective rights under the maritime law. I am of the opinion, therefore, that the Rhode Island statute is inapplicable to the facts alleged. As the plaintiff's declaration seeks a full indemnity under the law of the state of Rhode Island, and does not set forth merely

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that his injuries resulted from the negligence and an improvident order of a superior officer, he instituted a common law action in supreme court, New York County, demanding full indemnity for damage sustained. The cause was removed to the United States District Court because of diverse citizenship. Counsel did not question seaworthiness of ship or her appliances and announced that no claim was made for maintenance, cure, or wages. At conclusion of plaintiff's evidence the court directed verdict for respondent, and judgment thereon was affirmed by the circuit court

a claim for any wages unpaid or for the expense of cure and maintenance for a reasonable time, * * * the demurrer must be sustained.'' Barrett v. Macomber & Nickerson Co., 253 Fed. 205 (1918).

6. Washington.

The plaintiff was in the act of descending into the hold of a vessel to assist in its unloading, while lying at a wharf in the state of Washington, and had taken hold of a rope and stanchion at the side of the hatchway to support him while he gained a foothold on the ladder, when the support broke and he fell some 20 feet into the hold, sustaining the injuries in question. An action at common law resulted in a verdict and judgment in favor of the plaintiff for $3,500, from which the defendant appealed, contending the injury was within the scope of the Workmen's Compensation Act. The court affirmed the judgment, holding that the Workmen's Compensation Act did not apply to injuries to employees engaged in maritime service, such being within the control of the federal government. As the court said: ''That the employment in which respondent was engaged for appellant was maritime in its nature, and that the question of his compensation for the injuries received by him here involved are subject to controversy in admiralty in the federal courts regardless of all state laws, seems quite clear in view of the fact that he was working upon the ship for appellant while it was lying in the navigable waters of Puget Sound. Nor does the fact that he was assisting only in unloading the ship instead of assisting in its navigation lessen his right to seek his remedy in admiralty.'' Shaughnessy v. Northland S. S. Co., 94 Wash. 325, Ann. Cas. 1918 B 655, 162 Pac. 546 (1917).

The plaintiff instituted a suit in admiralty against the schooner Fred. E. Sander for personal injuries sustained while loading and storing piling in the hold of the schooner. The claimant filed exceptions to the libel, contending that the Workmen's Compensation Act of Washington which purported to abolish all civil actions for damages by workmen for personal injuries received on account of the negligence of employers and to give a new remedy provided therein, removed the present case from the jurisdiction of admiralty. The court in overruling the exceptions held that the state act did not supersede all remedies and withdraw from seaman injured while employed on a vessel, their remedy to proceed in rem against the vessel in admiralty. As the court said: ''The state legislature could not have abolished the jurisdiction of the United States District Courts over actions for maritime torts, even had it undertaken to do so.'' The Fred E. Sander, 208 Fed. 724, 4 N. C. C. A. 891 (1913).

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of appeals. 156 C. C. A. 234, 243 Fed. Rep. 536. The latter court said:

"The contract of a seaman is maritime and has written into it those peculiar features of the maritime law that were considered in the case of The Osceola, 189 U. S. 158, 47 L. Ed. 760; and although, because of these peculiarities, such contracts are almost invariably litigated in admiralty courts, still the contract must be the same in every court, maritime or common law. The only difference between a proceeding in one court or the other would be

7. Wisconsin.

The plaintiff, a seaman, was employed by the defendant to act as wheelsman on its ship when certain repairs to it were completed, and previous to such time to assist in making the repairs. While so engaged in repairing the boat, he was injured. Proceedings under the Workmen's Compensation Act of Wisconsin resulted in an award which was confirmed by a judgment of the circuit court. The employer appealed and the state supreme court in reversing judgment and ordering the award of the commission set aside, said: "* * * [The employer] contends that his contract with M was a maritime one, and that such contracts do not come under the provisions of the Wisconsin Workmen's Compensation Law; that the Industrial Commission was without jurisdiction to act, and for that reason its award was void, and should have been set asido by the circuit court. The case of Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, decided by the Supreme Court of the United States May 21, 1917, sustains his contentions and rules this case. It follows that the judgment of the circuit court must be reversed." Neff v. Industrial Commission of Wisconsin, 166 Wis. 126, 164 N. W. 845 (1917).

The plaintiff was seriously injured while helping to unload a steamer lying at a dock adjoining the defendant's elevator. The defendant furnished the appliances used in the hold of the steamer to convey the grain by an endless chain of buckets into its elevator. A machine shovel used to convey the grain from other parts of the hold to the point where the conveyor was located was jerked out of the hands of the defendant, with the result that he fell and caught his foot in the conveyor and sustained the injuries in suit. From a judgment for the plaintiff on the verdict of $1,102.10, the defendant appealed. The court in affirming the judgment said: "The work of a stevedore in loading or unloading a ship lying at the wharf is maritime service, and actionable injuries received during such work are so far maritime injuries that recovery may be had for them in the admiralty courts by libel in personam against the stevedore company which employs him. * * * Workmen's compensation laws provide remedies wholly unknown to the common law, which are incapable of enforcement by the ordinary processes of any court, and are not saved to suitors by the saving clause of the Judiciary Act above cited. * * * The common-law jurisdiction of the state courts over torts committed at sea is preserved by the clause cited, but remedies by proceedings in rem can only be administered in the admiralty courts. * * * If no remedy is sought against the vessel itself, the case is not within the exclusive jurisdiction of the federal

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that the remedy would be regulated by the lex fori. If a seaman who had been locked up or put in irons for disobedience of orders were to sue the master for damages in a court of common law, he could not recover like a shore servant, such as a cook or chauffeur, who had received the same treatment. So a seaman bringing suit in a common law court for personal injuries could recover, even if guilty of contributory negligence, although a shore servant suing in the same court could not; and a seaman suing in a common law court for personal injuries could recover (except in the case of

courts, but the state courts, administering common-law remedies, have concurrent jurisdiction. * * * Full consequential damages may be recovered in such an action according to the statute or common law of the state which has jurisdiction. * * * Even though the action be brought in the maritime court, it seems that full damages may be recovered in such a case as the one before us." Georgia Casualty Co. v. American Milling Co., — Wis. —, 172 N. W. 148 (1919).

B. Employers' liability acts.

1. New York.

The libelant sustained personal injuries, and to recover damages therefor, instituted this proceeding in rem in admiralty. The court in sustaining exceptions to the libel said: "The maritime law, which the libelant invokes, cannot be altered, modified, or changed by state enactment. * * * There is * * * no maritime lien by the statutes of this state to support this proceeding in rem, and I am constrained to hold in an action for personal injuries the Employer's Liability Act of the state [New York] has no application. Rights of action in admiralty are sui generis, and controlled by the maritime law, save in case of death, wherein the states, by legislative enactments, have created liens and rights of action which are not inconsistent with the maritime law. * * * There is no case which goes so far as to hold that the legislature of the state may modify, alter, or change the maritime law to the extent of enforcing a statute relating to proceedings in rem for personal injuries; and in the absence of controlling precedent I am disinclined to enlarge or expand the principles by which maritime torts are governed." The Henry B. Smith, 195 Fed. 312 (1912).

2. Ohio.

The plaintiff was a wheelsman upon a vessel of the defendant company and received the injuries for which suit was brought as the result of defective rigging and an improvident order made while the vessel was moored to a dock in waters within admiralty jurisdiction. The action was begun in the state court and removed to the federal court because of diversity of citizenship. The defendant pleaded that the plaintiff's employment was subject to the right of recovery for injuries incident to the maritime law. Averments of the answer were made the subject of a motion to strike out, raising the question whether the action was controlled by the State Employers' Liability Act or the general maritime law. The court overruled the motion to strike out, holding that the State Employers' Liability Act was not applicable to a maritime contract of employment. "The provisions of the law maritime as to the relation of a seaman to his employment," said the court, "are part of the substance

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unseaworthiness of the vessel or failure to give proper care and medical attention) only wages to the end of the voyage and the expenses for maintenance and cure for a reasonable time thereafter, whereas in a similar case a shore servant would be entitled to recover full indemnity. Therefore, by virtue of the inherent nature of the seaman's contract, the defendant's negligence and the plaintiff's contributory negligence were totally immaterial considerations in this case; the sole question for the jury to determine being whether the plaintiff was entitled to recover because he had not

and obligations thereof, which cannot be modified by state law, even through recourse to the saving clause of the Code." The saving clause of the Code, as the court pointed out, gave to a suitor the right to go into a common-law forum instead of into admiralty, to secure the enforcement of any part of a maritime contract of employment. But it merely provided a saving clause against the exclusive jurisdiction of admiralty in such case, said the court, and did not give to a suitor the right to go into a law court to find a new remedy not recognized in admiralty, the right of action to recover for an injury sustained in the course of his employment being determined exclusively by the maritime law, to the exclusion of the law of the state where the injury occurred or the suit was brought, whether brought in a state or federal court. Schuede v. Zenith S. S. Co., 216 Fed. 566 (1914).

3. Oregon.

An action at common law under the Oregon Employers' Liability Act was brought to recover damages for injuries to a longshoreman sustained on board a vessel of the defendant company, while engaged in taking cargo aboard. The defendant interposed an answer setting up assumption of risk and contributory negligence. A demurrer was filed to the answer and the question presented whether the action would lie, in view of the exclusive jurisdiction accorded courts of admiralty in maritime matters. The court sustained the demurrer, holding that under the Act of March 3, 1911, ch. 231, giving the Federal District Courts original jurisdiction of all civil admiralty cases, and saving to suitors in all cases the right of a common-law remedy where the common law was competent to give it, a right of action in personam for a tort given by a state statute was enforceable by action at law in state court, or in a federal court where there was a diversity of citizenship, though the tort was committed upon navigable waters within the boundaries of the state. As the court said: "While it may be true that admiralty will not enforce the remedy, even by libel in personam, yet it is not an encroachment upon admiralty jurisdiction, in the sense of the United States Constitution and laws of Congress, because it is excepted from that jurisdiction by the saving clause." Keithley v. North Pac. S. S. Co., 232 Fed. 255 (1916).

The plaintiff brought an action at law against the defendant and recovered damages on account of the personal injuries sustained by him while working on a dock in discharging a cargo of one of the defendant's steamers. The paper which the plaintiff filed was not a libel in personam, but a complaint in an action at law, and as an action at law the case was tried before a jury. On appeal, however, the defendant contended that the Em-

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received from the defendant his wages to the end of the voyage and the expense for his maintenance and cure for a reasonable time thereafter.

"Has congress changed the situation by section 20 of the Seamen's Act (c. 153, 38 Stat. 1164, 1185), as the plaintiff contends? He argues that the act makes the master a fellow servant of the seaman and therefore that congress intended to make the relation between the seaman and all the officers throughout the same as at common law. But the supreme court, in the case of The Osceola,

ployers' Liability Act of Oregon, under which the case was tried, was not applicable since the stevedore's employment was a maritime contract and controlled by maritime law. The court, however, affirmed the judgment, holding that as the plaintiff was injured while working on the dock, admiralty had no jurisdiction. As the court said: "Jurisdiction of torts in admiralty depends upon locality; that where the cause of action is completed on navigable waters, admiralty has jurisdiction, but where it is completed on land, the remedy belongs to the courts of common law. We cannot assent to the proposition that the Employers' Liability Law of Oregon is rendered inapplicable by the fact that the contract whereby the plaintiff was employed by the defendant was a maritime contract. The plaintiff is not suing upon the contract. He is suing upon the breach of the implied obligation of his employer to use due care. The argument of the defendant involves the untenable proposition that while the plaintiff could not have brought a suit in admiralty, and his only remedy was a common-law action, the court which entertained jurisdiction of the common-law action was nevertheless required to apply thereto the maritime law, and to try the case as if it were sitting as a court of admiralty, all for the reason that the contract under which the plaintiff was rendering services to the defendant at the time of the injury was a maritime contract. * * * We think it clear that if admiralty could have no jurisdiction of this cause of action, maritime law has no control over its determination." Swayne & Hoyt v. Barsch, 141 C. C. A. 337, 226 Fed. 581 (1915).

C. Common law.

1. Tests of admiralty jurisdiction.

The plaintiff took passage in a gasoline launch operated by employees of the defendant. A storm arose, the boat was driven back upon a pier, and the plaintiff was injured, as he attempted to jump from the boat. It was alleged that the boat was driven against the pier as a result of the incompetence of the defendant's employee in operating the boat and that the plaintiff's leap to the pier was in obedience to the order of the employee of the defendant. The plaintiff recovered a verdict and judgment of $5,000 in a common-law action for damages and from a denial of a motion for a new trial, the defendant brought error. The court affirmed the judgment holding, among other things, that the circuit court, and not the federal courts of admiralty, had jurisdiction of the action. As the court said: "Locality, by all the authorities, is the test in cases of tort by which to determine whether the wrongful act is one of admiralty cognizance. Where the active cause of the injury originates upon navigable waters, and

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supra, while reserving the question whether the master and seaman were fellow servants, held that it made no difference whatever in respect to the liability of the shipowners for an improvident order of the master which resulted in personal injuries to the seaman. * * *

"It follows that whether the master and seaman are fellow servants or not is quite immaterial in the case of a suit for injuries resulting from an improvident order of the master. For this

the tort is consummated upon land, admiralty has no jurisdiction. * * * Personal injuries received on shore, although caused by negligence originating on a ship, are not within the jurisdiction of admiralty. * * * The injury in the instant case happened on the land. Docks and wharves are but improvements or extensions of the shore. * * * Under the facts of this case * * * we must hold that the circuit court had jurisdiction." Gordon v. Drake, 193 Mich. 64, 159 N. W. 340 (1916).

2. Distinction between right of action and remedy.

The plaintiff, a seaman, fell into the hold of the vessel and was severely injured, as the result of grasping an insecure table pedestal near the hatchway which failed to support him. A common-law action was instituted in the state courts and the jury returned a verdict for $2,600 for the plaintiff, finding that the proximate cause of the injury was the placing of the loose pedestal at a place where a man in the exercise of ordinary care for his own safety might take hold of it. From a judgment entered on the verdict, the defendant appealed, contending that while a common-law remedy was saved to the states by the judiciary act, a distinction was to be drawn between a right of action at common law and a common-law remedy, and that the former, which was used by the plaintiff here, was not saved by the Code. The court, in affirming the judgment, disapproved of the defendant's contention and held that a state common-law court had jurisdiction concurrent with the federal courts when proceeding in personam, and in an action by a seaman for personal injuries arising, as here, from the vessel's unseaworthiness, had power to enter a judgment consistent with the common law. Larson v. Alaska S. S. Co., 96 Wash. 665, L. R. A. 1917 F 671, 165 Pac. 880 (1917).

3. Libel based upon judgment in state court.

The libelant, a seaman, while at sea and employed on a vessel of the company against whose stockholders the libel was brought, received injuries, for which he recovered a judgment against the company for $5,000. The company, however, having become bankrupt prior to the date of the judgment, the present libel in personam against stockholders was filed. The lower court dismissed the libel on the ground that the liability of the respondents had been merged in the judgment for $5,000, which had been recovered, and that the present suit was not a suit upon the original unliquidated claim for damages, but an action on a judgment not of a maritime character, and therefore not within the jurisdiction of admiralty. The circuit court, however, reversed

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reason the court was right in directing a verdict for the defendant and the judgment is affirmed."

In The Osceola, 189 U. S. 158, 175, 47 L. Ed. 760, a libel in rem to recover damages for personal injuries to a seaman while on board and alleged to have resulted from the master's negligence, speaking through Mr. Justice Brown we held:

"1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent

the decree and remanded the cause for further proceedings. As the court pointed out, the liability of shareholders in California corporations was by state statute a primary obligation like that of a partnership since each was liable for his proportionate share of all the debts incurred during the time he was a stockholder. Consequently, a judgment against a corporation did not merge the right of action against the shareholders. The court said further: "While the admiralty jurisdiction cannot be enlarged by state enactment * * *, it is well settled that the maritime law may be changed by state enactment conferring rights of action arising out of marine torts resulting in death. * * * Such being the case as to torts resulting in death, no good reason is seen why the admiralty court may not have jurisdiction of a cause to recover damages for personal injuries resulting from a marine tort against those whom the state law declares shall be primarily liable to respond in damages therefor. The stockholders of the shipping company were not tort-feasors, and were in no wise implicated in the tort, but they are liable to respond in damages therefor for the reason that the law makes them directly answerable for the debts and liabilities of the corporation. We hold that a liability so created by state law and arising out of a marine tort is subject to the jurisdiction of a court of admiralty." Buttner v. Adams, 236 Fed. 105 (1916).

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II. Death.

A. State wrongful death statutes.

1. California.

The plaintiff's decedent worked as a stevedore in unloading coal from the hold of a steamer of the defendant company. His death resulted from the improper handling of the bucket which conveyed the coal to the hold, it being withdrawn from the hopper before it was fully dumped, causing coal to fall upon the deceased. A proceeding under the Workmen's Compensation Act resulted in an award which was subsequently annulled by the state supreme court. From an award for $10,000 for the libelant under the California Death Act, the respondent appealed. The court affirmed the judgment, holding that the death of the deceased was occasioned by the defendant's negligence without contributory negligence on the part of the deceased. As the court said: "The present case being in admiralty, it is obvious that no provision of the California statute * * * has any application here; the rights, obligations, and liabilities of the respective parties being measured by the maritime law. * * * It is well settled that, in the absence of an act of congress or a statute of a state giving a right of action therefor, a suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being on

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of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

"2. That the vessel and her owner are both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. Scarff v. Metcalf, 107 N. Y. 211.

"3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen can-

the high seas, or on waters navigable from the sea, which is caused by negligence. * * * Where, however, a statute of the state where the injury occurs gives such right of action, it will be enforced by a court of admiralty, if of admiralty cognizance. * * * There being no United States statute upon the subject, the * * * [libelant's] right to recover in the instant case must be found in a statute of California. * * * The right of action for the death of the deceased being given by a statute of the state, a court of admiralty will enforce it, * * * but enforce it in accordance with the recognized principles of maritime law, unaffected by the provisions of any state or local law. * * * For this reason the California statute of limitations of one year, relied upon by the appellant in bar of the action, has no more application to the case than had the California statute of frauds involved in the case of Union Fish Co. v. Erickson [242 U. S. 645, 61 L. Ed. 543, 37 Sup. Ct. 239]." Western Fuel Co. v. Garcia, 255 Fed. 817 (1919).

2. Florida.

The libelant's decedent, a stevedore, was killed, while discharging a vessel, as a result of a defective topping lift. His death occurred within 20 to 30 minutes after his removal from the ship. A suit in admiralty was instituted, and from a decree for the libelant, the respondent appealed. The circuit court affirmed the decree, saying: "The cause of action arising on the steamship Chiswick was a maritime tort, and as it resulted in the death * * * within 20 to 30 minutes after his removal from the ship, the right to recover damages for such tort given by section 3145, Gen. St., Fla., 1906, could be enforced, and relief given in admiralty." The Chiswick, 145 C. C. A. 446, 231 Fed. 452 (1916).

3. Kentucky.

The deceased was asleep upon a raft tied to the bank of a river upon which the steam tugboat of the defendant traveled. Opposite to this raft was a second raft tied to the opposite side of the bank, leaving, however, 167 feet of clear river space between them. While traveling at a speed of between 3 and 4 miles an hour, one of the barges of the tugboat struck the corner of the raft upon which the deceased was sleeping, and resulted in his death by drowning. A suit was brought against the owner and pilot of the boat, and from a judgment for $5,000 upon the verdict, the defendants appealed, contending that the case should not have been governed by the state laws of Kentucky, by which it was tried, but by the federal laws. The court reversed the judgment for further proceedings, but held the case was properly tried under state laws. As the court said, "The clause (of the U. S. Judicial Code) 'saving to suitors a

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not recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

"4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

After reference to article 1, section 8, and article 3, section 2, of the Constitution, we declared in Southern Pacific Co. v. Jensen,

common-law remedy where the common law is competent to give it' is intended to save the remedy or right of action in those courts which proceed according to the course of the common law as distinguished from admiralty proceedings, and the words 'common-law remedy' do not necessarily imply an action or remedy obtainable in a common-law court, but are equivalent to 'the means employed to enforce a right or redress an injury,' nor are they limited to such causes of action as were known to the common law at the time of the passage of the judiciary act." Adopting the test that a proceeding in admiralty was in rem and over the vessel itself while a common-law proceeding was in personam against a personal defendant, the court pointed out that, the present suit, being against a personal defendant, was not to be considered as an admiralty proceeding and was consequently within the saving clause of the Judicial Code which left the rights of the parties to be determined by state and not judicial laws. Johnson v. Westerfield's Adm'r, 143 Ky. 10, 135 S. W. 425 (1911).

4. Maryland.

The husband of the libelant was a stevedore engaged in loading copper into the hold of one of the respondent's ships. The deceased worked in the hold and was killed as a result of the mat upon which the copper was lowered into the hold, catching under the crossbar, and causing about two tons of wood and iron making up the hatch covering, which had not been entirely removed, to fall into the hold. If the hatch had been entirely uncovered or the pins inserted to hold the covering in place the accident would never have happened. The respondent contended that the libel should be dismissed, since admiralty had no jurisdiction to enforce the Maryland form of the Lord Campbell's Act, which gave to a jury the task of assessing damages accruing from the wrongful act. The court awarded $4,500, which was affirmed on appeal to the Circuit Court of Appeals and then again by the Supreme Court of the United States on writ of certiorari. The court pointed out that a court of admiralty without a jury would enforce the Maryland statute giving a right of action for death arising from a maritime tort, notwithstanding the provision for the assessment of damages by the jury. Upon the further question of jurisdiction in the federal courts, the court said: "As the injury occurred on board a ship while it was lying in navigable waters, there is no doubt that the requirement as to locality was fully met. The petitioner insists, however, that locality is not the sole test, and that it must appear that the tort was otherwise of a maritime nature. * * * Even if it be assumed that the requirement as to locality in

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244 U. S. 205, 215, 216, 61 L. Ed. 1086, 14 N. C. C. A. 597, Ann. Cas. 1917 E 900: "Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. * * * And further, that in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction." Concerning extent to which the gen-

tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature, and hence the district court, from any point of view, had jurisdiction. The petitioner contends that a maritime tort is one arising out of an injury to a ship, caused by the negligence of a ship or a person, or out of any injury to a person by the negligence of a ship; that there must either be an injury to a ship or an injury by the negligence of the ship, including therein the negligence of her owners and mariners; and that, as there was no negligence of the ship in the present case, the tort was not maritime. This view we deem to be altogether too narrow. The libelant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character." Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157, 34 Sup. Ct. 733 (1914), aff'd 190 Fed. 229 (1911), 113 C. C. A. 398, 193 Fed. 1019 (1912).

The respondent had constructed submerged piles into the P river a short distance from Baltimore, and as a result of a gasoline launch striking on the piles, five persons were drowned. A libel in admiralty was filed, which the respondent contended should be dismissed (1) since the Maryland Death Act under which recovery was sought provided for the assessment of damages by a jury, which proceeding was of course impossible in admiralty and (2) also upon the ground that the Maryland statute (Code of Pub. Gen. Laws, section 48 of Article 54), giving the right to a riparian owner to acquire title to land by reclaiming it from the water, removed the place where the accident happened from admiralty jurisdiction, since the respondent had built the submerged piles to reclaim the land. The court gave a decree for the complainant, holding that the accident occurred within the jurisdiction of admiralty since the waters were navigable in fact and being such were navigable in law, regardless of where the title to the land under the water rested; and for the further reason that no state had the power by legislation to remove from admiralty jurisdiction waters which, but for that legislation, it would have had control of. As to the other contention of the respondent, the court in holding the provision immaterial which had reference to the assessment of damages by a jury, said: "Wherever Lord Campbell's act has been adopted in any form in any of our states, the right of action given has been a right of action at common law. By all, or nearly all, of the state constitutions, the parties to an action at common law are entitled as of right to a jury trial. The

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eral maritime law may be changed, modified or affected by state legislation this was said: "No such legislation is valid if it contravenes the essential purpose expressed by an act of congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes

language of the Maryland statute makes the participation of a jury no more and no less essential to the giving of the relief sought than to the constitutional provision in other states. That in a proper case, where some form of Lord Campbell's act is law, recovery may be had in admiralty for injuries resulting in death, is now settled law." State of Maryland v. Miller, 180 Fed. 796 (1910).

5. Massachusetts.

The British steamer, Sagamore, during a dense fog collided with and sank the fishing schooner, Olympia, a Massachusetts vessel. The schooner was on the starboard tack on a course nearly at right angles to that of the steamer and was struck on her port side aft the main mast, and so deeply cut that she sank in a few minutes. Of the crew of fourteen, six men were drowned. It appeared that the Sagamore was going at an excessive speed, all conditions and circumstances considered, and was at fault in causing the collision. The libels for loss of life were based on Chapter 171, Rev. Laws of Massachusetts, 1902, as amended by Chapter 375, Laws of 1907. The contention of the administratrix of the estates of two of the deceased men was as follows: "The schooner Olympia, a Massachusetts vessel, while on the high seas, was a part of the territory of Massachusetts. The deceased seamen were on board the schooner when she went down, and therefore, at the time of their death, as much on the territory of Massachusetts, and within the protection of the statute, as if actually upon the shore of Massachusetts." The court, in reversing judgment of the district court, held that the Massachusetts statute imposed no obligation on the owners of the Sagamore to make compensation, or to pay a penalty for causing death; and, as the general maritime law afforded no recovery for death thus occurring on the high seas, the libel so far as damages for death were sought, must be dismissed. As the court said: "While the statute 'offers a liability' of Massachusetts owners to those injured, it does not follow that it may impose a liability upon citizens of another state who are within its territorial jurisdiction. Its authority over its own ships and citizens does not extend to the ships and citizens of another nation." The Sagamore, 159 C. C. A. 601, 247 Fed. 743 (1917).

6. New York.

The deceased was one of a large party of excursionists on board the steamer of the respondents. A lifeboat manned by a deck hand was attached to the barge by a 5-foot line. On account of the heat of the sun, the deck hand subsequently left the boat and stood on the barge near the line of the yawl boat. Later he went forward to get a drink of water, and during his absence, the deceased

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are forcefully indicated in the foregoing quotations from The Lottawanna" (21 Wall. 558, 575, 22 L. Ed. 654). Among such quotations is the following: "One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial

voluntarily hauled the lifeboat to the stern of the barge and boarded her. Neither the entry of the man into the lifeboat nor his presence therein was known to the master of the steamer. Immediately upon his return, the deck hand called to the deceased to come out of the boat, but in his attempt to do so, he stumbled and was precipitated into the river. In spite of prompt efforts to effect a rescue, the deceased was carried away by the current and drowned. It appeared that the deceased was intoxicated. There were no defects in the construction of the lifeboat or the oarlocks, or the manner in which such boat was fastened to the stern of the barge. A libel in personam was filed and the court ordered it dismissed, holding the deceased was guilty of contributory negligence. As the court said: "In proceedings in admiralty for causing death by negligence the remedy is derived from the state [New York] statute which gives the right of action to the next of kin, and concededly the common-law doctrine of contributory negligence has application to the facts under consideration. Hence it must be affirmatively shown that the respondents, owners of the vessels, were negligent as a result of which the injury was sustained, and furthermore, that the decedent was free from contributory negligence." Gretschmann v. Fix, 189 Fed. 716 (1911).

Two tugs with tows alongside, approaching along the shore from opposite directions, collided and caused the death of a deck hand and injuries to the fireman on one of the vessels. Under the Code Civ. Proc. of New York (§ 1902) recovery for wrongful death was allowed where the defendant would have been liable to the decedent for the injury if death had not ensued. The circuit court, on a petition to limit liability, held that under the New York statute, an action could be maintained in admiralty against a vessel or her owners for the death of a seaman, through the negligence of the master. The court also pointed out that the right of action against a vessel for personal injuries sustained in such a collision was a suit in rem in the nature of a maritime lien, and did not abate by the death of the libelant. The Ticeline, 137 C. C. A. 207, 221 Fed. 409 (1915).

7. Ohio.

The decedent was master of a barge which foundered upon the high seas off the coast of Long Island, with the result that he and all others on board lost their lives. It appeared that the vessel was owned by the respondent, a corporation of the state of Ohio, and had been used for the carriage of freight upon the Great Lakes until 3 or 4 years before the voyage in question. She was then brought to Philadelphia and thereafter employed exclusively upon the Atlantic seaboard,

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character affecting the intercourse of the states with each other or with foreign states."

The work about which petitioner was engaged is maritime in its nature; his employment was a maritime contract; the injuries received were likewise maritime and the parties' rights and liabilities were matters clearly within the admiralty jurisdiction. Atlantic Transportation Co. v. Imbrovek, 234 U. S. 52, 59, 60, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157. And unless in some way there was imposed upon the owners a liability different from that prescribed by

between that city and other ports. A libel in personam was filed and recovery sought under the Ohio statute of 1851 and 1880. Answering, the respondent admitted that it was an Ohio corporation and the owner of the vessel, but denied that the barge was a vessel of that state and enrolled at an Ohio port. No evidence whatever was offered upon this subject by the libelant. The court, in dismissing the libel, held that while the statute of a state may be applied in admiralty proceedings, based upon a claim for death on the high seas, arising purely from tort, it must be proven, with the burden resting upon the libelant when it is denied, that the vessel upon which the death occurred belonged to the state whose statute is sought to be invoked. That the vessel belonged to such state, the court said, could not be presumed from the fact that the owner was a corporation of such state without other proof. As the court said: "The fact that the respondent was chartered by the state of Ohio is not conclusive of the territorial character of the vessel. Such a corporation might own many vessels, none of which belonged to the state of Ohio; and, even if it be granted that the domicile of the corporation may afford some presumption that its property belongs in the eye of the law to the same jurisdiction, this is certainly no more than a presumption which may be overthrown by sufficient proof." Fisher v. Boutelle Transportation & Towing Co., 152 Fed. 994 (1906).

8. Oregon.

The husband of the libelant, a longshoreman, was killed while assisting in loading the libeled vessel, because of a defect in the gangplank, which caused him to slip and fall. The Oregon statute gave a right of action for wrongful death and declared vessels navigating waters in the state subject to a lien for damages for injuries sustained thereon. Exceptions to the libel challenged the jurisdiction of the admiralty court to entertain the libel because of its "in rem" character. The court in overruling the exceptions held that a state statute giving a right of action for wrongful death and a lien on the vessel was enforceable in admiralty in a proceeding in rem. "It does not seem to me," said the court, "that the fact that this is not a case of collision, can alter the result. The deceased was injured by a fall upon the deck of the vessel. Hence the injury was sustained upon water, not upon land. The cause is therefore within maritime jurisdiction." The Aurora, 163 Fed. 633 (1908).

9. Pennsylvania.

The deceased, as master of a barge, was engaged at the time of the accident with other members of his crew, in paying out the hawser of the barge.

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maritime law, petitioner could properly demand only wages, maintenance and cure. Under the doctrine approved in Southern Pacific Co. v. Jensen, no state has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the "uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

After considerable hawser was paid out a signal was given to the tug to slacken her speed in order that those on the barge could make the hawser fast to the bitts of the barge. The tug was going at a rapid speed and did not slow down even after the third signal was given. The crew were unable to take the necessary turns around the bitts and when all of the hawser had been pulled out, it parted within a few feet of the end where it was made fast, the loose end sweeping around the barge, striking the deceased in the abdomen, producing a fatal wound from which he died on the following morning at a hospital in Philadelphia. The injuries, it appeared, were received while the barge was in the Delaware river within the state of Pennsylvania. A suit in admiralty was instituted and damages claimed by virtue of the Death Act of the state of Pennsylvania. The court in sustaining exceptions to the libel held it had no jurisdiction of the proceeding; for while the injury happened on the vessel, the result of it—the death—for which the libel was filed occurred on land without the jurisdiction of admiralty. "In the admiralty," the court said, "it has become well settled that where damages or death occur, it is not sufficient that the wrong originated upon the water. If it was not consummated upon the water, jurisdiction does not exist." Ryley v. Philadelphia & R. Ry. Co., 173 Fed. 839 (1909).

10. South Carolina.

A libel in personam was filed by the widow of the deceased against the steamship Horsa, a British vessel, alleging that the husband, a laborer, engaged in unloading the vessel, was through the defective and unsafe machinery of the ship, so badly injured that he died therefrom. On motion to dissolve the attachment and dismiss the libel it was contended that the proceedings were not brought by the person qualified to bring them, namely, the personal representative of the deceased, duly appointed. The state statute of South Carolina gave a right of action for injuries causing death to the executor or administrator of the deceased for the benefit of the wife and children. It appeared that several weeks must elapse before an administrator could be appointed, and that if such delay was allowed, the vessel would have departed from the jurisdiction. For that reason the libel was filed by the widow. The court refused to dissolve the attachment, holding that under such circumstances a court of admiralty had jurisdiction to permit a libel to be filed by the widow, with an order of attachment against the vessel, subject to amendment by substituting the administrator when appointed as libelant. The court also said: "The rule in the

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Two acts of congress are relied upon, and it is said that under each petitioner has the right to recover full indemnity according to the common law. They are: (1) Section 9, Judiciary Act of 1789, 1 Stat. 76, 77, whereby districts courts of the United States were given exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it" (Judicial Code, §§ 24, 256); and (2) section 20 of Act to Promote the Welfare of American Seamen, approved March 4, 1915, c. 153, 38 Stat. 1164, 1185, which provides: "That in any suit to

courts of admiralty in the United States is that, although originally admiralty did not enforce damages for death for the benefit of the next of kin or heirs of the dead party, yet that a court of admiralty will enforce in admiralty, by proceedings in personam, damages in cases in which the right of action is given to the next of kin or the representative of the deceased party by the state law, at the place where the injury was caused." The Horsa, 232 Fed. 993 (1915).

11. Virginia.

The steamship Anglo-Patagonian being injured in a collision, was placed in dry dock in order that her stem might be straightened and a number of plates in and around the bow be replaced. Staging was erected around the bow upon which the men worked. The anchor was suspended on the brake above the place where the work was carried on and on becoming unloosened in some manner on the day in question, dropped slowly to the bottom of the dock, crushing a part of the staging and hurling the men to the bottom, causing the death of one, seriously injuring three, and inflicting minor injuries upon another. It appeared that if the chain stopper had been used or the anchor lashed to the ringbolt in the deck, the accident would never have happened. The trial court found as a fact that the accident was caused by the negligence of the steamship and fixed the damages, aggregating $18,600, to which each libelant was deemed entitled. The circuit court, on appeal, affirmed the judgment, holding (1) that injuries sustained while repairing a seagoing vessel in a dry dock occurred upon "navigable waters of the United States" and were the subject of admiralty jurisdiction; (2) the circumstance that one workman was taken from the dry dock where he was hurt, to a nearby hospital, where he died shortly afterwards, could not serve to defeat the jurisdiction which would have attached if his death had occurred at the scene of the accident; (3) that the Code of Virginia (§ 2902) providing a right of action for wrongful death against a ship or vessel which would have been liable had death not ensued and giving an action for damages or a libel in rem was enforceable by a suit in admiralty where the injury occurred at a place within the maritime jurisdiction. The Anglo-Patagonian, 148 C. C. A. 586, 235 Fed. 92, aff'g 228 Fed. 1014 (1916).

12. Washington.

The deceased was, at the time of his death, a second mate of the respondent steamship, a domestic vessel in the halibut fisheries hailing from the port of Seattle. The libel was in rem and sought recovery under the Washington statute, giving a right of

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recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority."

The precise effect of the quoted clause of the original Judiciary Act has not been delimited by this court and different views have been entertained concerning it. In Southern Pacific Co. v. Jensen we definitely ruled that it gave no authority to the several states to enact legislation which would work "material prejudice to the characteristic features of the general maritime law or interfere

action to the next of kin for wrongful death. In sustaining exceptions to the libel, the court held that admiralty would enforce the state law, giving a right of action against a person for wrongful death where the injury occurred on board a domestic vessel of the state on the high seas, and not within the jurisdiction of any other sovereignty. The court cited with approval the rule stated in 13 Cyc. 316b which says: "Where the statute of a state causes a survival to the next of kin of a right of action for damages for death wrongfully caused, such statute can have no application to a case where the death was caused outside the jurisdiction of such state and on the high seas. However, by the weight of modern authority, the state laws follow the domestic vessel upon the high seas until she comes within another jurisdiction, and therefore an action will lie, under a statute of that state, for a death caused by negligence on board a vessel whose home port is in that state, even though upon the high seas, without the jurisdiction of any other sovereignty." The court pointed out, however, that the action provided by the Washington statute was in personam against the person causing the injury and death, and that since it created no right in rem or lien against the thing, and as such was not given by admiralty, the present proceeding in rem against the vessel could not be sustained. The Starr, 209 Fed. 882 (1913).

B. Effect of failure to plead place of accident.

The decedents were drowned in the Mississippi river near Memphis as the result of a collision between a motor boat in which they were riding and a tow of one of the defendant's steamers. It appeared that the motor boat became disabled, and while it carried no lights, its four occupants shouted and waved burning papers to apprise the approaching vessel of their presence, so that from all the evidence it should have been discovered when at least 250 to 300 feet away, and in time to avoid the collision. A libel in personam was filed, but did not allege whether the accident occurred in Arkansas or Tennessee. From a decree of $10,000 for each libelant, the respondents appealed. The court affirmed the decree, holding (1) that a right of action for wrongful death given by a state statute could be enforced in admiralty by proceedings in personam; (2) that admiralty was not without jurisdiction of such a proceeding because the libel did not show in which of two states the wrongful act was committed, since the United States court had the power to take cognizance of and apply the law of the state in which the proof showed the collision occurred; (3) that where contributory negligence would defeat an action under the state statute giving the remedy, as here, such rule was to be followed by admiralty.

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with the proper harmony and uniformity of that law in its international and interstate relations." In The Moses Taylor, 4 Wall. 411, 431, 18 L. Ed. 397, we said: "That clause only saves to suitors 'the right of a common-law remedy, where the common law is competent to give it.' It is not a remedy in the common-law courts which is saved, but a common-law remedy. A proceeding in rem, as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law." And in Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638, 644, 648, 44

Monongahela River Consol. Coal & Coke Co. v. Schinnerer, 117 C. C. A. 193, 196 Fed. 375 (1912).

C. Workmen's compensation acts.

1. Connecticut.

The accident resulting in the death of decedents occurred in the navigable waters of New Jersey. All parties concerned were citizens of Connecticut and the contracts of employment were made in that state to be performed partly within and partly without the state. A compensation proceeding under the Connecticut Workmen's Compensation Act was instituted and from an award an appeal was taken to the superior court, which reserved the cases upon certain questions of law and as to the judgment or decrees to be rendered by that court. The court, in advising the superior court to render its judgment dismissing the appeals, held among other things (1) that the jurisdiction of admiralty was exclusive as to actions in rem, but not as to personal actions, and (2) that a proceeding for compensation under the act being a personal action, the jurisdiction of admiralty did not prevent the Workmen's Compensation Act from being applicable, even though the employee was killed outside of the state. The court also pointed out that the word "common-law remedy" of the saving clause in the United States Judicial Code (§ 256, c. 231), saving to suitors in all cases the right of a common-law remedy where the common law was competent to give it, was not limited to remedies in the common-law courts, but embraced all methods of enforcing rights known to the common or statutory law, thus including a Workmen's Compensation Act. Kennerson v. Thames Towboat Co., 89 Conn. 367, L. R. A. 1916 A 436, 94 Atl. 372 (1915).

2. New Jersey.

The deceased, while on a steamer owned by a New Jersey corporation, but operated by the respondent, a California corporation, was drowned in the high seas, through the negligence, it was averred, of the owner and operators of the vessel. A suit in admiralty having been instituted, it was contended that the action was governed by the California law, for the reason that the vessel was chartered to a California corporation and operated by it. The court in dismissing the libel held that the Workmen's Compensation Act of New Jersey denied compensation to such alien dependents not residents of the United States, as were those of the deceased. As the court said: "Under the general maritime law, of course, the action cannot be maintained, as no right of action exists under that law for damages for the death of a decedent. The laws of California and New Jersey, however, do authorize such an action in behalf of certain heirs and dependents of a decedent, and where

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L. Ed. 921: "Some of the cases already cited recognize the distinction between a common-law action and a common-law remedy. Thus in The Moses Taylor, * * * it is said of the saving clause of the Judiciary Act: 'It is not a remedy in the common-law courts which is saved, but a common-law remedy.'" "If the suit be in personam against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of

such right of action is given even by state laws in admiralty cases they will be enforced in the admiralty courts. * * * But it has always been held that if any law, in addition to the general maritime law or congressional enactments, is to be applied to a vessel on the high seas, it is not the law of the state or country where the charterer resides, but the law of the state or country of the owner. * * * If, therefore, this action can be maintained at all, * * * it must be because of some provision of the law of New Jersey." Bjolstad v. Pacific Coast S. S. Co., 244 Fed. 634 (1917).

3. New York.

The deceased operated a small electric freight truck, driving the same into a steamship of the defendant, where it was loaded with lumber and then out upon the pier where it was unloaded. At the time of the accident, the deceased stood on the rear of the truck, and upon reversing the truck into the low hatchway to clear it from a jam with the gangway, his head was thrown forward and his neck broken so as to cause death. An award of compensation was made by the New York State Workmen's Compensation Commission and affirmed by the courts of that state. The United States Supreme Court, however, reversed the decision holding (1) that the work of a stevedore like that in which the deceased was engaged was maritime in its nature; (2) that congress had paramount power to fix and determine the maritime law; (3) that exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction having been vested by congress in the federal district courts, saving to suitors the right of a common-law remedy, where the common law was competent to give it, the New York Compensation Act attempting to cover certain maritime injuries like that in suit, being of a character wholly unknown to the ordinary processes of any court, was not saved to suitors from the grant of exclusive jurisdiction, conflicted with the United States constitution to the extent that it purported to have such jurisdiction and was to that extent invalid. Jensen v. Southern Pac. Co., 215 N. Y. 514, 9 N. C. C. A. 286, L. R. A. 1918 A 403, Ann. Cas. 1916 B 276, 109 N. E. 600 (1915), 244 U. S. 205, 61 L. Ed. 1086, Ann. Cas. 1917 E 900, 37 Sup. Ct. 524 (1917).

The deceased, a stevedore, was killed as the result of the breaking of an I bolt and tackle falling upon him. Although his injuries were fatal, the actual demise did not take place until the following day in a hospital on shore, to which he had been removed. A proceeding under the Workmen's Compensation Law of New York resulted in an award and part payment, when the Jensen case was rendered by the supreme court, holding that stevedoring work on a ship was of a maritime character, and that the

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the statute * * * of a common-law remedy. The suit in this case being one in equity to enforce a common-law remedy, the state courts were correct in assuming jurisdiction."

The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Bouvier's Law Dictionary. Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing

Workmen's Compensation Commission was without jurisdiction to make an award for such injuries, admiralty and common-law courts being vested with exclusive jurisdiction. Payment was then stopped and the plaintiff brought this common-law action for recovery. From a verdict for the plaintiff, the defendant moved to set it aside. The court denied the motion, holding (1) that though death occurred on the shore the tort was maritime and the remedy of the plaintiff was in rem in admiralty or at common law under the New York death act with no remedy under the Workmen's Compensation Act; (2) that the election in the first instance to proceed under the Workmen's Compensation Act did not preclude the common-law action since the compensation act could give no remedy. Liverani v. John T. Clark & Son, — N. Y. Misc. —, 176 N. Y. Supp. 725 (1919).

The deceased met his death while working on a vessel and an action against the employer was brought, alleging a common-law liability. It was admitted by the plaintiff that the legislature intended to include maritime workers like the deceased within the Workmen's Compensation Act and that such a provision was unconstitutional under the authority of the Jensen case prior to the amendment to the Judicial Code, saving to claimants the rights and remedies under the Workmen's Compensation Law of any state (Comp. St. 1918, § 1233). The plaintiff, however, contended that by this change, he was given an election either of taking the benefit prescribed by the state Workmen's Compensation Law, or of bringing a common-law action, or of proceeding in admiralty. The complaint was dismissed and the court, in denying a motion for a new trial, held there was no such election and that where the injury was within the Workmen's Compensation Act, though maritime in nature, that remedy being valid by the force of congressional amendment, was exclusive. As the court said: "If the employer has complied with the statute, there can be no election by the employee. He cannot then determine which remedy he will pursue. He must take the benefits provided by the statute. Furthermore, congress could not broaden the effect of a state statute. No act of it could give an employee an election of remedies in the state court which was not given by the state statute. What, then, is the effect of the 1917 amendments? They must have to do with the right to take proceedings in the United States courts, not in the state courts. The amendments, coming as they did after the Jensen decision, have an added significance. In that case the attempt was made to hold the employer liable under the Workmen's Compensation Law, and it was upon the employer's appeal that the United States Supreme Court rendered its decision, holding that the state statute did not

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therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea.

Section 20 of the Seamen's Act declares "seamen having command shall not be held to be fellow-servants with those under their authority," and full effect must be given this whenever the rela-

apply to maritime workers. The amendments evidently were intended to overcome the effects of that decision, by making state statutes, which in terms covered such workers, valid and enforceable by maritime workers as well as by others." Ruddy v. Morse Dry Dock & Repair Co., — N. Y. Misc. —, 176 N. Y. Supp. 731 (1919).

The claimant's intestate lost his life by falling down a hatchway while engaged in making repairs on an ocean-going steamship. The ship, at the time of the accident, was in navigable waters and was being made ready to carry a cargo of grain. The industrial commission allowed an award, part of which was paid before the rendition of the supreme court opinion in Southern Pac. Co. v. Jensen, 244 U. S. 205, 61 L. Ed. 1086, Ann. Cas. 1917 E 88, 37 Sup. Ct. 524. Thereafter payments were stopped and from a denial of its motion to vacate the award by the industrial commission, because of lack of jurisdiction, an appeal was taken to the appellate division which vacated the award. The court, in affirming such order, held: (1) that a contract to repair a steamship to receive cargo, as was the contract of the deceased, was of a maritime nature; (2) that injuries arising in the execution of such contract were within the jurisdiction of the federal district court and without the jurisdiction of the industrial commission. In determining whether the contract in question was of a maritime nature, the court said: "In determining whether a contract be of a maritime nature, locality is not controlling, since the true test is the subject-matter of the contract—the nature and character of the work to be done." Doey v. Clarence P. Howland Co., 224 N. Y. 30, 120 N. E. 53 (1918). Certiorari denied 248 U. S. 574, 63 L. Ed. 428, 39 Sup. Ct. 11 (1918).

4. Texas.

The deceased was assistant engineer on the dredgeboat of a dredging concern insured by the defendant against loss from injuries to its employees under the Texas Workmen's Compensation Law. During a very severe storm, the boat capsized and the deceased was drowned. Suit was brought against the insurance company to recover the compensation prescribed by the Workmen's Compensation Act, but not for damages for any personal injuries resulting from alleged negligence. Judgment for the plaintiff in the sum of $5,400 was given, from which the defendant appealed, contending that the state court was without jurisdiction for the reason that the accident occurred upon the navigable waters of the United States and was within the exclusive jurisdiction of the federal courts. The court decreased the judgment to $815 and then affirmed it, holding (1) that the state common-law courts had jurisdiction

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tionship between such parties becomes important. But the maritime law imposes upon a shipowner liability to a member of the crew injured at sea by reason of another member's negligence without regard to their relationship; it was of no consequence therefore to petitioner whether or not the alleged negligent order came from a fellow-servant; the statute is irrelevant. The language of the section discloses no intention to impose upon shipowners the same measure of liability for injuries suffered by the

with the federal district courts in suits of maritime origin, where the proceeding was in personam and (2) that the federal court's jurisdiction was exclusive only where the suit was in rem against the vessel. As the court said: "As is elsewhere herein stated, this was not a suit in personam against the owner of a vessel to recover either upon a contract, or for damages for a maritime or other character of tort, but was upon an insurance contract against an insurer, who voluntarily and for a valuable consideration assumed the obligation to pay compensation to the employee or his beneficiaries, upon the happening of an accidental injury while in the course of his employment, and who received the benefits of that contract in the premiums paid it for carrying the risk. We therefore think that, in these circumstances, its claim, that appellees mistook their forum, cannot be availed of. Upon these considerations the contention that the trial court had no jurisdiction is overruled." Southern Surety Co. v. Stubbs, — Tex. Civ. App. —, 199 S. W. 343 (1917).

D. Employers' liability acts.

1. Federal.

An employee of the petitioner was captain of one of its lighters used in transporting freight in and about the harbor of New York. He met his death as a result of being struck on the head by a part of the cap of one of the lighter's bitts, which was wrenched off in towing. It appeared that the deceased was not guilty of contributory negligence and that the petitioner was at fault in that the bitt in question was fastened to a rotted log rail, which gave way when the strain was placed upon it. Suit was brought by the administrator of the deceased under the Federal Employers' Liability Act in the state courts of New Jersey. The petitioner thereupon filed a petition in admiralty to limit its liability, alleging that the injuries which deceased received occurred without its privity or knowledge. It also denied liability, and the claimant, after his exceptions were overruled, filed an answer and claim, the effect of which was to put in issue both the petitioner's right to limited liability and its claim to exemption from any liability. The court held that the evidence was sufficient to establish negligence on the part of the petitioner and authorized an award for the value of the lighter, but limited the liability of the petitioner to that extent, so as not to include the tug towing the lighter, which was also owned by the petitioner. The court pointed out that, as the decedent was, at the time he received the fatal injuries, employed in interstate commerce by the petitioner, a common carrier by railroad, the Federal Employers' Liability Act governed the rights of the parties. The court said further on the question of jurisdiction: "The only ground for an owner

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crew while at sea as the common law prescribes for employers in respect of their employees on short.

The judgment of the court below is

Affirmed.

MR. JUSTICE HOLMES concurs in the result.

MR. JUSTICE PITNEY, MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE dissent.

to come into admiralty is because of his asserted right to limit his liability. If it is found that he is not entitled to that right, for the court to go further and determine general liability, etc., would be to deprive a claimant of the choice of forums given to him by the statute and deprive him of his right to trial by jury.'' This conclusion followed. The court said as a necessary result of the consideration that a person who had a cause of action of admiralty cognizance was entitled to seek his remedy in either the common-law courts if they are competent to give it, or in the admiralty courts. The court therefore held that it was without jurisdiction to proceed further, and was obliged to leave the claimant free to pursue his remedy in the state court. The Erie Lighter 108, 250 Fed. 490 (1918).

2. New York.

The deceased was drowned in Buffalo river as the result of a collision between the tug on which he was working and a large steamer which was to be taken in tow. It appeared that both vessels were at fault, the steamer exceeding the federal speed limit of 6 miles per hour and the tug having approached too near the vessel. A libel in personam was filed and the court in giving a decree for the libelant held (1) that the New York Employers' Liability Act authorizing recovery for wrongful death was enforceable in admiralty, since the death occurred in a collision in the waters of that state; (2) that the master of the tug, having sole charge of its navigation was one ''whose sole or principal duty is that of superintendence'' within the meaning of that act and consequently his negligence was imputable to the ship owner; (3) that the action was maintainable against both vessels since both were at fault. Trauffler v. Detroit & Cleveland Nav. Co., 181 Fed. 256 (1910).

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HEUMAN v. M. H. POWERS CO.

[Court of Appeals of New York, April 15, 1919.]

226 N. Y. 205, 123 N. E. 373, rev'g 175 N. Y. App. Div. 627, 162 N. Y. Supp. 590.

1. **Carriers—Transfer company—Violation of obligation—Theft by employees.** When the employees of a transfer company, employed to move household

CASE NOTE.

Liability of transfer company for loss of or damage to goods intrusted to it, to move.

I. Moving household goods, 338-342.
  A. Goods burned, 338-341.
    1. Generally, 338.
    2. Unexplained fire in goods on van, 338-339.
    3. Fire in warehouse during delay for crating, 339-340.
    4. Fire starting from revolver in goods, 340-341.
  B. Articles broken or lost, 341-342.
    1. Part of bed broken off and lost, 341.
    2. Loss from boxes discovered week after delivery, 341.
    3. Loss of rugs not reported for 3 days, 341-342.
    4. Piano being moved in presence of owner, 342.

II. Baggage transfer, 342-344.
  A. Missing after being placed on truck at depot, 342-343.
  B. Articles lost by damage to trunk, 343.
  C. Baggage lost during transfer between depots, 343-344.
  D. Trunk lost between depot and home, 344.

III. Moving freight to and from railroad depot, 344-346.
  A. Flour burned in car being unloaded, 344-345.
  B. Load of goods stolen while in line at depot, 345-346.

IV. Forwarders, 346-349.
  A. Goods burned in warehouse while waiting for car, 346.
  B. Diversion of goods from designated route, 346-347.
  C. Liability as initial carrier, 347-349.

V. Injury due to defective crating, 349.

VI. Fall of crane supplied by owner for unloading machinery, 350.

VII. Larceny of goods by driver, 350-351.

VIII. Hogs drowned in leaky scow chartered to carry them, 351-352.

IX. Time of injury conjectural, 352-353.
  A. Boxed harp taken from hotel baggage room, 352.
  B. Property found damaged after acceptance as in good order, 352-353.

X. Proof of delivery to carrier, 353.

XI. Suit before date of delivery of goods destroyed by fire, 353.

XII. Limitation of liability, 353-361.
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    2. Limitation stated in receipt not read, 354-356.
    3. Reduced valuation tacitly assented to, 356-357.
    4. Right to benefit of railroad tariff valuation, 357-358.

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goods, stole jewelry from a safe in a cabinet which was among the articles moved, the company violated the common-law obligation of a carrier to safely carry and deliver the goods.

2. Carriers—Limitation of liability—Requisite of special contract.

The rule is that where a common carrier desires by special contract to exonerate itself from the effect of its own acts or omissions, or those of its employees, the special contract must openly and plainly express that intention so that it cannot, in the slightest degree, be misunderstood.

5. Effect of shipper's misrepresentation as to contents, 358.
B. Forwarding of household goods, 358-360.
C. Local commercial delivery service, 360-361.
1. Receipt plainly stating reduced valuation, 360.
2. Receipt drawn by shipper, 360-361.
3. Charge plainly based upon reduced valuation, 361.

Cross-references. Liability of carrier as insurer or warehouseman where goods are damaged or destroyed while in vehicle of transportation before or after transit, see 4 N. C. C. A. 277-291.

I. Moving household goods.

A. Goods burned.

1. Generally.

The defendant, a company incorporated to do a general warehouse and storage business, was also engaged in the business of moving household goods. The president of the company testified that the concern solicited business of this character by public advertisements, signs on wagons and fences, and by cards, bills and tags. The defendant contended, however, that this public committal of the company to a general and undiscriminating service did not make it a common carrier since it exercised the right of accepting some persons as patrons and rejecting others. The plaintiff delivered household goods to the defendant, and the same having been destroyed by fire, a suit for damages was instituted. Though the contract of transportation was made with plaintiff, the husband, part of the goods belonged to his wife, and a separate suit was instituted to cover her damage. The court, in affirming a judgment for the plaintiff in both suits, held, though a contract of transportation was made by one party, another party, when shown to be the real owner of the goods, was entitled to recover damages in tort for any loss. The court also held that one who, as the defendant, held itself out to the public as ready to undertake for hire the transportation of goods, and so invited the custom of the public, was a common carrier, though it claimed the right to select those whom it would serve, accepting some and rejecting others, and, the defendant being considered as a common carrier, the burden of proof was upon it, said the court, to escape liability for goods proven to have been lost by bringing itself within one of the recognized common-law exceptions. Lloyd v. Haugh & Keenan Storage & Transfer Co., 223 Pa. 148, 21 L. R. A. (N. S.) 188, 72 Atl. 516 (1906).

2. Unexplained fire in goods on van.

The defendant, a company engaged in the general business of moving household goods from one part of the city to another, undertook to transport such goods for the plaintiff. While in the vans being moved to another residence of the plaintiff, a fire somehow started and the goods were destroyed. The jury were in-

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3. Carriers—Transfer company—Limitation of liability—Special contract—Theft by employees.

The clause in the contract between the owner of household goods and the transfer company, employed to move the goods, providing that the responsibility of the company was limited to a specified sum for any article, together with the contents thereof, referred to the company's responsibility as a carrier, and did not include the misfeasance or nonfeasance of the company or its employees, and hence did not limit the company's liability for jewelry stolen by its employees from a safe in a cabinet which was among the articles moved.

structed that the plaintiff must show negligence on the part of the defendant in order to recover; and from a verdict and judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the defendant was a common carrier, not a private carrier, and as such was an insurer of the goods against such accidents as the fire which destroyed the goods in question, without proof of negligence, and as the instruction to the jury was more favorable to the defendant than the law allowed, it had nothing about which to complain in this respect on appeal. The court also pointed out that while a common carrier could limit its employment to the carriage of a particular kind of goods and thus restrict its liability as an insurer to such goods, nevertheless when a person, even though a mere carter or expressman engaged in carrying freight to and from a depot or warehouse or between places in the same locality undertook to transport the goods of all those who sought to employ him, he became a common carrier, and was liable as an insurer for all goods intrusted to his care. Collier v. Langan & Taylor Storage & Moving Co., 147 Mo. App. 700, 127 S. W. 435 (1910).

3. Fire in warehouse during delay for crating.

Plaintiff and the defendant transfer company entered into a contract pursuant to which the plaintiff delivered to the defendant, in two separate lots, certain household goods, all of which the defendant undertook to deliver for shipment to a certain railroad on a certain day. One lot was delivered to the railroad company on the date set, but the second, retained over night in the defendant's warehouse, was destroyed by fire before the next morning. It appeared that the delivery to defendant in two lots was consequent upon a further undertaking of the defendant to box and crate such parts of the shipment as required that service; that pursuant to this arrangement, defendant sent men to get the goods requiring crating, etc., on a day in advance of that appointed for the delivery to the railroad; that such servants selected all of the goods which required crating, and on the day set called upon plaintiff for the remainder of the shipment. Included in such second lot, however, were two trunks, which, upon their arrival at the defendant's warehouse, it was likewise decided to crate. The time necessary for this work, it appeared, made it impossible for defendant to get the second lot to the depot of the railroad company before the hour after which goods were not accepted for shipment on that day, hence the second lot was retained in defendant's warehouse over night, with the result above stated. In affirming a judgment for the plaintiff for the value of the goods so destroyed, the court held that, whether the defendant was to be held as a carrier or as a warehouseman, its failure to comply with its absolute agreement to deliver the two lots to the railroad company on a day certain was the proximate cause of the loss, and such failure

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4. **Carriers—Transfer company—Nondisclosure by owner of fact that valuables were in cabinet—Effect on theft by company's employees.**

The failure of the owner of household goods, employing a transfer company to move such goods, to disclose the fact that there was, in a cabinet which was among the articles to be moved, a safe containing valuable articles, did not relieve the company from liability for the theft of jewelry from such safe by its employees.

Action against transfer company for loss of articles stolen by

not having been due to any default of the plaintiff, the defendant was responsible in damages. Beall v. Bekins Van & Storage Co., 33 Cal. App. 652, 166 Pac. 370 (1917).

4. **Fire starting from revolver in goods.**

The defendant transfer company undertook, for hire, the transportation of a load of household goods belonging to the plaintiff, from one town to another, and pursuant to such undertaking started the same in a wagon, drawn by two horses and in charge of two of its servants, upon the highway leading to such designated place. En route the goods caught fire and were destroyed, and the wagon of the defendant was at the same time somewhat damaged. The evidence tended to show that the fire was caused by the accidental discharge of a loaded revolver, packed with the goods; that the fire so started burned while the wagon was proceeding a distance of three-fourths of a mile, with the horses walking, before either of the defendant's servants in charge of the wagon was aware thereof, and that they only became aware of it then through the outcries of one living beside the road who had seen the smoke arising from the wagon before the wagon arrived at a point opposite her house. All of this time the servants in charge were seated at the front of the wagon and within 3 or 4 feet of the burning goods. When they became aware of the fire they alighted, unhitched the team and prepared to remove it and themselves to a place of safety, but upon the protest of the one who had seen the fire, hitched the team again to the wagon and hauled it farther away from her house, then again unhitched and left the wagon, making no attempt at any time to remove any of the plaintiff's goods or to extinguish the flames. Plaintiff sought damages for the loss of the goods, on the ground of a failure to perform the contract of transportation. Defendant, answering, alleged that plaintiff had "fraudulently, negligently and wrongfully" placed the loaded gun in the load, without defendant's knowledge, and that the loss in question was due to the discharge of such gun, without its fault. Plaintiff's reply denied these averments and set up further that if the fire was so caused, defendant's servants, by the exercise of ordinary diligence, could have saved the goods from burning, but negligently failed to exercise any care in that behalf. The court held, in affirming a judgment for the plaintiff for $815, that the burden rested upon the defendant to show that its liability as an insurer of the goods was absolved by reason of the exception claimed, namely, the fault of the plaintiff in packing the loaded gun in the load; that even then it would not be absolved if its own negligence or that of its servants contributed to cause the loss; and that under the evidence it was for the jury to say whether the defendant's servants exercised due diligence to save the goods after discovering that they were on fire. Merchants' Transfer

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defendant's employees. Order of appellate division reversed and judgment of appellate term reinstated.

For appellant—Bertram L. Kraus.

For respondent—John W. Browne.

Co. v. Kiser, 179 Ky. 324, 200 S. W. 454 (1918).

B. Articles broken or lost.

1. Part of bed broken off and lost.

The defendant, with his horse and sleigh, was employed by the plaintiff to move certain furniture to an adjoining town at an agreed compensation of $10. Among the goods delivered to the defendant was a brass bed in perfect condition. At the destination it was discovered that part of the bed had been broken off and lost in transit. At the trial of a suit for damages, the defendant admitted that he had lost the missing part. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, pointed out that while a common carrier was an insurer of the goods intrusted to him, a private carrier, like the defendant, who was really a bailee for hire, was required to use only ordinary care in the discharge of his duty; but upon proof of delivery of the goods in good condition to the bailee, and their loss, a presumption of negligence arose, which if unexplained by the bailee, entitled the bailor to judgment for the loss. O'Rourke v. Bates, 73 N. Y. Misc. 414, 133 N. Y. Supp. 392 (1911).

2. Loss from boxes discovered week after delivery.

In an action against a transfer company for the value of goods alleged to have been lost, the defendant and his driver testified that the boxes in question were in good condition when delivered to the plaintiff's apartment house. A receipt showing the goods to be in good condition was given to the defendant at the time of delivery. The goods were placed in a basement and remained there without being unpacked for over a week, and were not all removed until after the lapse of two weeks. From a judgment for the plaintiff, the defendant appealed. The court, in reversing the judgment and remanding the case for new trial, held that the plaintiff had failed to show by a fair preponderance of the evidence that the goods were missing from the boxes when delivered by the defendant. Creager v. McGowan (N. Y. Misc.), 104 N. Y. Supp. 416 (1907).

3. Loss of rugs not reported for 3 days.

Defendant, a common carrier, undertook the transportation of certain household goods of the plaintiff, by wagon, from one town to another. Three days after the load had been transported and delivered at the agreed place, the plaintiff reported the discovery of the fact that part of the goods, including certain rugs, had been lost in transit, and claimed the value thereof from defendant under its contract of transportation. In an action based upon this claim it appeared that the loss had in fact occurred as alleged. The court held, in affirming a judgment for the plaintiff for $188, that it was no bar to plaintiff's action that she had failed

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The following are the pleadings in the action:

Complaint.

Plaintiff, complaining of the defendant, by Wesselman & Kraus, her attorneys, respectfully shows to this court and alleges as follows:

First: That at all the times hereinafter mentioned was a domestic corporation.

Second: That heretofore and on or about the 20th day of May, 1913, plaintiff engaged the defendant to move her household effects from the apartment

for 3 days to assert the loss of the goods and to make claim for the value thereof. Hughes v. Dobson, 202 Ill. App. 54 (1916).

4. Piano being moved in presence of owner.

The defendant agreed to move plaintiff's piano from one house to another for a certain sum, but the work was performed so negligently that the piano was damaged. The defendant pleaded contributory negligence in that the plaintiff consented to allowing an insufficient number of men to attempt to load the piano on the wagon of the defendant, and also in that the plaintiff himself superintended the moving and loading of the piano and that the work was performed in accordance with his instructions. On the trial of a suit for damages, the court refused an instruction of the defendant charging the jury that the burden of proof was upon the plaintiff to show that the defendant failed to use due care in handling the piano. On appeal by the defendant from a verdict and judgment for the plaintiff, the court affirmed the judgment, holding that the charge to the jury requested by the defendant and refused by the trial court exacted too high a measure of proof. "The burden," said the court, "is not to show or prove facts certainly or absolutely by the evidence, but only to the reasonable satisfaction of the jury." The court also pointed out that the pleas of contributory negligence were bad, in that the plaintiff's knowledge of the number of men necessary to move the piano was not alleged in the pleas concerning consent to allowing an insufficient number of men to move it, and as to the plea that the work was performed in accordance with the instructions of the plaintiff who superintended the work, the court held that no fact of negligence by the plaintiff was alleged. Smiley, Son & Co. v. Keith, 3 Ala. App. 354, 57 So. 127 (1911).

II. Baggage transfer.

A. Missing after being placed on truck at depot.

The plaintiff delivered to the defendant, a local transfer company, a large trunk containing samples of shoes and two other trays or telescopes, for transportation to the local railroad station. He was given in return three checks which served as receipts for the property and which were to be delivered to the defendant on the return of the goods. While there was an express oral contract to transport the baggage to the station, there was no written contract to define the rights of the parties. The baggage was carried to the station and there placed on a truck ready for delivery to the plaintiff upon the arrival of his train. The plaintiff, however, was unable to depart on the train originally intended, and did not call for his baggage until the following morning, when it was discovered that the two trays had been lost. The

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then occupied by her at 435 Convent avenue, in the borough of Manhattan, city of New York, to 2478 Second avenue, in the borough of Manhattan, city of New York, and for a consideration agreed upon, the defendant agreed to move said household effects in a good and careful manner and to be responsible for damages that this plaintiff might sustain, and for any loss of said household effects or other property in the apartment at 435 Convent avenue, occupied by this plaintiff as aforesaid.

Third: That thereafter and on the 22nd day of May, 1913, the defendant caused its servants and employees to call at the apartment then occupied by this plaintiff at No. 435 Convent avenue to pack the said household effects.

Fourth: That on the 24th day of May, 1913, said employees again called

trunk and other parcels were known to have remained on the truck until 8 o'clock on the preceding evening, when the defendant's agent, who had taken charge of the baggage on its arrival at the station, directed the attention of the night man to it. What became of the two missing parcels was unknown. From a judgment for the plaintiff, the defendant brought error. The court, in affirming the judgment, held that local carriers, such as cabmen, wagoners, or transfer men, like the defendant, were to be regarded as common carriers, liable as insurers for the goods intrusted to them, and while if the owner did not call for the goods on delivery at destination, the high obligation of the insurer was relaxed, still the goods could not be abandoned but the carrier must assume the duties of a warehouseman with its obligations of reasonable care for the goods. Brown Shoe Co. v. Hardin, 77 W. Va. 611, L. R. A. 1916 D 1199, 87 S. E. 1014 (1916).

B. Articles lost by damage to trunk.

The defendant agreed with the plaintiff to transport two trunks and their contents from the place where she was visiting to the railroad station in time for a certain train. The wagon hauling the baggage was struck by a train, due to negligence of the driver, who was shown to be drunk, and as a result many of the articles contained in the trunks were either lost or damaged. The plaintiff, due to the accident, was compelled to postpone her journey a day and a night to regain the remainder of the baggage. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the plaintiff was entitled to recover the expense incurred as the result of the delay in her journey, occasioned by the necessity of regaining the contents of the broken trunks, and was entitled to recover the value of the goods, though certain articles that were destroyed, such as photographs, had no market value. Kates Transfer & Warehouse Co. v. Klassen, 6 Ala. App. 301, 59 So. 355 (1912).

C. Baggage lost during transfer between depots.

Plaintiff brought suit against defendant transfer company to recover damages for the loss of a certain "grip" and its contents which defendant had undertaken to transfer from the depot of one railroad carrier to that of another, alleging that, through the negligence of the defendant, the grip and its contents were lost. The defendant impleaded the receiver of the railroad company at the depot at which the grip was to have been delivered, charging that the loss of the grip was due to the negligence of the servants of such receiver. The demurrer of the receiver was sustained and plaintiff had judgment against the transfer company alone, for $122.23, the sum which plaintiff had testified represented the cost of replacing the articles lost and

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at the said address, No. 435 Convent avenue, to remove all household effects and all other property of this plaintiff.

Fifth: That while the said defendant, its servants, agents and employees were so engaged in moving said property of this plaintiff from the first-mentioned place to the place of their destination at 2478 Second avenue, in the borough of Manhattan, city of New York, certain servants, agents and employees of the said defendant, or one or more of them, stole from this plaintiff certain jewelry owned by her, a schedule of which is hereto annexed, made a part hereof and marked Exhibit A.

Sixth: That said jewelry was in the apartment at the time the said men so called at the same to remove the property and household effects of this

the value of such articles to her. The court, while affirming the judgment as to the transfer company and the plaintiff, holding that the proper measure of damages had been applied, reversed the judgment dismissing the receiver on demurrer, on the ground that the petition of the transfer company stated a cause of action good, at least as against general demurrer, and on the further ground that the trial court, on dismissing the receiver, should have granted the transfer company's seasonably filed application for leave to amend its answer. Houston Transfer & Carriage Co. v. Whitcomb, — Tex. Civ. App. —, 147 S. W. 358 (1912).

D. Trunk lost between depot and home.

Shortly after plaintiff's assignor arrived in New York City she delivered to an agent of the defendant transfer company a claim check for a trunk which she had brought with her on the train, asking that the trunk be delivered to a certain address. She was not then asked and did not then state its value, but paid the usual minimum charge exacted by defendant's company for such service. The trunk was delivered to defendant's agent driving a truck, but in some way was lost and never delivered to the address stated. Thereafter this action to recover damages was brought, it being alleged that the real value of the trunk, with its contents, was $982.42, and for this sum plaintiff, as assignee of the owner, recovered judgment. On appeal it was held that the case was governed by a statute making any common carrier or railroad company liable for the full value of any "property carried as baggage," except in certain cases not material here, such statute, in terms, applying to "express companies" and others performing like service. The inclusion of express companies, the court pointed out, indicated an intention to use the term "baggage" as descriptive of the character of merchandise covered, rather than as indicating that it meant property carried with the passenger and as an incident of his carriage. This consideration, the court concluded, rendered the section applicable to the instant case, so that recovery of the full value of the trunk was properly allowed. Meister v. Woolverton, 140 N. Y. App. Div. 926, 125 N. Y. Supp. 439 (1910), aff'g 67 N. Y. Misc. 167, 121 N. Y. Supp. 606 (1910).

III. Moving freight to and from railroad depot.

A. Flour burned in car being unloaded.

The defendant, engaged in the general business of teaming and draying, undertook to unload and deliver to the place of business of the plaintiff a carload of flour. The car was delivered by the railroad upon a sidetrack and the defendant during the first day of its work unloaded most of the contents of the car. After the work had been in progress for about

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plaintiff and was stolen between the time when they so called at said apartment and the time when the remainder of the plaintiff's property was delivered at the place last mentioned, to wit, 2478 Second avenue.

Seventh: Upon information and belief that the men employed by the said defendant, or some of them, to pack and move the property, furniture and effects of this plaintiff were dishonest and were not selected by the defendant as employees with a proper regard and care as to their honesty, but were carelessly and casually selected and employed by the defendant without regard to their previous character and reputation, which could have been ascertained upon proper inquiry made by the defendant, which wholly failed to make such inquiry, and that the said employees, or some of them, were men of loose

24 hours, however, a fire started a short distance away, and spreading to the car in question, consumed it and what flour remained unloaded. From a verdict directed for the plaintiff, and judgment thereon, the defendant appealed. The court, in affirming the judgment, held that the defendant was a common carrier, and having accepted the goods from the railroad for transportation to the place of business of the plaintiffs, it had assumed the extraordinary liability of an insurer and was liable for the loss sustained by the fire. "In order to constitute one a common carrier," said the court, "the business as such must be regular and customary in its character, and not casual only. An occasional undertaking to carry goods will not make one a common carrier. But the business of carrying must be conducted as a business, and must be of such a general and public nature that a person carrying it on is bound to convey goods of all persons indifferently, who offer to pay for the transportation thereof. Where, therefore, one is engaged in the business of carrying goods for others indiscriminately, and undertakes for compensation to transport personal property from one place to another for all persons, and by virtue of the public nature of his business is under an obligation to carry for all alike, and not merely at his own option, then he is a common carrier, and is subject to the extraordinary liability imposed on carriers. * * * And this rule applies alike to draymen and transfer companies, who are engaged in hauling goods from one place to another in a city, as it does to carriers by rail or by water." The court also pointed out that the liability of the defendant, as such a common carrier, commenced when it took possession of the car, and began actual removal of the goods therefrom, and continued until the actual delivery of the goods to the plaintiffs at their place of business. Arkadelphia Milling Co. v. Smoker Merchandise Co., 100 Ark. 37, 139 S. W. 680 (1911).

B. Load of goods stolen while in line at depot.

The driver of defendant, a public truckman, carried goods of the plaintiff to a railroad freight depot, left his truck standing in a line of waiting vehicles and went into the station, where he remained four or five minutes. When he returned the truck and its load, including plaintiff's goods, were gone, presumably by reason of theft. The contract under which the hauling of the goods was to be done included a provision that in such service the responsibility of the defendant and its servants should be that of a carrier and bailee for hire. The trial court found that the defendant was a common carrier, but denied plaintiff a recovery on the ground that the loss was due to an accident not within defendant's control. Reversing this judgment the court held that defendant, as a common carrier, was bound in respect of any loss other than one due to an act of God, or the

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character and dishonest and not proper men to be trusted with the labors that the defendant entrusted the same with.

Eighth: That by reason of the premises, the plaintiff has been damaged in the sum of eight hundred and fifty dollars ($850).

Wherefore plaintiff demands judgment against the defendant for the sum of eight hundred and fifty dollars ($850), together with interest thereon from the 24th day of May, 1913, besides the costs and disbursements of this action.

Answer.

Defendant herein by Leopold B. Pollak, its attorney, answers the complaint of the plaintiff herein as follows:

public enemy, or the act of authority, or an act of the shipper; that this loss did not fall within any of these exceptions; and that, even if the defendant were considered only a bailee for hire, his failure to guard the truck and its contents would have been sufficient to fasten liability upon him. Sullivan v. Williams, 107 N. Y. Misc. 511, 176 N. Y. Supp. 710 (1919).

IV. Forwarders.

A. Goods burned in warehouse while waiting for car.

The defendant made a business of accepting less than carload shipments of various parties at a rate lower than the railroad's less-than-carload rate, and by combining the various shipments and forwarding them in carload lots, securing for itself the difference in the railroad rates made on carload and less-than-carload shipments. Its custom was to receive such lots and hold them at its warehouse until a carload destined to a common point had been assembled. The defendant received the goods of the plaintiffs at their residence, under a contract to transport them to another town. The goods arrived at the warehouse too late in the evening for loading into the car, and as a result they were left in the warehouse to be loaded the next morning. During the night the warehouse burned, and the goods were destroyed. From a judgment of $686 for the plaintiff, the defendant appealed, contending that its possession of the goods was that of a forwarder or warehouseman, and not that of a common carrier. The court, in affirming the judgment, held that the contract of shipment in question was one from the house of the plaintiffs to the adjoining town, and though in other branches of its business the defendant may have acted solely as a warehouseman, its contract and duties in this instance in storing the goods in the warehouse for forwarding were those of a common carrier, and hence it was liable as a carrier for the destruction of the goods while stored in the warehouse. Kettenhofen v. Globe Transfer & Storage Co., 70 Wash. 645, 42 L. R. A. (N. S.) 902, Ann. Cas. 1914 B 776, 127 Pac. 295 (1912).

B. Diversion of goods from designated route.

Plaintiff contracted with the defendant transfer company to have it pack and ship certain household goods from a point in Oklahoma to one in Iowa, instructing it to ship the goods via the line of a certain railroad company. The defendant packed the goods as agreed, but shipped them over the line of a railroad company other than that designated by the plaintiff. While in transit over such company's line the goods were totally destroyed by fire. At the time of the shipment, plaintiff's agent signed a shipping receipt wherein the liability of the defendant was limited to $10 per hundred pounds of goods shipped

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I. It denies each and every allegation contained in paragraph "Second" of said complaint.

II. It denies that it has any knowledge or information sufficient to form a belief as to each and every or any of the allegations contained in paragraphs "Fifth," "Seventh" and "Eighth" of the complaint herein and therefore denies the same.

Defendant further answering the said complaint and in mitigation of damages alleges:

III. That if any contract was made between the plaintiff and defendant herein, as set forth in said complaint, that it was provided in said contract that the liability of the defendant was to be limited to the sum of fifty dol-

and lost. Plaintiff sued the transfer company and the railroad carrier jointly, claiming that the goods lost were worth $2,314.55. The defendant railroad company offered to confess judgment as to its liability on the basis of the release, in a sum amounting to something over $300. Judgment was had on a directed verdict as to the railroad company for this amount, and the case was submitted to the jury as to the liability of the transfer company on plaintiff's theory that this defendant, by its failure to carry out plaintiff's instructions relative to the road over which shipment should be made, had made itself liable for the difference between the amount recovered from the railroad company and the value of the goods. On this issue the jury found for the plaintiff in the sum of $1,026.57, and she had judgment for this sum. Affirming the judgment, the court held that, since the shipping receipt was silent as to the name of the railroad over which the shipment was to be made, it manifestly did not cover the entire contract between the parties, so that parol evidence was admissible to establish that part of the contract not reduced to writing; that since the defendant transfer company had failed to ship the goods over the road shown to have been designated by plaintiff to perform that service, the written contract as to the terms of the shipment, including the limitation therein attempted as to the transfer company's liability, became wholly inapplicable, so that the measure of the plaintiff's damages against the transfer company were as stated by the trial court, to wit, the difference between the sum recoverable from the railroad company and the value of the goods lost. The court held, in conclusion, that the recovery against the railroad company did not operate as a bar to a recovery against the transfer company. O. K. Transfer & Storage Co. v. Neill, — Okla. —, 159 Pac. 272 (1916).

C. Liability as initial carrier.

The defendant corporation was engaged in the business of transporting merchandise for hire. It accepted from the plaintiff a case of silk, marked for shipment via a certain railroad line to a consignee without the state. The case was delivered by defendant to the railroad company, which placed it in a freight car, duly sealed, en route to its destination. The car was broken into and the silk stolen. This action was then brought to hold the defendant liable, as initial carrier, for the loss so caused. At the time the goods were accepted by defendant, it issued to plaintiff a receipt, reciting in part, "and it is hereby expressly agreed, and is a part of the consideration of this contract, that the Fuller's Express [defendant] are not to be liable for any loss or damage except as forwarder only, nor for any loss or damage of any box, package or thing for over $50, unless the just and true value thereof is herein stated." It was shown that

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lars for the contents of any article and, on information and belief, that the jewelry referred to in paragraph "Fifth" of said complaint was contained in one article.

Wherefore defendant demands judgment that the complaint herein be dismissed together with the costs and disbursements of this action.

The action was begun in the city court against the defendant, a common carrier, to recover the value of certain jewelry which was lost while in possession of the defendant.

the value of the silk was in excess of this amount, but that neither the true nor any other value was stated in the receipt. The trial court charged that plaintiff was bound by this receipt, and this appeal was based upon a judgment entered upon a verdict returned in accordance with such instruction. On this appeal it was stipulated, in addition to the foregoing facts, that the receipt given in this case was one made from a book of blanks furnished by the defendant, out of which receipts had been filled out and used by the plaintiff for a long period before the time of the shipment in suit. The court held, affirming the judgment, that while the defendant could not lawfully stipulate for exemption from the consequences of its negligence, it could stipulate with the shipper as to the value of the property accepted by it for shipment, and that its liability in respect thereof should be limited to such value. "Applying this rule to this case," said the court, "there can be no doubt that this plaintiff tendered such a contract with full knowledge of its contents; and that it was accepted. * * * Such being the the status of the present case, the instructions given by the trial judge were not erroneous, and the judgment below should be affirmed." American Silk Dyeing & Finishing Co. v. Fuller's Exp. Co., 82 N. J. L. 654, 82 Atl. 894 (1912).

Plaintiff sought damages from the defendant, a local express company, on account of the loss of one package containing merchandise of the value of $170.75, and the loss of the contents of another package to the extent of $68.20. The two packages had been accepted by the defendant at different dates for shipment to a destination without the state, the carriage beyond the lines of the defendant to be made via a railway express company. Defendant sought to be relieved of liability as to the first mentioned package by proving that it had delivered the package, in good order, to the connecting carrier, and as to the other package, by proving that the damage shown occurred without negligence on its part. In any event, it further contended, its liability as to each package should be limited to $50, the amount specified in its shipping receipt issued to plaintiff on each occasion. These shipping receipts, it was shown, plainly stated that the charge made by the defendant for each shipment was based on the value of the goods receipted for, which should be declared by the shipper at the time of shipment, and which was agreed to be not over $50, if the shipper did not declare otherwise. In reversing a judgment covering the two shipments, for $253, the court held that, as to the defense of delivery in good order to the connecting carrier, the case was governed by the interstate commerce act provision making the initial carrier responsible for any loss by a connecting carrier as fully as if the loss had occurred on its own

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The plaintiff employed the defendant to move her household goods from one apartment to another in the city of New York. Included in the furniture to be moved was a cabinet with a small safe inside, containing, among other things, some articles of jewelry.

When the defendant was employed, the plaintiff's husband, with his wife's authority, signed a memorandum showing when and where

lines; that the fact that the damage to the second shipment had occurred without negligence on the part of the defendant was no defense, its liability being that of an insurer; but that in each case its liability was limited to $50, the carrier having the right to such a limitation where it had plainly indicated that its charge was based on the value of the goods shipped, and the burden being upon the plaintiff to overcome the presumption that no greater value had been declared by him at the time of shipment. Florman v. Dodd & Childs Exp. Co., 79 N. J. L. 63, 74 Atl. 446 (1909).

V. Injury due to defective crating.

The defendant was engaged by the plaintiff to haul certain marble slabs packed in crates from the railroad station to their destination in the same town. During the transfer, some of the crates fell from the wagon and several slabs were broken. The defendant contended that the crates were properly placed and braced while upon the wagon, and that the accident occurred by reason of the improper packing of the plaintiff, since the crating was worm eaten, dozy, decayed, and would not properly hold the nails driven into it for that purpose. From a verdict for the defendant, the plaintiff appealed. The court, in affirming the judgment, held that while the defendant was a common carrier, and liable for loss to goods intrusted to its care irrespective of negligence, it was not liable for loss due to improper packing, not apparent to the defendant as making impossible the safe transportation of the goods, and that the question of whether the improper packing was apparent to the ordinary observation of the defendant, was under the evidence of the case properly left to the determination of a jury. "If goods presented for carriage are not properly packed," said the court, "and that fact is apparent to the carrier or his servants upon ordinary observation, then the carrier may refuse to receive the goods in that condition; but, if he does see fit to receive them, he assumes to carry them as they are, and his full common-law liability as carrier attaches to the contract of carriage. * * * It cannot be said, however, that the carrier must, at his peril, know that the goods are not in fact safely packed. The shipper usually knows better than the carrier the manner in which the goods have been packed and the manner in which they should be packed, and even though the carrier may have knowledge of some defect in the packing, still if it is not apparent to the ordinary observation of the carrier or his servants that the goods cannot be safely carried in the condition in which they are presented, the carrier should not be held to take the chances of injury from improper packing." Northwestern Marble & Tile Co. v. Williams, 128 Minn. 514, L. R. A. 1915 D 1077, 151 N. W. 419 (1915).

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the moving was to be done, and the defendant's charges therefor, which were $49, and containing also the following clause:

"The responsibility of the company is limited to $50 for any article, together with the contents thereof."

The property was to be moved on Saturday, and late in the

VI. Fall of crane supplied by owner for unloading machinery.

The defendant agreed to move a certain stone planer for the plaintiff for an agreed compensation of $30. The defendant, however, was to have the use of a traveling crane of the plaintiff to assist in loading the planer upon the transfer wagon. This crane, the plaintiff assured the defendant, had a carrying capacity of 10 tons. The upper part of the planer had been safely moved, but while the crane was lifting the lower part, weighing about 3 tons, it fell, due to the spreading of the tracks upon which it ran, and caused serious damage to both planer and crane. The court, in submitting the case to the jury which found a verdict for the plaintiff, charged that (1) a bailment was established under the contract of the parties, when the defendant came into possession of the property for the purpose of moving the stone planer, and that such bailment continued while the property was in the custody of the defendant; (2) that the defendant was bound to exercise reasonable care to prevent the loss or injury to the property; (3) though ordinarily a failure of duty would not be presumed, yet where the property which was the subject of the bailment was damaged by the bailee while in his exclusive custody, it was incumbent upon him to satisfy the jury that the injury was not occasioned by his default or negligence; (4) that while the defendant was liable for the loss sustained if the removal of the planer and the use of the crane was under its exclusive control, in the absence of any assumption of responsibility by the plaintiff, still it was not liable if the plaintiff guaranteed the sufficiency of the crane (including the tracks both inside and outside of the building), or induced the defendant to believe that it would safely lift and carry the planer. Union Stone Co. v. Wilmington Transfer Co., 5 (Boyce's) Del. 59, 90 Atl. 407 (1914).

VII. Larceny of goods by driver.

Plaintiff, a teaming contractor, had an arrangement with the C company to do all of its hauling, providing for that purpose each day as many teams as the C company should notify him, on the preceding day, would be necessary. It was the practice of the plaintiff, whenever the C company called for more teams than he had available, to request defendant and others engaged in the teaming business to furnish him with the necessary extra teams. Defendant was, like plaintiff, engaged in a general teaming business, hauling merchandise from depots to warehouses and from warehouses to stores, for any one who sought its services. On a certain day the C company notified plaintiff that on the day following it would need a certain number of teams, which was a number greater than plaintiff had available. He at once telephoned defendant, and secured its promise to furnish three teams for the service of the C company on the following morning. When the time came, however, none of the promised teams appeared. Finally it was arranged that defendant would furnish one team, but some hours later, no team having appeared

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afternoon a van load of furniture, including the cabinet safe, arrived at the apartment to which the goods were to be taken.

The plaintiff's husband and the defendant's representative arranged that this van load of goods should be taken to the defendant's warehouse, and should be delivered to the plaintiff on the following Monday morning. When the goods were delivered on Mon-

at the store of the C company, plaintiff again called up the defendant, whose representative then advised plaintiff that earlier in the day defendant, lacking teams of its own, had arranged for the loan of a team from the G company, also engaged in the teaming business; that the G company had sent a team to the C company's warehouse, and that evidently something was wrong. It then developed that after the defendant had called up the G company and arranged for the loan of a team, a man giving his name as M, bearing an order from the defendant, had appeared at the office of the G company, secured a truck and team and driven away with it. There was evidence tending to show that a man giving the same name as M had thereafter appeared with the G company truck at the C company warehouse, secured a load of merchandise and driven away with it. In any event the teamster who secured the load disappeared, as did the merchandise he had been intrusted with. The team and empty truck were found, late that evening, deserted in another part of the city. This action was brought to recover damages of plaintiff for the value of the goods so lost, and plaintiff had judgment upon the verdict in his favor for $1,292.77. On appeal this judgment was affirmed, the court holding, in part, that under the facts of the case it was a jury question whether defendant was a private or a common carrier, and that the evidence justified the conclusion that it was a common carrier, and hence liable for the goods lost as an insurer; and that since there was competent evidence in the record from which the jury could find that M was the employee of the defendant, its conclusion on that issue was not open to review by the court. Hinchliffe v. Wenig Teaming Co., 274 Ill. 417, 113 N. E. 707 (1916), aff'g 194 Ill. App. 627 (1915).

The defendant, a public truckman, engaged in the business of transporting for hire the goods of those who chose to employ him, contracted to deliver to an adjoining town certain merchandise which was delivered to him by the plaintiff. The goods were stolen by the defendant's driver and never recovered. The trial court dismissed the plaintiff's complaint, and rendered judgment for the defendant upon a counterclaim for services previously rendered to the plaintiff. The court, in reversing the judgment and ordering a new trial, held that the defendant was a common carrier and liable for the loss of all goods intrusted to his care, irrespective of negligence, when the loss did not occur by the act of God or the public enemy. Heyman v. Stryker (N. Y. Misc.), 116 N. Y. Supp. 638 (1909).

VIII. Hogs drowned in leaky scow chartered to carry them.

The defendant agreed with the plaintiff, in consideration of $12.50, to transport 71 hogs by water to certain stockyards in another part of the county. The hogs were placed on a barge towed by a tug. During the voyage a high wind came up, producing a heavy swell, and the barge began to sink. It was towed to the

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day it was found that the cabinet safe had been broken open, and certain articles of jewelry belonging to the plaintiff had been taken.

It turned out that while the goods were in the custody of the defendant over Sunday, three of the defendant's employees broke open the safe and took the jewelry.

In the city court the plaintiff recovered a judgment against the

bank, where the stern settled, and 16 of the hogs were drowned. After the scow was raised, a hole was discovered in the after-rtke above the usual water line. The complaint alleged that the defendant failed to perform his contract of carriage and negligently caused part of the hogs to be drowned. The defendant interposed the defense afforded by the Harter Act, Feb. 13, 1893, c. 105, sec. 3, 27 Stat. 445 (U. S. Comp. Stat. 1901, p. 2946) providing that the owner of a vessel transporting property, exercising due diligence to make the vessel seaworthy, shall not be liable for dangers of the sea or other navigable water, nor for damages from faults or errors in navigation. From a judgment for the plaintiff, the defendant appealed. The court, though reversing the judgment and remanding the case on other grounds, held that, as the scow was chartered to transport only the plaintiff's property, the defendant was not a common carrier, with an insurer's liability, but a private carrier, subject to the care to be exercised by an ordinary bailee, and that, as the complaint of the plaintiff charged negligence in transporting the goods, it was sufficient in that respect. Sevier v. Mitchell, 72 Ore. 483, 142 Pac. 780 (1914).

IX. Time of injury conjectural.

A. Boxed harp taken from hotel baggage room.

The defendant, a local express company, received a harp in a box from the plaintiff for delivery to another point in the same city. Before being delivered to the defendant, the box had stood in the baggage room of a hotel for 24 hours, where very slight contact would have caused it to fall over. The judge, however, found that the goods were delivered to the defendant in good condition, and the evidence showing that the box was delivered with the damaged and padlock side downward, the plaintiff recovered a verdict upon which judgment was entered. The court, in affirming the judgment, said: "Even if the defendant was merely an expressman delivering packages in a certain district, and not a common carrier of goods for hire and held to the same degree of liability, which we do not decide (see 4 R. C. L. 557, sec. 24, where cases are collected), still by virtue of his contract with the plaintiff, the defendant agreed to use proper care and attention in carrying and delivering the harp, and the judge has found the defendant negligent in performing the agreement. This was a question of fact. * * * We cannot disturb the findings of the court, especially when it appears that the box was delivered to the plaintiff with the damaged or padlock side downward, from which fact an inference showing the negligence of the defendant can be drawn." Astrella v. Laffey, 222 Mass. 469, 111 N. E. 681 (1916).

B. Property found damaged after acceptance as in good order.

The plaintiff delivered certain theatrical property to the defendant W, a transfer company, for delivery to himself in care of the defendant M,

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defendant of $1,000 and costs, which was affirmed at the appellate term, but was reversed in the appellate division.

CUDDEBACK, J. The action is for a breach by the defendant of the contract of carriage.

It will be observed that the memorandum signed by the plaintiff's husband contains no stipulation as to the value of the property

a warehouseman. A receipt was given the representative of W by the representative of M, showing the goods to have been received "in good condition." They were subsequently found, however, in front of the premises of M in the damaged condition complained of. The court reversed a judgment against the transfer company, W, but affirmed it as to the warehouseman. M. Neville v. Woolverton (N. Y. Misc.), 142 N. Y. Supp. 292 (1913).

X. Proof of delivery to carrier.

The plaintiff prepared goods for transfer to be sent to a certain company. The man in charge of the elevator in the building where the plaintiff had its place of business testified that he knew the truck of the defendant company and some of its drivers, and that on a certain date he gave a package which he had taken from the office of the plaintiff to one of the defendant's drivers. No receipt, however, was taken for the package, and the witness finally admitted that he did not remember the particular date upon which he delivered the package until the secretary of the plaintiff, a few days before the trial, had told him the date of the shipment. The court, in reversing a judgment for the plaintiff, held that, while the defendant was a common carrier, the evidence was insufficient to show that the defendant ever received the package which the plaintiff prepared for transfer, and also pointed out that there was no evidence in the record to show that the goods were not delivered to the consignee. James Autler Co. v. Rankin (N. Y. Misc.), 112 N. Y. Supp. 1085 (1908).

XI. Suit before date for delivery of goods destroyed by fire.

In an action to recover damages from a transfer company for an alleged breach of its agreement to transport certain goods belonging to the plaintiff from San Francisco to Oakland, the plaintiff recovered a judgment, the trial court finding that, through the negligence of the defendant, the goods in question were destroyed by fire. The court held, in affirming a judgment for the value of the goods, placed at $1,000, that even if defendant's contention that suit was brought several months before the date when it had contracted to deliver the goods was sustained, the finding that the goods had been destroyed by fire through defendant's negligence rendered the contention of no consequence. Morris v. Bekin's Van & Storage Co., 6 Cal. App. 429, 92 Pac. 362 (1907).

XII. Limitation of liability.

A. Baggage transfer service.

1. Claim based upon statute.

The defendant was a transfer company operating in New York City. Plaintiff, while on a train in New Jersey, en route to New York City, arranged with an agent of defendant to transfer her baggage, when it should arrive at the New York City terminal, to her residence. She received from the agent an exchange check which contained, among other

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intrusted to the defendant, but simply a clause limiting the responsibility of the defendant for any article or the contents thereof to $50. Therefore those cases which involve a stipulation between the shipper and the carrier as to the value of the goods carried to measure the extent of the carrier's liability in case of loss do not apply. D'Utassy v. Barrett, 219 N. Y. 420, 114 N. E. 786.

things, a clause limiting the defendant's liability in case of loss or damage, to $100. In some way the baggage was lost, and in this suit plaintiff recovered a judgment for the value thereof, which exceeded $1,200. It was not contended, on this appeal, that plaintiff was bound by the limitation expressed upon the receipt, but it was urged that the case was governed by the following statute: "Every common carrier and railroad corporation shall be liable for loss, damage or injury to property carried as baggage up to the full value and regardless of the character thereof, but the value in excess of $150 shall be stated upon delivery to the carrier, and a written receipt stating the value shall be issued by the carrier, who may make a reasonable charge for the assumption of such liability in excess of $150 and for the carriage of baggage exceeding 150 pounds in weight upon a single ticket." The court held, affirming the judgment, that the instant contract was not one for the carriage of baggage as the term was used in this act, but merely a contract for the transfer of property independent of the owner, and that therefore the section relied upon did not apply to this case. Morgan v. Woolverton, 203 N. Y. 52, 36 L. R. A. (N. S.) 640, 96 N. E. 354 (1911), aff'g 136 N. Y. App. Div. 351, 120 N. Y. Supp. 1008 (1910).

Plaintiff received from defendant's agent aboard a railroad in Jersey City a check for a trunk which was to be delivered by defendant to a hotel in New York City. The trunk was lost and plaintiff sued to recover the full value of the trunk, $1,080. The defendant claimed that its liability was limited to $150, the amount provided by section 38 of the public service commissions law (Laws 1907, c. 429). Directing judgment for the plaintiff for the sum of $1,080, the court held that this statute, limiting the liability of common carriers for loss of baggage to $150, unless the owner stated a value in excess thereof, so that the carrier could make an extra charge, applied only to carriers who transported baggage without charge in connection with carrying the owner, and did not apply to a carrier engaged solely in transporting baggage. Hiddink v. Woolverton, 67 N. Y. Misc. 611, 124 N. Y. Supp. 841.

Also see Meister v. Woolverton, II, D, ante.

2. Limitation stated in receipt not read.

The plaintiff delivered to the defendant, at its office, four baggage checks, and received from the defendant a receipt, which contained on its back a limitation of liability to the sum of $25. There was nothing on the face of the receipt to show that the printing on the back contained any limitation or part of a contract. Plaintiff never read the receipt, and the defendant did not call it to plaintiff's attention. Upon appeal the court reversed the order denying plaintiff's motion to set aside the judgment limiting recovery to $25 and held that, while it is well established that an express company may limit its liability for failure to de-

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Whatever else may be said of the manner in which the defendant performed its contract, it certainly violated the common-law obligation of a carrier to safely carry and deliver the plaintiff's goods. The question is whether the clause quoted from the memorandum signed by the plaintiff's husband is sufficient to limit the responsibility of the defendant for the loss of the jewelry to $50. The sim-

liver goods intrusted to such company, it must, however, in every case where such limitation is urged, be established that a special contract for this purpose was made; and, as in the case of other contracts, such limitation must be accepted by the consignor. "Consequently," concludes the court, "where the limitation is contained in a receipt, and the consignor accepts the receipt without knowledge or notice that it contains a contract of carriage, no special contract is accepted by him [consignor]." As to the test of acceptance the court held: "Where the consignor accepts a paper which he knows contains a contract of carriage, he impliedly agrees to all its terms, even though he does not read it. The test in all cases is, not whether the consignor read the limitation, but whether he knowingly entered into a special contract of carriage, and thereby impliedly agreed to all its terms." Bennett v. Virginia Transfer Co., 80 N. Y. Misc. 222, 140 N. Y. Supp. 1055 (1913).

Plaintiff at her residence delivered baggage to the defendant, to be transferred to the G. C. station and received a coupon check for identification marked: "Claim Coupon No. 5947." The reverse side contained a clause limiting the value of the article shipped by the person receiving such coupon receipt, or his agent, to $25. Reversing judgment in favor of the defendant, the court held that this limitation was not binding on the plaintiff, as it did not appear that plaintiff knew of the limitation, or as a reasonable person should be presumed to have examined the coupon to see exactly what was printed upon it. Smith v. Hughes, 63 N. Y. Misc. 226, 117 N. Y. Supp. 162 (1909).

Defendant express company undertook to transfer a trunk for plaintiff from the city of Oakland to Berkeley. Defendant gave plaintiff a receipt therefor upon a printed form, containing a statement commencing with the words, "Read conditions of this contract," and limiting defendant's liability to $50 unless otherwise especially agreed in writing and the extra risk paid for. It was in fine print, each letter being less than one-sixteenth of an inch square. Plaintiff did not read the receipt or know what was written or printed thereon, except that she read her name written thereon, until long after the loss of the trunk. For such loss action was brought for $414.35. Section 2176 Civil Code provides that a consignor accepting a ticket, bill of lading or contract of carriage, with a knowledge of the terms, assents to the limitation stated therein. Under this section and sections 18 and 19 defining actual and constructive notice, defendant contended that plaintiff must be deemed as a matter of law to have had constructive notice of the conditions of limitations, and was bound by them. Reversing the judgment against the plaintiff on refusal to amend, after demurrer based on defendant's contention was sustained, the court held that under section 2176 the knowledge of the consignor may be constructive as well as actual; and whether the receipt or paper was accepted with actual

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ple and complete answer to that question is that the clause referred to, when read in the light of the decisions construing such clauses, does not even purport to limit the defendant's responsibility for the violation of duty shown in this case.

The rule is that where a common carrier desires by special contract to exonerate itself from the effect of its own acts or omis-

knowledge or under such circumstances as constituted constructive notice or knowledge in contemplation of law, is a question of fact for the jury and not a matter of law for the court. "The controlling question is:" says the court, having in view section 2176, "Was there an acceptance with knowledge of the terms of the limitation of liability? This is to be determined not merely from acceptance but from a consideration of all the circumstances," and the determination of this question was held to be for the jury. Outside of section 2176, expressly requiring knowledge of the consignor, upon which section this case rested, the court recognized it as a general rule that a shipper or consignor who accepts a bill of lading or receipt containing the terms of a contract of carriage from a carrier, without objection, assents to it and is bound by its terms whether he has knowledge of them or not, under the rule of constructive notice. Curtis v. United Transfer Co., 167 Cal. 112, 138 Pac. 726 (1914).

3. Reduced valuation tacitly assented to.

In an action to recover damages for the loss, through negligence, of a trunk and its contents which the defendant transfer company had undertaken to transport to plaintiff's residence, the defendant, while admitting liability, contended that the recovery against it should be limited to $100, the amount stated in the shipping receipt evidencing the contract between the parties. The receipt in question recited, among other things, that the defendant's charge for the transportation service was based upon a valuation of the trunk and its contents at not to exceed $100, and that the service was undertaken upon the plaintiff's agreement that in case the trunk were lost, the defendant should not be liable in any sum in excess of such amount, regardless of the cause of the loss or the real value of the property. It was alleged that this shipping receipt was delivered to plaintiff at the time defendant undertook the service, and that the plaintiff expressed no dissent from the terms therein stated. The trial court charged that if the jury believed that the plaintiff accepted the shipping receipt merely as a receipt, to be used in order to trace the property in case of loss, and did not assent to the provision as to the valuation of the goods and the limitation of the defendant's liability with respect thereto, then defendant was not entitled to have its liability so limited, even if they believed that plaintiff knew, at the time, of the valuation and limitation aforesaid. This charge, the court held, in reversing a judgment for the plaintiff for $300, was error, saying, in part: "We are unable to see any distinction in law between an express misrepresentation of value made by the shipper to the carrier and a statement made by the carrier to the shipper as to the rate charged and the liability assumed by him, based upon the value of the goods, being a sum named by him, and the reception of that statement in silence, so far as the determination of the rights of the respective parties is

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sions, or those of its employees, the special contract must openly and plainly express that intention so that it cannot be in the slightest degree misunderstood. Mynard v. Syracuse, B. & N. Y. R. R. Co., 71 N. Y. 180, 27 Am. Rep. 28; Spinetti v. Atlas S. S. Co., 80 N. Y. 71, 36 Am. Rep. 579; Gardiner v. N. Y. C. & H. R. R. R.

concerned. The carrier has a right to infer from the silence of the shipper that his valuation is accepted by the latter as accurate, not only for the purpose of fixing transportation charges, but also for the purpose of determining the amount of liability in case of loss. Having taken advantage of the lower rate, based upon the value fixed by the carrier, the shipper is estopped from afterwards asserting that the value is greater." Atkinson v. New York Transfer Co., 76 N. J. L. 608, 71 Atl. 278 (1908).

4. Right to benefit of railroad tariff valuation.

Plaintiff, holding a railroad ticket entitling him to transportation from T in New Jersey to N in New York, arranged with the baggageman at T depot for the transfer of his bag from the N terminal to his residence in N, paying for such service 40 cents in advance, pursuant to a special delivery schedule contained in the published baggage regulations of the railroad company, wherein it was stated that such special deliveries would be made from the N terminal by the defendant express company. It appeared, however, that although the defendant in fact received the plaintiff's bag at the N terminal, it never delivered the same to plaintiff's residence, and this suit was brought to recover the alleged value of the bag and its contents, placed by plaintiff at $250. Liability of the defendant for the loss having been either admitted or established, it then contended that it was entitled to a limitation thereof to the sum of $100, on the ground that it was entitled to the benefit of a certain tariff regulation of the railroad company from which it received the bag, providing that property accepted for shipment was to be taken at an agreed valuation of $100 unless a greater value was declared at the time of shipment, in which case a charge correspondingly greater would be exacted for the transportation service. This regulation, it appeared, was one filed with the interstate commerce commission pursuant to an act of Congress governing all interstate shipments of baggage. Judgment was entered for the plaintiff in the sum stated in such limitation, but on appeal this was held error and the judgment was modified to cover the full value of the lost bag and its contents. This result followed, the court pointed out, from the consideration that, although the transportation of the bag by the railroad was interstate, and subject to the act of Congress, the transportation service undertaken by the defendant was purely intrastate, and no part of the interstate journey, the railroad company merely having acted as agent in effecting the contract between the defendant and the plaintiff. This position was further established, the court added, by the consideration that the defendant's schedule of charges was not posted at the T depot, and its name did not appear on the railroad company's tariff as a participating carrier, both of these requirements being essential to a claim of any rights under such tariff regulation. The liability of the defendant being therefore determinable solely under the state law, the court concluded, it was under the necessity of

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Co., 201 N. Y. 387, 94 N. E. 876, 34 L. R. A. (N. S.) 826, Ann. Cas. 1912B, 281.

The clause in the memorandum is:
"The responsibility of the company is limited to $50 for any article, together with the contents thereof."

Plainly this clause refers to the defendant's responsibility as a

proving that it had asked plaintiff, at the time of undertaking the handling of his bag, as to its value, as a condition precedent to limitation of its liability in case of loss. Not having so asked plaintiff to declare, it was, by the express terms of the state act, deemed to have waived any limitation of its liability. Noel v. Westcott Express Co., 95 N. Y. Misc. 154, 158 N. Y. Supp. 702 (1916).

See, also, O. K. Transfer & Storage Co. v. Neill, IV, B, ante.

5. **Effect of shipper's misrepresentation as to contents.**

In an action to recover damages for loss of baggage which defendant had undertaken to deliver for the plaintiff, it appeared that the consideration charged and paid for the service was 50 cents; that on accepting the baggage the defendant had given plaintiff a receipt, stating in effect that transportation by defendant was at plaintiff's risk; that plaintiff stated to defendant's agent that the baggage contained glassware, but did not state that it contained valuable jewelry. Defendant testified that the baggage contained goods, including jewelry, worth $1,782; that her attention was not called to the limitation placed upon the defendant's liability by the terms of the receipt, and that she did not assent thereto. She admitted, however, that she had heard there was such a limitation. In reversing a judgment entered upon a directed verdict for plaintiff the court held that, while a limitation of liability on a receipt given by a common carrier for baggage would not be binding upon the shipper unless assented to by him, the case should nevertheless have been submitted to the jury on the issues whether there was an express agreement, in this instance, that the transportation was at the plaintiff's risk, whether the baggage in fact contained articles to the value claimed by the plaintiff, and whether the plaintiff fraudulently concealed from the defendant the fact that the baggage did include articles of such value. Such fraud, the court held, would operate to release the defendant from its liability as an insurer, even though it would not be effective as to liability for negligence. Mitchell v. Frank Parmelee Co., 209 Ill. App. 428 (1918).

B. Forwarding of household goods.

The defendant was engaged, at C, in the business of receiving and forwarding to its agents at various large terminals, shipments of household goods and other merchandise. Its plan of business was to accumulate at its warehouse in C consignments of such goods of various sizes, and whenever it had on hand enough to make up a carload to any one point, to forward such consignments in a single car, each consignment being marked to its particular consignee, with instructions to its agent at the destination of the car as to the delivery of the consignments at that end. By this method it was able to ship at the car-lot rate consignments for which normally a much higher rate would be charged by the railroad. The various consignees whose goods made up the car-lot shipment were

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carrier, and does not include the misfeasance or nonfeasance of the carrier itself or of its employees. The plaintiff had no reason to understand she was releasing them from responsibility for their own depredations. While couched in the words selected by the defendant, the clause does not, under the circumstances of this case, limit the defendant's responsibility at all.

given the benefit of part of this reduction in the rate, and the balance was absorbed by the defendant for its services. Plaintiff, desiring to ship a box of household goods to her brother in another state, commissioned S to attend to the details of the shipment. He delivered the box to the W railroad, consigned to the defendant at C, with instructions to have the defendant forward the shipment to the plaintiff's brother whose address was marked on the box. The bill of lading issued by the W road recited that the shipment to C was at the owner's risk, and the freight for this transportation was paid at the low rate accorded for shipments of this kind. The box having reached C, the defendant sent one of its teams and trucks and hauled it to its warehouse. In due time, defendant, having accumulated consignments, including the box in question, sufficient to make up a carload destined to the address marked on the box, loaded a car therewith and notified the R railroad, over which it proposed to ship the goods, that the car was ready for transportation. The R company hauled the car away, and started its transportation; but en route, the car and its contents were destroyed by fire. Plaintiff then brought this action to recover damages, charging the defendant with a breach of its duty as a common carrier to safely carry and deliver the box aforesaid. It appeared that S, in billing the box to the defendant via the W railroad, had signed a bill of lading releasing the W railroad from all liability for loss or damage to the goods in excess of an agreed valuation of $5 per hundredweight; that the defendant, in accepting the box on its arrival from the W station at C, had issued a shipping receipt, reciting, in part, that the shipper (S) thereby constituted the defendant, his agent to forward the box to the destination marked thereon; that defendant agreed to forward the box as soon as it had a carload going to that same place; that defendant should not be held liable for any loss of or damage to the box while not in its actual possession; that in case of loss or damage occurring while the box was in transit, in its hands or otherwise, the liability therefor was to be determined on the basis of $5 per hundredweight of the goods so damaged or lost; and that the shipper, by accepting this bill, would be deemed to have assented to its terms as fully as if he had actually signed the same. This shipping receipt was duly sent to S and by him delivered to the plaintiff. The defendant, on loading and billing out the car containing plaintiff's box, had signed a bill of lading over the R railroad releasing the shipments therein contained, including plaintiff's box, at a valuation of $5 per hundredweight. The freight rate on carload lots from C to the destination of the plaintiff's box was $1.12½ per hundredweight, when released to a valuation of $5 per hundredweight. The less-than-carload rate, under like conditions, was $2.30. Plaintiff was charged at the rate of $1.80 per hundredweight, defendant paying the proper proportion therefrom to the R

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The defendant also contends that it was relieved from its liability as a common carrier by the failure of the plaintiff to disclose the fact that there was a safe in the cabinet containing valuable articles. The answer to that argument is that the failure to make such disclosure did not relieve the defendant from liability for its own acts or those of its servants, which amounted to a misfeasance. Magnin

company and absorbing the remainder to cover its own charges. Following the loss the R company settled with the defendant for $17.50, a sum based upon the released valuation above stated. Plaintiff recovered a judgment against defendant for $278.75, based upon the proved actual value of the box and its contents. The defendant appealed, contending that in this transaction it acted merely as a forwarding agent of plaintiff, and that in such capacity it had authority to ship the goods at the released valuation in order to get the benefit of the lower rate allowed for such shipments. The court reversed the judgment, holding that the facts authorized a finding that the defendant acted merely as a forwarder, and a finding that defendant was authorized to ship at the reduced rate. Blair v. American Forwarding Co., 159 Ill. App. 511 (1911).

C. Local commercial delivery service.

1. Receipt plainly stating reduced valuation.

The plaintiff brought suit against the defendant express company, filing a complaint stating three causes of action for the negligent failure to deliver three consignments of goods accepted by the defendant at different times for transportation to certain named consignees. One consignment was alleged to have a value of $55.78, one $68.89 and one $137.86. He recovered a judgment for $50 and his costs, and appealed, contending that he was entitled to judgment for the full value of the lost property, or in any event for $50 on each of the shipments. It appeared that at the time of consigning each of the shipments, plaintiff had accepted from defendant a receipt reciting, in part, that defendant would not be liable for any loss of the goods covered thereby, due to its negligence or otherwise, in excess of $50, "unless the just and true value is stated in writing and an additional amount paid under a special agreement made in writing at the office of the company [defendant]." It was admitted that plaintiff had not so stated the true value of the several shipments, and that no special agreement in respect thereof had been made. The court held that plaintiff was bound by the limitation clause of the several receipts; that they were not avoided by defendant's failure to explain the cause of nondelivery; and that judgment should have been entered for plaintiff for $150. A new trial was ordered. Rappaport v. White's Exp. Co., 146 N. Y. App. Div. 576, 131 N. Y. Supp. 131 (1911).

2. Receipt drawn by shipper.

Plaintiffs sought damages for the loss of a book intrusted to the defendant express company for local delivery, and recovered a judgment apparently based upon the value of the lost property. On appeal it was contended that defendant was entitled to a limitation of its liability to $50 in accordance with the terms of the shipping receipt which evidenced the undertaking of the defendant. This receipt was one out of a book of blank forms delivered to plaintiff

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v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442; Id., 70 N. Y. 410, 26 Am. Rep. 608.

I recommend that the order of the appellate division be reversed, and that the judgment of the appellate term be reinstated, with costs in this court and in the appellate division.

Order reversed, etc.

more than a year before the transaction in suit, out of which more than 90 prior receipts had been drafted and used. The receipt was simple in form, containing merely the name of the defendant, the serial number, and the words "Received from," "date," "description of package," "consigned to," and "addressed." Printed at the foot of the receipt in clear black type was the following: "The company's charge is based upon the value of the property, which must be declared by the shipper. Liability limited to $50, unless a greater value is declared." The court held that, under the circumstances of the case (not indicated by the report) the foregoing limitation became a part of the contract between the parties, and directed the modification of the judgment accordingly. Greenberg v. Rapid Delivery Exp. Co., — N. Y. Misc. Rep. —, 163 N. Y. Supp. 102 (1917).

The plaintiff was a customer of the defendant express company, which had provided plaintiff with a book of blank express receipts. These plaintiff customarily used when making shipments by defendant's line. These receipts contained the usual form of limitation of liability, in substance that the rate charged for the service was based upon an agreed valuation of $50, that in event of loss or damage the liability of the defendant was not to exceed that sum, unless a greater value was declared at the time of shipment, and that the valuation of $50 should be taken as correct if no other value was declared. Defendant's driver called to take up a package of merchandise for delivery, and found the package already made up and a receipt filled out therefor in the usual form, lying on a table in plaintiff's place of business. The shipping clerk was at the moment in the rear of the store. The driver hurriedly signed the receipt and started for the door, when the shipping clerk called out to him to wait until he could come up to declare the value of the package. The driver called back, "Never mind," that he was in a hurry. The shipping clerk allowed the driver to take away the package without any special value having been declared, and plaintiff did not thereafter repudiate the valuation of $50 stated on the form receipt so given. The package was lost and this suit followed, plaintiff recovering a judgment for the full value of the package, $129. On appeal the judgment was reversed, the court holding that plaintiff's failure to insist upon a special valuation of the package, and his failure thereafter to repudiate the valuation stated on the form receipt, amounted to a waiver of the right to claim that the value was greater than $50. Braus v. Manhattan Delivery Co., 78 N. Y. Misc. 371, 138 N. Y. Supp. 324 (1912).

See, also, American Silk Dyeing & Finishing Co. v. Fuller's Exp. Co., IV, C, ante.

3. Charge plainly based upon reduced valuation.

See Florman v. Dodd & Childs Exp. Co., IV, C, ante.

F. A. D.

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HEISER v. REYNOLDS.

[Supreme Court of Pennsylvania, February 3, 1919.]

— Pa. —, 106 Atl. 888.

1. **Brokers—Loss of investor's money—Action—Pleading and proof—Variance.** In an action against an investment broker, held that the statement of claim, averring a contract to loan for plaintiff only upon first liens, an actual loan on a third incumbrance, and loss by reason thereof, averred negligence growing out of a breach of contract, and, therefore, that the claim that the allegata and probata did not agree in that the statement of claim was in deceit and the evi-

CASE NOTE.

Liability of bank, investment company or broker for loss through investment negligently advised or made for customer or client.

I. Bank, 362-370.

A. Gratuitous advice by officials, 362-366.

B. Private transaction with official as broker, 366-368.

1. Failure to obey instructions, 366.

2. Failure to investigate record title, 366-367.

3. Failure to investigate solvency of borrower, 367.

4. Failure to segregate collateral, 367-368.

C. Loan to official as individual, 368-370.

II. Brokers failing to obey instructions, 370-371.

A. As to time and mode of buying stock, 370.

B. As to identity of land to be purchased, 370-371.

Cross-references. Liability of bank directors for negligence, see 18 N. C. C. A. 495-554; liability of officers and directors of building and loan association for loss due to negligence, see 19 N. C. C. A. 539-545; liability of attorney for negligence, see 9 N. C. C. A. 176-206.

I. Bank.

A. Gratuitous advice by officials.

This was an action by plaintiff bank on defendant's promissory note, which had been originally made for $10,000 by defendant as comaker with her son, in order to secure a loan of $10,000 from plaintiff bank, with which loan the son purchased stock in a corporation. The corporation used the $10,000 to pay off a portion of its indebtedness to the plaintiff bank. Subsequently defendant paid $5,000 on the note of $10,000 and this action was for the balance due. Plaintiff alleged misrepresentation on the part of the officers of the bank in obtaining the note. Affirming judgment for plaintiff for $5,184.77, the court said, after holding that the evidence failed to show misrepresentation, fraud or mistake on the part of the bank. "The advice was given in good faith by an official of the bank, not in his official capacity, but as one individual to another; and it would be a far-fetched doctrine to hold that, because a person seeks advice and it is given

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dence at most showed negligence—upon which latter ground the case was submitted to the jury—could not be sustained.

2. **Brokers—Loss of investor's money—Action—Pleading and proof—Variance.**
In an action against a broker for his negligent loss of money intrusted to him for investment, held that where the plaintiff averred and the jury found that no loan was to be made whether to a named or an unnamed person unless secured as a first lien on real estate, any variance between the allegata and probata, in that the statement of claim was so drawn as to lead to the conclusion that plaintiff did not know, at the time he agreed to advance the money, to whom it was to be loaned, and the evidence showed the borrower's name was stated at such time, was unimportant.

3. **Appeal—Review—Necessity of objection in trial court.**
Where no specific objection was made to an unimportant variance between the allegata and probata at the time the testimony was taken, an objection thereto cannot be made on appeal.

him gratuitously, and he acts on it along with his own judgment and makes a mistake in so acting, he could hold his adviser responsible in damages for mistaken judgment." American Bank v. Sublett, 104 S. C. 366, 89 S. E. 319 (1916).

In Banbury v. Bank of Montreal [1918], A. C., 626, appellant sued respondent for negligently advising him as to the investment of money whereby such investment became worthless. It appeared that appellant, a resident of England, visited Canada upon a pleasure trip in 1911, and while in Montreal was a guest of the general manager of respondent bank and had some talk with him concerning investments, and before leaving for further travel in Canada was given a letter by such general manager as follows: "Head Office, Bank of Montreal, Montreal, July 6, 1911. The Managers, Bank of Montreal. Dear Sirs: I take pleasure in introducing to you Captain Banbury, of London, England, who is visiting this country on pleasure. Should he apply to you for assistance or advice you will be good enough to place yourselves at his disposal. Yours faithfully, E. S. Clouston, General Manager." During the following year appellant again visited Canada, and when talking with Clouston about investments was asked if he would like to have a letter, and, upon mentioning the one given him before, was told that would be sufficient. On visiting Victoria, B. C., he presented the letter to respondent's local manager at that place and inquired about investments, and was finally led to invest 25,000£ in a company engaged in constructing a water supply system for the city of Victoria, upon the advice of respondent's manager that the investment would be perfectly safe, that the money was needed and would be used to complete the project, and that he would have as security a mortgage second only to one held by respondent bank. In the trial court the case was submitted to the jury, who returned a verdict for "25,000£ and the securities to be returned to the bank." The court of appeal directed that the judgment entered on the verdict be set aside and that judgment be entered for the defendants in the action, basing their judgment on the grounds (1) that there was no evidence before the jury proper for their consideration upon which they, as reasonable men, could find that respondents had authorized their local manager to advise appellant as to his investments in Canada, or that they owed any duty to advise him carefully on that subject, and (2) that Lord Tenterden's Act (9 Geo. 4, c. 14), requiring that no action should be brought to charge any person upon or by reason of any representation as to the credit of an-

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4. **Release—Construction—Applicability of maxim.**
In an action against a broker for his negligent loss of money intrusted to him for investment purposes, held that the maxim "verba generalia restringuntur ad habilitatem rei vel personam" might well be applied to a receipt, claimed by the defendant to constitute a release of the claim sued on.

5. **Witnesses—Cross-examination—Matter brought out on direct examination.**
Where a broker, sued for his negligent loss of money intrusted to him for investment purposes, claimed that a certain receipt constituted a release of the claim in suit and asked the witness testifying to the receipt whether "the paper was a settlement paper," the plaintiff was entitled on cross-examination to have the jury know of what it was a "settlement."

Action against broker to recover sum intrusted to him for in-

other unless such representation be in writing, signed by the person to be charged, was applicable to the representations made by respondent. Upon the latter point the House of Lords seemed to be agreed that the court of appeal was in error, and that the act applied only to an action for fraudulent representations, and not to one for the negligent making, in good faith, of representations as to the credit of another, and the court of appeals was reversed upon that question. Upon the question of the liability of respondent to appellant for the results of the representations made by its local manager, however, the decision of the court of appeal was sustained upon the ground that there was no evidence upon which the jury could reasonably find that the local manager was authorized to advise appellant. Upon the effect of the letter of the general manager Lord Wrenbury said: "In my judgment the letter is not capable of a construction which would attribute to it that the general manager was giving to the local manager authority to give assistance or advice in matters of business as distinguished from matters relevant to the wants of a gentleman who was in Canada on pleasure." He further said that the case seems to have proceeded throughout upon the footing that advising upon investments was not such part of the business of bankers as that it would fall, without further showing, within the scope of the authority of a manager of the business. It was contended that the fact, which appeared, that the respondent bank was vitally interested in the success of the waterworks project because of its own investment therein, which was endangered by inability of the constructors to obtain sufficient capital to complete and reap the benefits from the project, raised a presumption that the agent of the bank had authority to advise appellant on the matter of investing therein, because the bank was interested in a successful issue of the advice, and this view was taken by Lord Finlay, L. C., in his dissenting opinion. The opposite view was taken, however, by Lord Parker, who said: "This circumstance is no doubt of the utmost importance, but it seems to me to prove almost conclusively that the question left to the jury ought to have been answered in the negative. No one is in a position to give advice where his interest conflicts with his duty, and facts which prove that the bank was not in a position to advise at all are certainly not evidence that it was part of the bank's business to give advice. If the question of authority was to be left to the jury, the jury should have been warned that these facts were evidence against, and not in favor of,

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vestment, and lost as a result of the investment made. Judgment for plaintiff. Affirmed.

For appellant—B. D. Oliensis.

For appellee—C. S. Eastwick.

SIMPSON, J. Plaintiff sued defendant to recover the sum of $2,000 intrusted to him, as a broker, for investment. The verdict and judgment were for plaintiff, and defendant appeals.

The evidence shows that defendant was engaged in the business

the appellant's contention." And Lord Wrenbury, speaking of the contention that the interest of the bank raised a presumption of authority, said: "The presumption, of course, is exactly the other way," and added that the jury should have been so instructed. Lord Atkinson said that, if the letter from the general manager of defendant to the local manager was, as alleged, some presumptive evidence of the writer's intention to create a legal confidential relation between the local manager and appellant, as was contended, the showing of an interest of the bank in the water company would have effectively rebutted the presumption. In addition to the opinion that the jury was not warranted in finding that the local manager had any authority to advise appellant, Lord Atkinson also expressed the opinion that the respondents owed no duty to advise appellant, carefully or at all, upon the matter of his investment, or promised, undertook, or contracted to see to the application of appellant's money solely for the purpose of completing the contract for the construction of the water system. Lord Atkinson further said that, as fraud was not charged explicitly, it could not be insinuated, so that it must be taken that whatever advice was given by the local manager was given honestly and was the expression of an opinion he bona fide believed to be true, and that he had grave doubts if anything beyond that was required, and that he was not required to inform appellant that others held opinions differing from his own. Lord Parker, while of the opinion that respondent's local manager had no authority, general or special, to advise respondent upon investments said, "It is, I think, obvious that if it be part of the bank's business to advise their customers with regard to Canadian investments, the bank would be liable for any negligence of their branch manager in transacting this class of business on the bank's behalf. Prima facie the person held out by the bank as the manager of one of their branches would have authority to transact all the bank's business in connection with that branch, and no limitation of such authority as between him and the bank would affect a person dealing with the bank without notice of the limitation." Lord Finlay, L. C., who dissented from the decision of the majority, speaking of the duty of a banker, said: "If he undertakes to advise, he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently." The order of the court of appeal setting aside the verdict and judgment in favor of appel-

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of loaning money for others; that he obtained money at various times from plaintiff to loan to other people, and on this particular occasion he obtained the sum of $2,000. Plaintiff says defendant expressly agreed that the money would be loaned only upon securities which were a first lien upon real estate. Defendant says the money was advanced to loan specifically to a named person at a large bonus, that plaintiff knew the property was heavily incumbered, and took the risk of the result. The jury having found the fact in favor of plaintiff, we must accept his statement as true.

The principal complaint made by the defendant is that the allegata and probata do not agree. He avers the statement of claim is in

lant and ordering that judgment be entered for the respondents was affirmed.

B. Private transaction with official as broker.

1. Failure to obey instructions.

Defendant signed her name to a blank note, without date or amount to be filled in by P, cashier of the plaintiff bank in case, after investigation, she concluded to purchase certain corporate stock, but thereafter, deciding that the stock was worthless, she concluded not to buy, and so notified P by letter. P nevertheless filled out the note and placed it among the assets of the bank, which advanced the full face value of the note, and P bought stock, which apparently turned out to be worthless. The bank sought recovery on the note and plaintiff pleaded a failure of consideration. Affirming judgment for the plaintiff, holding the bank not liable for the act of the cashier, the court said: "The answer is that the bank advanced the full face value of the note. It was paid out for the stock by its cashier, but in this transaction the cashier, Primus, became the agent of the defendant and not of the bank, and she cannot assert failure of consideration for the note, because the bank discharged its duty in turning the money over to Primus, defendant's accredited agent, and there is no proof that the bank had any part in what was done with it afterwards." Clardy v. American Trust and Sav. Bank, — Tex. Civ. App. —, 208 S. W. 990 (1919).

2. Failure to investigate record title.

Defendant was a banker, who was also engaged in the real estate business. For a consideration of $640 he negotiated an exchange of plaintiff's property for the property of L, which was incumbered by a mortgage for $6,850, evidenced by six notes. Also $80 in taxes were unpaid. Plaintiff took over the incumbrances, except the unpaid taxes, and one of the notes which defendant and plaintiff assumed was paid. The record of the mortgage and the mortgage itself specified that the notes bore interest at the rate of 6 per cent. The mortgage notes, however, drew interest at the rate of 12 per cent after due, and any unpaid interest thereon also drew 12 per cent. The broker did not ascertain this fact, and failed to investigate, as requested by the principal, to see if the note not taken over had been paid. In consequence plaintiff paid the increased rate of interest on the five notes past due, the taxes, and the note which he had always assumed had been paid, and in this action he sought to recover from the broker the excess so paid. Upon a re-

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deceit, whereas the evidence at most showed negligence, upon which ground the case was submitted to the jury. We cannot agree with his contention. The statement avers a contract to loan only upon first liens, that the money was loaned on a third incumbrance, and was all lost by reason thereof. The averment, therefore, is one of negligence growing out of a wrongful breach of the contract. Defendant also alleges the statement is so drawn as to lead to the conclusion that plaintiff did not know, at the time he agreed to advance the money, to whom it was to be loaned; whereas the evidence shows the borrower's name was stated at that time; and hence, for this reason also, the allegata and probata do not agree.

hearing the court reversed its former opinion affirming judgment for the plaintiff, and held that the broker had a right to rely upon the recitals of the record, which definitely stated the rate of interest, as had the principal (plaintiff), who could not be held for a higher rate, and hence there could be no recovery from the broker for payments of interest in excess of that rate; but defendant was liable for the taxes, and having failed to investigate as to whether the one note had been paid, and having allowed the principal to act on the assumption that it had been paid, the broker was liable to the plaintiff for the sum which plaintiff could be legally held to pay thereon. Hinrichs v. Brady, 23 S. D. 250, 121 N. W. 777 (1909).

3. Failure to investigate solvency of borrower.

Defendant, a national bank, agreed through A, its assistant cashier, to lend some of plaintiff's money for him. Plaintiff's complaint alleged that A represented to him that the bank was authorized to negotiate loans for its depositors; that A agreed to obtain from the borrower a valid promissory note of a solvent maker secured by first-class, bankable collateral security; that thereafter having been informed by A that the loan had been negotiated and the security ample, plaintiff had drawn his check of $900 in favor of defendant bank, and relying upon defendant's representations, had accepted a promissory note signed by M, and as collateral a deed of certain real estate, and an assignment of a contract of sale of certain other lands; that M was at the date of the note insolvent, and the note was of no commercial value. The bank defended on the ground that as a national bank it had no power to enter into such an agreement as set forth in the complaint. Affirming a judgment of nonsuit the court held that national banks had no power to negotiate loans for others, and that this want of authority could be raised not only by the state, as was contended by the plaintiff, but that the bank had a right to plead its want of power. Pollock v. Lumberman's Nat. Bank, 86 Ore. 324, 168 Pac. 616 (1917).

4. Failure to segregate collateral.

Plaintiff deposited in defendant bank $12,000 as a loan to a corporation on its note. By agreement with the bank, the money was to be left in the hands of the bank to be turned over to the corporation when it deposited with the bank collateral for the benefit of plaintiff. The bank loaned the corporation the full amount but did not keep the collateral to secure the plaintiff's money distinguishable from its own held from the cor-

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Inasmuch, however, as plaintiff averred and the jury found the agreement was that no loan was to be made, whether to a named or unnamed person, unless secured as a first lien on real estate, the variance, if it is such, is an unimportant one; and, as no specific objection was made thereto at the time the testimony was taken, it cannot be made now. It is true a general objection was made, at the beginning of the trial, to plaintiff's offer of proof, but the admission thereof is not assigned as error, and, moreover, the objection did not refer specifically to this matter.

Defendant also complains because the court did not give binding

poration, and when the plaintiff applied for his collateral or his money, after the corporation had become insolvent, he was informed that the bank had neither for him. Affirming judgment for the plaintiff, the court held that all the collateral of the bank became the property of the plaintiff to secure his debt. In the course of the argument the court said: "It would be inequitable to suffer the fraud or negligence of the agent to prejudice the rights of the principal. * * * The measure of damages which the holder is entitled to receive of the bank or other collecting agent who has been guilty of negligence or default in respect to it is the actual loss which has been suffered." First Nat. Bank of Decatur v. Henry, — Ala. —, 49 So. 97 (1905).

C. Loan to official as individual.

Plaintiff, a woman aged sixty and ignorant of business affairs, had been a customer of defendant, a national bank, for 6 years. Upon the suggestion of the president of said bank that she had too much idle money in the bank, she acquiesced in his proposition that he would keep it working, giving her 7 per cent and keeping 1 per cent for the bank. Thereupon the president at various times and in various amounts checked out from the deposits of the plaintiff, signing her name to memorandum checks. The bank never questioned the president's authority to do so. At various times a portion of the sums checked out was repaid by crediting plaintiff's account with moneys and various credits. There was a balance of $3,254.25 for which this action was brought. Affirming judgment for the plaintiff the court held that this was not a contract between plaintiff and the president individually to act as broker for plaintiff in lending her money to third persons and therefore not a contract coming within the rule that a national bank could not act as brokers in lending its depositors' money to third persons; but that it was a loan to the bank, and therefore a contract within the power of the bank to make, national banks having the power to borrow money. Holding the bank estopped to deny the authority of the president to negotiate the loan in its behalf the court said that a bank might by its active or passive conduct "and by its negligence and lack of supervision place itself in a position where to allow it to avoid the transaction would be to permit it to perpetrate a fraud upon the creditor." Byron v. First Nat. Bank of Roseburg, 75 Ore. 296, 146 Pac. 516 (1915).

Plaintiff, a depositor, declared to the president of the defendant bank that he would not need all his money in the bank, and if the president would loan it he wanted him to do so. Thereupon the president drew plaintiff's money, $600, by means of

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instructions in his favor, on account of a receipt given by plaintiff's counsel to defendant at the time of the payment of a sum of money stated therein. It would perhaps be sufficient to say in regard thereto, that the court was not asked to construe the paper; and no assignment of error sets forth a failure to construe it properly. Moreover, the paper is only a receipt; it deals with several claims, but not with the one in this litigation, and then contains general language which, if dissevered from the context, might be held to operate as a release of the present claim. It does not say it is a release of the claims specified and other claims, but is merely

a memorandum check to which he signed plaintiff's name, appending thereunder the letter "T" which was the first initial of the president's name. The president then placed his note for the amount in an envelope, addressed it in plaintiff's name, and put it in the letter "C" in the bank vault, under which letter customers' papers were kept, the bank having control of the vault. The bank honored the memorandum check and the president appropriated the money to his own use. Affirming judgment against the bank the court, while recognizing the doctrine that "if money is left with a bank to be loaned, the bank is an agent of, and not a debtor to the depositor, but, if the bank lends the money in good faith and exercises due care it is not liable to a customer in the event of a pecuniary loss," held that the declaration of the plaintiff did not authorize the president to sign a memorandum check with plaintiff's name, and that by honoring such check it made the act of the president the act of the bank itself; that it was chargeable with all the knowledge possessed by the president and liable for his misappropriation. Chapman v. First Nat. Bank of Roseburg, 72 Ore. 492, L. R. A. 1917 F 300, 143 Pac. 630 (1914).

Plaintiff had $1,200 on deposit in defendant bank. One of its officers suggested to her that she allow the bank to loan $1,000 of this money, representing that the parties to whom a loan was suggested were responsible and that the money would be available at any time after 30 days. The loan was accordingly made to J, who gave a note therefor, leaving an unfilled blank for a payee. The name of defendant bank did not appear in or on the note. The bank continued to hold the note, to attend to the collection of the same, for 7 years, and then returned it to the plaintiff with the information that it belonged to her. J had in the meantime gone into bankruptcy, and had paid no part of the principal on the note and only a portion of the interest. Presenting her claim to the trustee in bankruptcy, plaintiff realized $27.07, and this action was brought against the bank to recover $1,356.14, the balance due on the note. The complaint sought to charge the defendant as an indorser and an amended complaint sought to set up a cause of action on the theory that when the officers of the bank suggested the loan, they thereby guaranteed the loan, that it amounted to an express warranty of the solvency of J. Affirming judgment sustaining a demurrer to this complaint and its amendment, the court said: "If a bank is authorized by a depositor to loan the latter's money, the bank for that purpose acts as an agent, and if it lends the money in good faith and uses due diligence it is not ordinarily

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a receipt for the amount paid in settlement of the claims specified and provides for a general release in the future; and the maxim, "Verba generalia restringuntur ad habilitatem rei vel personam," may well be applied thereto. The attorney who drew and signed the receipt was called as a witness for defendant, and testified that it was only intended to cover the matters specifically referred to therein. The defendant testified otherwise, and the court, in a charge of which no complaint is made on this point, left it to the jury to say whether or not it was intended to cover the present claim. The jury have found that it was not.

liable for any losses that occur." After stating that the complaint and its amendment failed to make clear whether the representations were intended merely as limitations upon the authority of the agent or were intended as a contract of guaranty, and failed to say when J became a bankrupt, the court held that the allegations did not state facts sufficient to make the defendant liable on account of any bad faith or neglect in loaning the money or on account of any contract of guaranty. Simpson v. First Nat. Bank of Roseburg, — Ore. —, 185 Pac. 913 (1919).

II. Brokers failing to obey instructions.

A. As to time and mode of buying stock.

Plaintiff placed in the hands of defendants, who were stockbrokers, the sum of $12,800, with direction to purchase certain specified stock for cash at the market price. This was in January, and defendants, in violation of plaintiff's instructions, purchased stocks for plaintiff on margin, applying $3,000 of plaintiff's money thereto, and appropriating the balance to their own use. The brokers represented to plaintiff up to February 18 that they could not deliver the certificates because of delay in their transfer. On that day plaintiff learned that they had violated instructions and demanded that the stocks be delivered whereupon the defendants delivered the certificates to him February 28. The market price of the stock certificates had depreciated $1,100 between the time the order was given for the purchase in January and the delivery February 28. Affirming judgment for the plaintiff for the amount of depreciation, the court said in the course of the argument referring to defendant's duty: "That duty was, of course, not only to purchase in the manner directed by the plaintiff, with reasonable diligence as to time, but also to purchase at the best price obtainable whenever the purchase was made, if there was a fixed market price." Wahl v. Tracy, 139 Wis. 668, 121 N. W. 660 (1909).

B. As to identity of land to be purchased.

Plaintiff owned and occupied a house on a lot No. 43. On one side of his house was a vacant lot No. 45; a party wall of plaintiff was on that side of the house. On the other side of the house was also a vacant lot No. 41. Plaintiff desired to purchase lot No. 45 for the purpose of erecting a house on it, utilizing the party wall, and accordingly called for defendants who were real estate agents and from his front porch pointed out to them lot No. 45 and they agreed to negotiate the purchase for him. Plaintiff could not read or write. The pur-

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The only other assignment of error is because plaintiff, in cross-examination of the witness who testified to the receipt, was permitted to ask him, "Did the Spears $2,000 enter into this settlement at all?" The objection was a general one, and cannot now avail the defendant, especially as the witness was asked in chief if "the paper was a settlement paper," and plaintiff was therefore entitled on cross-examination to have the jury know of what it was a "settlement."

The judgment of the court below is affirmed.

chase price and $25 for commissions was paid. Plaintiff built a house on lot No. 45 and leased it. Notice to quit was served on the tenant, and plaintiff then learned for the first time that he had title to lot No. 41 and not to lot No. 45, and sued defendants for damages. Affirming judgment recovered by plaintiff for $1,550, the court held that "men who undertake to do a service for another in a business or professional capacity, like real estate agents and the like, undertake to use the reasonable skill which is ordinarily possessed by their fellows in like service, nothing more and nothing less; if they fail in the performance of that duty, they are responsible to the injured person to the extent of the damages that either naturally flow from the wrongful act and are a direct consequence of it, or of those results, those consequences, which are in contemplation of the parties at the time the service is undertaken." Towski v. Griffiths, — N. J. L. —, 103 Atl. 192 (1918).

F. A. D.

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JONES et al. v. INDUSTRIAL COMMISSION OF UTAH et al.

[Supreme Court of Utah, January 30, 1920.]

— Utah —, 187 Pac. 833.

Workmen's compensation— Utah act—"Agricultural laborer"— Employee of owners of co-operative threshing machine.

The primary purpose, in the joint purchase of a threshing machine, to use such machine in threshing the grain of the owners is controlling in determining the nature and character of the owners' business for the purpose of the Utah Workmen's Compensation Act, and, even though the machine is used to a certain extent for commercial purposes, one employed to accompany the machine as a pitcher is an "agricultural laborer" within the meaning of such act.

GIDEON and WEBER, JJ., dissenting.

Certiorari to review proceedings of Industrial Commission in awarding compensation for death of employee. Findings, conclusions, and award set aside and annulled.

For plaintiffs—Harvey Cluff.

For defendants—Dan B. Shields, Attorney General, and O. C. Dalby, James H. Wolfe, and H. Van Dam, Jr., Assistant Attorneys General.

THURMAN, J. Plaintiffs have applied to this court for a writ of certiorari to review the proceedings of the Industrial Commission

CASE NOTE.

What are "agricultural" and "domestic" pursuits within exemption provisions of compensation acts.

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of Utah in awarding compensation for the death of one Joseph Hyrum Rowley, which occurred August 13, 1918.

The plaintiffs were the owners of a threshing machine, and Rowley was in their employ when the accident occurred which resulted in his death. The defendant commission, among other things, found that the machine was operated primarily for the purpose of threshing the crops of the owners of the machine, but inasmuch as they were preparing to thresh the crop of a son and renter of one of the owners, and did thresh a part of said crop on the day of the accident, and also threshed for the public during the season of 1918, the commission concluded that the plaintiffs were engaged in commercial threshing, that Rowley was not an agricultural laborer, and that therefore compensation should be awarded to his minor dependents, and funeral expenses allowed. These findings and conclusions are challenged by plaintiffs, and they insist that the commission was without jurisdiction to make the award.

The statute expressly excludes from its operation "agricultural laborers and domestic servants." Comp. Laws 1917, § 3111, as amended in Session Laws 1919, p. 156.

While many questions are presented by plaintiffs for our consideration, the only question that need be determined is, Was the deceased, Rowley, at the time of his death, employed as an "agricultural laborer" as that term is used in the Workmen's Compensation Act? If he was, the commission was without jurisdiction to make the award; if he was not, the findings and conclusions of the commission are unassailable.

The facts pertinent to a determination of the question are, in substance, as follows: The plaintiffs are all farmers residing in Utah county. Several years ago, having suffered considerable inconvenience and loss in failing to get their grain threshed in due season, they conceived the idea of co-operating together in the

Cross-references. What are agricultural and kindred pursuits within exemptions from compensation acts, see 13 N. C. C. A. 80-97, 16 N. C. C. A. 592-603; rights of employees injured while engaged in exempted pursuits subsidiary to principal occupation of employer which was within compensation acts, see 14 N. C. C. A. 1075-1087; injury to employees engaged in agricultural pursuits, see 11 N. C. C. A. 847-856.

I. Agricultural service.

A. Wagon maker employed in farm repair shop.

Claimant was injured while employed as a wagon maker in a shop operated by his employer for the sole purpose of repairing vehicles and implements used by the employer in farming operations. The whole time of the claimant was given to this oc-

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purchase of a machine, as found by the commission, primarily for the purpose of threshing their own grain. During the first two or three years, while paying for the machine, they did considerable threshing for the public. After that they did less, and limited their outside threshing generally to crops lying along the route from the farm of one co-owner to another, and on occasions when it would not seriously interfere with the threshing of their own crops. The commission found that they did commercial threshing for the public during the season of 1918, but the undisputed fact is it was not done until after the unfortunate accident to which we have referred. No grain whatever was threshed in 1918 until after the death of Rowley. They were making preparations to thresh on the day of the accident, and the deceased was assisting in the preparations. He was sent with a team and wagon for a tank of water for the engine, and was instructed not to ride on the tank, as it was considered dangerous. He disregarded the instruction, and not only rode on the tank, but attempted to do so by standing thereon, from which position he fell or was thrown, resulting in his death. After his death on the same day plaintiffs proceeded to thresh the grain of one Calvin Meldrum, a son and renter of James Meldrum, one of the owners of the machine. The grain was grown on the farm of said owner, and he and his son resided together on the farm.

After the accident the owners of the machine, acting upon legal advice, procured insurance under the Industrial Act, and did more or less custom work during the remainder of the season.

The owners of the machine were not formally organized, either

cupation. In the course of this employment claimant's right hand was caught in a moving planer, and the wound became infected. The court annulled the award of the industrial accident commission upon certiorari brought by the employer, holding that "the weight and better reasoning support the contention of petitioner that the repairing of farming machinery on the farm, in a shop devoted to such repairs, is an agricultural pursuit, and is one of the employments excluded by provisions similar to section 14 of the Workmen's Compensation Insurance and Safety Act." Miller & Lux Incorporated v. Industrial Acc. Commission of California, — Cal. —, 178 Pac. 960 (1919).

B. Hauling manure to farm from village.

The claimant was injured while engaged in hauling manure and refuse from the barn of his employer to certain land owned and operated by such employer. It appeared that at the time of the accident the employer was engaged in farming, in conducting a retail flour and feed store, a saloon, a grain elevator, and in retailing sand, gravel, tile and brick in the village. Employer also owned a 20-acre subdivision to the village and a 117-acre

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as a corporation or voluntary association. Their respective interests were denominated "shares," each share representing a cash contribution of $50 to the purchase of the machine. Together they employed three or four men, who were paid by the owners so much for every hundred bushels threshed. The owners themselves who worked on the machine were paid in the same manner. It is contended by plaintiffs that less than four men were employed by them, but we are of the opinion the commission was justified in finding otherwise.

The number of adjudicated cases respecting questions analogous to the one here presented is exceedingly limited. This should not be a matter of wonder when we consider that workmen's compensation laws are, in most cases, of comparatively recent origin. We have found no case substantially identical in its facts with the present case. The nearest analogy we have been able to find are cases in which threshing machines or other farm machinery have been devoted entirely to custom work for the community, instead of being used principally on the crops of those who own the machine. Even as to those cases there is a marked conflict among the authorities. Some of the cases hold that when a farm machine, such as a hay baler, corn-shredder, or threshing machine, is used even for custom work, the business is farm work, and the employees employed thereon are farm laborers. Other cases take the contrary view. We find no case whatever which holds that the work is not farming, and the employees not farm laborers, where the machine is used primarily by the owners for use on their own farms. The cases we have reviewed holding that where machines

farm which was about one mile from the village. The employer had 4 or 5 horses at the time of the accident. These horses were kept in the barn on the premises where the feedstore and the residence of the employer were located and were used in connection with all the businesses enumerated. The manure from the barn was in a bin adjoining the barn, and when the bin was full employees would haul it out to the farm and onto the land in the subdivision. Claimant was emptying the bin and hauling its contents into the subdivision with a team and wagon, and while unloading the manure he was either thrown or fell from the wagon and was badly injured. Claimant did every kind of work for the employer except office work. Sometimes he worked at the machinery at the elevator; at other times he unloaded or hauled gravel, sand, brick and tile; at other times he hauled grain to a point near by, and feed to the store, and during the farming season he worked on the farm. The court under these facts deciding that the claimant at the time of the injury was not engaged in a hazardous occupation coming within the purview

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are used for custom work the employees thereon are not farm laborers are as follows:

White v. Loades, 178 App. Div. 236, 164 N. Y. Supp. 1023, in which it is held that a man traveling through the county with a threshing machine and stopping at different farms to thresh grain and beans is not engaged in farming, and his employees are not farm laborers, within the meaning of the New York Workmen's Compensation Act (Consol. Laws, c. 67).

Vincent v. Taylor Bros., 180 App. Div. 818, 168 N. Y. Supp. 287, in which the court seems inclined to hold to the same effect, although the case was not decided on account of a defective record.

In re Boyer, a case from the appellate court of Indiana, 117 N. E. 507, in which the facts are substantially similar to those in the New York case first above cited and the holding the same. In the course of the opinion, however, the court says:

"If farmers generally owned threshing outfits and were in the habit of threshing their own grain, and the claimant had been employed by the farmers to assist in the work of threshing, and had been injured while doing such work, a more serious question would be presented."

Miller & Lux, Inc., v. Industrial Acc. Com. of Cal. et al., 32 Cal. App. 250, 162 Pac. 651. This case can be more easily comprehended by the reader by quoting two paragraphs from the headnotes which clearly indicate both the facts and the law as determined by the court:

"One employed as carpenter and foreman in charge of the construction of a cottage for employees upon one of the numerous properties of a large corporation, chartered, among other things, to construct buildings necessary to its business and whose business had for years included the construction, improvement, etc., of buildings on its properties, requiring the constant employment

of section 3 of Workmen's Compensation Act, said: "The defendant in error [claimant], as appears from the record, was at the time of his injury engaged in the spreading of fertilizer over certain farm land of the plaintiff in error [employer]. This occupation was that of farming." Seggebruch v. Industrial Commission, 288 Ill. 163, 123 N. E. 276 (1919).

C. Filling ice house on farm.

Plaintiff was employed as a farm laborer. In the performance of his duties he was injured while filling an ice house with ice for use on the farm. The ice was being unloaded from a sleigh into the building by means of a skid which had a tendency to lift into the air when the ice entered the building. Two logs supported the skid between the doorway of the ice house and the sleigh. Plaintiff ordinarily stood on the logs outside the skid and guided the pieces of ice as they slid from the sleigh to the building by means of ice tongs. A piece of ice longer than usual slid down the skid and wedged in the doorway of the ice house. To release it plaintiff, standing on the logs by the side of the skid, placed one foot within one

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of carpenters thereon, was employed in the 'usual course of the trade, business, profession, or occupation of his employer' within the Workmen's Compensation Act.

"'Such employee did not come within the express exclusion of section 14 of the Workmen's Compensation Act, as one engaged in 'farm labor,' notwithstanding the building which he was engaged in constructing was upon a ranch property of his employer.'"

Shafter Estate Co. v. Industrial Acc. Com. of California et al., 175 Cal. 522, 166 Pac. 24. For the reasons stated in the case next preceding, we quote from this case two paragraphs of the syllabus:

"'Where plaintiff's decedent was employed to patrol defendant's ranch as gamekeeper, and was also expressly instructed to aid defendant's lessees in killing a deer, and in the course of the hunt he was accidentally shot by one of the lessees, the accident occurred in the course of the employment.

"'Workmen's Compensation Act (Acts 1913, p. 279), sec. 14, excluding from the beneficiaries thereof 'any employee engaged in farm, dairy, agricultural, viticultural or horticultural labor, in stock or poultry raising,' does not include a gamekeeper employed to patrol a ranch to eject poachers and to aid in hunting deer.'"

The California cases can hardly be said to be even remotely in point. It would require an exceedingly strained interpretation of the law to exclude these employees from the operation of the act on the grounds that they were farm laborers.

Defendant also cites the case of Anderson v. Glen, Indiana Industrial Board No. 32, as the same appears in the notes to 13 N. C. C. A. 84. This case is pertinent to the point that when a person is employed by employers engaged as independent contractors loading hay, shredding fodder and filling silos as a distinct and independent business the employees are not farm laborers.

It must be conceded that Indiana, as far as its Industrial Board and appellate court are concerned, is wedded to the doctrine thus announced. The same may be said of the New York supreme court.

of the spaces formed by the longitudinal slats of the skid. When the ice was released it slid over the two feet of the skid projecting within the building, causing the part of the skid outside the building to be projected upward, throwing the plaintiff forward into the building and causing him to be injured. At the time of the accident 12 loads of ice had been placed within the building and it was the third day of the work. Plaintiff knew of the tendency of the skid, and standing on the logs outside the skid he was in a place of safety. No reason was apparent why he could not, from that position, have released the piece of ice and avoided the accident. The court held that under these facts there was contributory negligence on the part of the plaintiff, and answered his contention that this was unimportant as the case fell within the Workmen's Compensation Act as a hazardous employment, by saying: "Ice harvesting is a hazardous employment under the act, but was not in this instance 'carried on by the employer for pecuniary gain' within the meaning of the statute (section 3, subdivision 5). The plaintiff was in reality a farm laborer (section 3, subdivision

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Neither of these states has determined the question in its court of last resort.

The foregoing cases are the only authorities for defendant that have been called to our attention, or that we have been able to find in our independent research, that are in any substantial sense analogous to the case at bar. On the other hand, the California Industrial Accident Commission has frequently passed upon the question, and has consistently adhered to the doctrine that one employed to operate a machine used as a farming implement is engaged in farm labor even in cases where the machine moves from farm to farm engaged in custom work as an independent business.

Morris v. Spears, 1 Decisions Ind. Acc. Com. of Cal. 317, is a case in which the syllabus, consisting of one paragraph only, succinctly states both the facts and the law:

"Where an employer owns a hay press which he moves from farm to farm baling hay on contract for the owners of said farms, and his employee is injured while working on the hay press on a farm of a person for whom hay is being baled on contract, such employee is engaged in farm labor at the time of his injury, and his employer is not liable under the Workmen's Compensation Insurance and Safety Act."

To the same effect are Vincent v. Louis, 2 Decisions Ind. Acc. Com. of Cal. 168, and Neimeyer v. Volger, same volume, page 335. These cases are hay-baling cases, in which the business was carried on in substantially the same manner as in the case of Morris v. Spears, supra, and the conclusion of the commission was the same in each case.

Sylcord v. Horn, 179 Iowa, 936, 16 N. C. C. A. 592, 162 N. W. 249 (supreme court of Iowa) is a case in which an employee was engaged in the operation of a corn shredder used by the owner as

4), and the ice was being stored for use on the farm, and only as incidental to farm purposes. Hence this case is not within the act." Mullen v. Little, 186 N. Y. App. Div. 169, 173 N. Y. Supp. 578 (1919).

D. Farm laborer hauling logs from farm.

Plaintiff, while hauling a load of logs to a mill for the defendant, who was his employer and a farmer, was injured by reason of the load tipping over or in some way becoming disarranged. Plaintiff was the teamster. Defendant was present when the logs were loaded. He thought it unnecessary to bind the load, but failure to do so caused the tipping. It was winter time and the logs were out on the farm. The court, reversing the judgment for the plaintiff, held: "While lumbering and logging are classed as hazardous employments by the compensation act (section 2, group 14), and while plaintiff, the employee, would be included within the general language of subdivision 4 of section 3 as engaged in a hazardous occupation, still it is expressly provided in subdivision 4 of section 3 of the act that the term 'employee'

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an independent contractor operating the machine for profit. One paragraph of the syllabus correctly reflects the opinion of the court:

"An employee, injured while operating as an engineer and laborer a corn shredder for an employer under contract with a farmer to do such work, was a 'farm laborer' within Workmen's Compensation Act, sec. 2477m, exempting from the operation of the act an employee who is a farm or other laborer engaged in agricultural work, the fact that the employer was an independent contractor operating a corn shredder for profit being immaterial, since the word 'agricultural' means pertaining to, connected with, or engaged in 'agriculture,' which is the science of cultivating the ground, especially in fields or large quantities, including the preparation of the soil, the planting of seeds, the raising and harvesting of crops, and the rearing, feeding, and management of live stock; tillage, husbandry, and farming."

State ex rel. Bykle v. District Court, 140 Minn. 398, 168 N. W. 130, L. R. A. 1918F, 198 (supreme court of Minnesota), is a case exactly in point, except that it goes further than is necessary in support of plaintiffs' contention in the present case. An employee was employed on a threshing machine which the owner and employer moved from place to place, threshing grain for the farmers. The employee, while operating the machine, was injured. He asked for compensation, and the court denied him relief. The opinion of the supreme court is brief, but strong and to the point. We are constrained to quote it at some length, as it reflects our own views in better form than we are able to do. After citing one or two of the cases to which we have referred, the court, 140 Minn. 398, 399, 168 N. W. at pages 130, 131 (L. R. A. 1918F, 198), says:

"We think the better rule is to hold that plaintiff is a 'farm laborer.' The fact that plaintiff was not in the employ of the owner of the farm is not controlling. The important question is: What is the nature of the work? The work is done upon a farm. It is done upon farm crops. The purpose of growing the crops is to provide food for consumption or market. Threshing is as necessary in order that the farmer may consume or market the crop as is sowing

shall not include farm laborers or domestic servants; so that, even if a farm laborer is engaged in logging, he is specifically excepted from the provisions of the act. We think the jury could find that logging was farm work." Brockett v. Mietz, 184 N. Y. App. Div. 342, 171 N. Y. Supp. 412 (1918).

E. Constructing fence along highway.

As part of a project of highway construction the defendant county N had bought a right of way from various landowners and undertaken the construction of fences along such right of way. The option was granted the landowners to allow the county to construct the fence or to construct it themselves, with reimbursement from the county for the cost thereof. Defendant R elected to construct his own fence of a description of his own election, paid all the expenses thereof and was later reimbursed by the county. The applicant sprained his ankle while constructing this fence. It was held that the applicant was an employee of defendant R and not of defendant county; that the construction of the fence was farm labor, and that therefore applicant was not entitled to

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or harvest. Surely, the man who, years ago, threshed grain with a flail was doing farm labor as much as the man who cradled the grain. So is the man who now threshes beans with a flail. The fact that more complicated mechanical devices are used in this case does not change the character of the work. Much farm work is done by the use of complicated machinery. There are tractor plows, self-binders, and even combination harvester-threshers by means of which harvesting and threshing are done as one operation. These and other operations may be done for others by one who is able to own the more complicated and expensive machinery. But it is all, nevertheless, farm work, and the employee who does such work is a 'farm laborer' within the meaning of the Compensation Act. Any other rule would be impractical, and would lead to discriminations that could not be tolerated. This case illustrates this. Suppose the farmer's hired man who was helping plaintiff had also fallen. Both were doing the same work. Surely the hired man was then a 'farm laborer.' It cannot be said that one was a 'farm laborer' and the other was not."

In the instant case we need not go to the full extent to which the supreme court of Minnesota and Iowa and the Industrial Accident Commission of California have gone, for, as manifestly appears, the employers in all of those cases were engaged in custom work for the farmers of the community, or, as our own Industrial Board calls it, "commercial business." There is no pretense that owners of the machine in the cases referred to purchased the same primarily for their own use as farmers, or that they were owners of farms upon which the machines could be used. Notwithstanding this the courts and commissions referred to held that they were engaged in farming business and their employees, farm laborers.

The illustration made by the Minnesota court in the closing sentence of the excerpt above quoted exactly fits the present case. James Meldrum was one of the owners of the machine in question. He also owned a farm. His son Calvin resided with him on the farm and as a renter was interested in the grain to be threshed. Their grain was in separate stacks on the farm. The position of

compensation, the employer not having elected to accept the liabilities imposed by the act. Jenkins v. Rhinehart, — Cal. Ind. Acc. Comm. — (1919).

F. Building road on ranch to facilitate leasing parts of it.

The defendant B, a practicing attorney, owned a large ranch. A small part of it was reserved by defendant for his own use for visits on week-ends and holidays, and the remainder was leased to tenants. Defendant was clearing the uncultivated sections of the land and putting them into condition for cultivation and leasing. In order to improve the tenants' access to certain portions of the farm, he arranged with defendant C, who had done considerable work as grading contractor, to build a road through the farm under contract. For the execution of a portion of this project defendant C engaged the services of applicant, who was injured by the explosion of blasting powder which he was using in the work. It was held that defendant B's intention to lease or sell the unreserved portions of the ranch, rather

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defendants in respect to the business, in the last analysis, logically leads to the conclusion that while threshing the stack belonging to the son the employees were not "agricultural laborers" within the meaning of the act, and therefore were entitled to compensation at the expense of their employer, but that when they turned to the stack belonging to the father and commenced to thresh they immediately became "agricultural laborers," and were not entitled to compensation. Such an interpretation of the meaning of our Industrial Act, in the opinion of the court, is inadmissible and would result in manifest discrimination and lead to inevitable confusion.

It is not necessary in the present case, nor is it our intention, to go to the extent that some of the cases have gone. We deem it more prudent to deal with such cases when they are presented for our consideration. We hold, however, that in the case at bar, the commission itself having found that the owners of the machine purchased the same primarily for the purpose of threshing their own grain and used it principally for that purpose, such primary purpose becomes controlling in determining the nature and character of their business within the meaning of the Industrial Act.

For the reasons stated the findings, conclusions, and award made by the defendant commission are set aside and annulled. No costs are allowed in this proceeding, for the reason that no printed briefs were filed or costs of a similar nature incurred.

CORFMAN, C. J., concurs.

FRICK, J. I unhesitatingly concur in the conclusions reached by

than himself carry on the farming operations to be conducted thereon, did not characterize his activities in connection with the ranch as a real estate business as distinguished from farming, and that the work being done by applicant, being designed to facilitate the farming operations to be conducted on the ranch and to improve the condition of the land for such operations, was itself farm labor, and an injury suffered in the course of such labor was therefore without the jurisdiction of this commission. Pearson v. Crandall, — Cal. Ind. Acc. Comm. — (1919).

G. Constructing tunnel in connection with farm water supply.

The applicant's decedent was fatally injured while working in the employ of defendants P and C as a laborer in the construction of a tunnel connecting two wells used for supplying water to the farm premises of the employers. He and the other laborers engaged with him had, before beginning this work, done general work about the employers' ranch. The commission held that the work in which the deceased was engaged at the time of his injury was farm labor, and

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my associate, Mr. Justice THURMAN. The statute excepts all "agricultural laborers." The exception includes all persons engaged in the pursuit of agriculture. If, therefore, one who is engaged in threshing grain which is produced upon our farms is engaged in agricultural work, he is not within the provisions of our Industrial Act. It is conceded by the Industrial Commission, and by all concerned in this proceeding, that in case a farmer threshes his own grain with his own threshing machine he and all others who are assisting him are engaged in agriculture, and are thus excepted from the act. The commission, however, held that where grain is threshed by farmers or others for toll or hire the owner of the machine and those he employs to help him are not engaged in agriculture. In other words, if A pitches bundles to a threshing machine which is owned and operated by a farmer in threshing his own grain, then A is engaged in agriculture, and does not come within the provisions of the act; but if he pitches bundles to the same machine when it is used for threshing grain for toll or hire for farmers who pay toll, then he is not engaged in agriculture, and comes within the provisions of the act respecting compensation. According to this view, it is not the nature of the work which determines one's calling, but that is determined by the fact that the work is done by a particular person and is compensated for in a particular manner. If, therefore, a farmer purchases a tractor and gang plows, and plows his own fields therewith, he is engaged in agriculture, but if he uses the tractor and plows in plowing his neighbor's fields for a stipulated price per acre he is not engaged in agriculture. To so hold is to make a distinction where there is no difference, and attempt to classify

therefore excluded from the provisions of the compensation act. Montgomery v. Pruner, — Cal. Ind. Acc. Comm. — (1919).

H. Raising trout.

Deceased was employed upon a trout farm and, while clearing and hauling away brush and ferns from the flume, was injured by the overturning of the wagon, and died from the injuries received. An order awarding a death benefit was made by the industrial accident commission and the employer petitioned for certiorari to review the order. It being contended among other things that the business conducted by the employer, the propagation of trout for domestic purposes, comprised farm labor and stock raising, and that an employee of such business was excluded from the benefits of the Workmen's Compensation Act under the provision: "Excluding any employee engaged in household domestic service, farm, dairy, agricultural, viticultural or horticultural labor, in stock or poultry raising." The court affirmed the award, however, holding that the wording of the clause in question showed that the legislature was giving a restricted

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a calling, the classification of which is purely arbitrary and without a proper reason or foundation. In my judgment the threshing machine, if used for threshing grain, and the plows, if used to plow the farmers' field, howsoever or by whomsoever used, are merely agricultural implements used in the pursuit of agriculture or farming. Moreover, if a classification of agricultural laborers is legally permissible without discrimination, it must be made by the legislature, since classification is a legislative and not a judicial function. As I view it, threshing grain produced on our farms or ranches, in the nature of things, belongs to agriculture just as much as plowing these farms or ranches does, and it is utterly immaterial by what method or by whom the threshing or plowing is done.

This case, in principle, is entirely different from the case of Chandler v. Industrial Commission, 184 Pac. 1020, recently decided by this court. In that case it was sought to except an employer and an employee from the provisions of the act each of whom belonged to a class which was clearly intended to be and was within its provisions. It was therefore not only proper, but was necessary, to apply the provisions of the act liberally so as not to exclude any member of a class which, manifestly, was intended to come within the provisions of the act. Here, however, the reverse is sought. What is attempted here is to bring an employee within the act who belongs to a class which is expressly excepted therefrom. Again, the attempt here is to segregate agricultural laborers into classes, which may not be accomplished by judicial construction, but if permissible at all without discrimination must be brought about by legislative action. But it is urged that even

meaning to the terms employed and was segregating into certain definite and exclusive classes all kinds of labor which, in the broad and unrestricted sense, would come under the head of farming, and that, under the clause, the term farm labor must be taken in its ordinarily accepted meaning as labor engaged in the production of hay, grain, vegetables and the like, by the tillage of the soil, because, to give it a broader meaning would be to restrict the terms dairy, agricultural, viticultural or horticultural labor as used in the statute, for by the employment of those words it was clear that the legislature did not intend to include dairy farming, fruit farming, grape growing, etc., within the term farm. Likewise the term stock raising must be interpreted in the sense in which it is commonly employed, such as the raising of those domestic animals usually classed as live stock and commonly raised on farms or ranches, such as horses, mules, cattle, sheep, goats, hogs, and the like, otherwise poultry raising would not have been specially mentioned. This interpretation, the court said, was further supported by the fact that the statute permitting the raising of trout

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those engaged in pitching bundles to a threshing machine may, under certain circumstances, be classified. The contention is based upon the ground that it is possible to classify those who are engaged in domestic work such as house and window cleaning when done under special contract. While the question of who are and who are not "domestic servants" within the purview of the act is not before us, and hence may not be decided, yet it is quite clear that if one were engaged in house and window cleaning under a special contract he would necessarily be an independent contractor, and hence would not come within the provisions of the act. The legislature, in making its classification, has, however, used the comprehensive terms of "agricultural laborers" in referring to the class now under consideration, while in referring to the class engaged in domestic service it has used the restrictive term of "domestic servants." All are aware that one may be engaged in house and window cleaning without being a domestic servant, while we also know that one cannot be engaged in any kind of farm work without becoming an "agricultural laborer." That term would apply even to an independent contractor engaged in farm work.

It is, however, further said that the deceased was not engaged in pitching bundles, and hence it seems to be assumed he is covered by the act. If that were so, then instead of dividing those engaged in threshing grain into two classes, as was done by the commission, they would have to be divided into three classes. In making that contention, therefore, the difficulty is increased rather than solved. The fact, however, still remains that if agricultural laborers may be classified it should be done by the legislature and not by the courts.

GIDEON, J. (dissenting). It appears without contradiction that on the date of the accident the deceased and other workmen were

described the business as "persons engaged in the business of propagating and rearing such fish," and that in this act, which was in existence before the Workmen's Compensation Act, the words farm and stock were not used. Krobitzsch v. Industrial Acc. Commission of California, — Cal. —, 185 Pac. 396 (1919).

II. Janitor and gardener trimming tree as horticultural laborer.

Claimant was employed as janitor and gardener by W, who conducted a school for girls. The school buildings stood on a tract of about two acres, much of which was under cultivation. It was claimant's duty to look after the grounds and to clean the schoolrooms. In August W ordered him to trim a tree which interfered with the entry of light to a schoolroom. Claimant cut off portions of the tree. After this the tree was unsightly, and in October W directed claimant to remedy this condition. Claimant accord-

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engaged in taking the machine in question from the shed where it had remained during the winter months and were making the necessary repairs thereon for the season's work. The deceased had been employed to accompany the machine as a pitcher. On the day in question he was assisting in the repair work, as above indicated.

Among other things, the commission found:

"The pitchers were men employed to throw grain into the machine. They traveled with the machine, were paid by the machine company, and were under the supervision of the foreman, all receiving pay on a percentage basis of the amount threshed. In case the toll taker failed to collect all tolls due, the machine crew were, nevertheless, paid for actual work performed, while the co-owners suffered the loss. It appears that in no case during the season of 1918 did the farmer furnish pitchers; also pitchers were expected to assist in moving and setting up the machine."

The provisions of the Workmen's Compensation Act in force at the time of the accident, so far as material to the question under discussion, are:

"The term 'employee,' 'workman,' and 'operative,' as used in this title, shall be construed to mean:

"1. * * *

"2. Every person except agricultural laborers and domestic servants in the service of any person, firm, or corporation, employing four or more workmen or operatives regularly in the same business."

Comp. Laws 1917, sec. 3111.

Under the findings of the commission, and as abundantly supported by the testimony, the deceased was employed by the threshing machine company, and was in no way under the direction or orders of the owner of the farm. He was not employed to do any of the usual labor required of a farm hand. His sole duty seems to have been to assist the owners of the threshing machine in operating such machine. The term "agricultural laborers," considered in its most comprehensive sense, might consistently be construed to embrace one engaged as was the deceased. The

ingly cut off the stump of a large limb which projected over the roof of the schoolhouse. By means of a rope he lowered the limb to the roof. He untied the rope, which slipped out of his hand suddenly, whereupon he fell to the ground, sustaining injuries. The industrial accident commission dismissed the application of claimant for compensation, upon a finding that claimant was at the time of the injury engaged in horticultural labor. Upon certiorari, the court, holding that the finding of the commission, if supported by any rational view of the evidence is beyond review, and further holding that a finding under the facts of this case that claimant was engaged in horticulture was not unreasonable, said: "George's [claimant's] employment was dual in character. In so far as he acted as gardener, his work was horticultural and beyond the purview of the compensation act. In so far as his duties were those of a janitor, his em-

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object of the general act and the phraseology of the section under consideration, however, do not warrant such interpretation. The language excluding such laborers from the general class mentioned in the act is contained in an exception. Without such exception, undoubtedly, all agricultural laborers would be entitled to the benefits of the act. "We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any exception must establish it as being within the words as well as within the reason thereof." U. S. v. Dickson, 15 Pet. 165, 10 L. Ed. 689. The office of a proviso and of an exception to a general statute is similar and subject to the same rules of construction respecting the meaning of such proviso or exception. Black, Interpretation of Laws (2d Ed.), c. XL. It is provided by Comp. Laws Utah 1917, § 5839:

"The revised statutes establish the law of this state * * * and their provisions * * * are to be liberally construed with a view to effect the *objects* of the statutes and to promote justice." (Italics mine.)

Admittedly, the object sought by the Industrial Commission Act is to insure to employees engaged in the industries of this state compensation for accidents, and also compensation to the dependents of such employees where death is caused by such accidents. The state, as well as dependents, is vitally interested in having such compensation paid. Reteuna v. Ind. Com., 185 Pac. 535. I am of the opinion that by the exception the intent of the legislature was to exclude only such laborers as are connected with the everyday or ordinary operation of the farm; that is, any one employed to perform the usual work required on a farm owned or operated by some one in the actual business of farming. The purposes sought

ployment was not exempt from the terms of the act." It was contended by claimant that the work in which he was engaged had for its primary purpose the improvement of the condition of the schoolroom with respect to light, and that he was therefore acting as janitor rather than as gardener. Answering the court said: "It may be doubted whether the premise justifies the conclusion. Be that as it may, the removal of the obstruction to light was completed when George first trimmed the tree in August. His injury occurred a couple of months later, in the course of a further cutting, the purpose of which was to improve the appearance of the tree. It is certainly a gardener's work to trim ornamental trees and keep them sight-

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by the act, and the phraseology employed in expressing the intent of the legislature, warrant such construction.

It is suggested in the concurring opinion of Mr. Justice FRICK that any one pitching bundles to a threshing machine, whether employed by the farmer or by the owner of a machine doing commercial threshing, is nevertheless in the same work, and must be included within the exception. That does not, in my judgment, necessarily follow, nor is it controlling. To illustrate: Take the facts in one of the cases relied upon by counsel for plaintiff—Rheam v. Wharton, 2 Pa. Work. Com. Board 326. In that case the deceased was employed by the defendant who was engaged exclusively in farming. At the time of the accident the deceased was driving a team and wagon loaded with lumber to be used in constructing a new corncrib on one of the farms owned by the defendant. The claim was disallowed. The commission held that the deceased was engaged as a farm laborer. I doubt if any one would contend that if the deceased had been engaged by an independent contractor who had agreed to construct a corncrib on one of defendant's farms, he would have been considered a farm laborer. Nevertheless, he would have been engaged in the identical work he was doing at the time of the accident. I apprehend that, it could not be successfully maintained before any court that any one employed by another engaged in going from house to house operating a vacuum cleaner, or washing windows, where the contractor was under contract to clean carpets and wash windows of a family residence, and such employee was injured while engaged in such work, such injured employee would fall within the exception as a domestic servant. Cleaning carpets and washing windows is work essential to and intimately connected with, and part of the necessary work in maintaining a home, and is work that may be, and usually is, performed by either the housewife or domestic servant. No reason is given—not even suggested—whereby it is concluded that the legislature in the exception under consideration

ly, and this is the work in which the petitioner was engaged at the time he was hurt." George v. Industrial Acc. Commission, — Cal. —, 174 Pac. 653 (1918).

III. Domestic service.

A. Waxing floors.

Claimant's husband had been employed as a janitor by K for several years. He then went to work for a ship-building corporation where he was employed continuously until his injury. Later the wife was engaged to do a substantial part of the janitor work previously performed by her husband. She received stated weekly compensation therefor. The husband, at the suggestion of K, occasionally

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used the term "agricultural laborers" in a comprehensive sense and "domestic servants" in a limited or restricted sense. Both are included in the exception to the general class mentioned in the statute.

The nature of the general employment, in my judgment, largely, if not wholly, determines the class to which the employee belongs. In the present case the deceased, at the moment of the accident, was not pitching bundles into the machine—on the contrary, he was driving a team hauling a tank partly filled with water. The work of hauling water may or may not be agricultural work. It is governed and depends upon the general employment. Any one employed to do general farm work may well be held to be engaged in agricultural labor while hauling water for stock or other farm purposes. On the other hand, one employed to haul water for the purpose of running an engine to operate a drill boring for oil on the same farm would not be an agricultural laborer. The work is identical, and the same means are employed in both cases.

The majority opinion, as I understand it, distinguishes the plaintiffs in this case from parties engaged strictly in commercial threshing. In my judgment the facts do not warrant such distinction. The outfit was not owned in equal shares by the plaintiffs. One of the parties owned at least 12 shares, another 6, and still others only 1. Each owner paid the same per bushel for threshing his grain as a nonowner did. At the end of the season any profit was prorated to the several owners as represented by the number of shares held in the enterprise; that is, each man received his part of the profit accruing to the company according to the investment made. Apparently, a strictly commercial enterprise. The fact that this machine happened to be owned by a

assisted her or worked in her stead when she was tired, but for this he received no compensation. Later he was engaged by K regularly to wax the floor, for which he was paid $1 every two weeks. He received fatal injuries in the course of and arising out of that employment. Held that these circumstances did not warrant a finding that the deceased was employed as janitor, and that his only employment by K was in waxing the floor at a specified price. Marvin's Case, — Mass. —, 125 N. E. 154 (1919).

B. General housework in sanitarium.

The claimant was employed at a sanitarium which petitioners were conducting. She was employed as a maid, her duties consisting of what is known as general housework, in addition to which she waited upon patients in the sanitarium. The petitioners lived in the same building, and the place answered as a residence for them, as well as for a sanitarium. Claimant intended to take up her abode permanently with petitioners, but had not yet brought her effects

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number of farmers is, in my judgment, wholly immaterial. If a number of farmers jointly and equally owned a machine for threshing their own grain, and each furnished the necessary help to thresh his grain, a different question would be presented. This record presents no such question.

The following cases are cited in support of the views indicated: White v. Loades, 178 App. Div. 236, 164 N. Y. Supp. 1023; Vincent v. Taylor Bros., 180 App. Div. 818, 168 N. Y. Supp. 287; O. L. Shafter Estate Co. v. Industrial Acc. Com., 175 Cal. 522, 166 Pac. 24; Miller & Lux, Inc., v. Industrial Acc. Com., 32 Cal. App. 250, 162 Pac. 651; In re Boyer (Ind. App.), 117 N. E. 507.

The rulings of the California commission are cited in the majority opinion. They hold, broadly, that threshing grain by farmers, whether for themselves or others, is agricultural labor, an extreme to which few commissions and fewer courts have gone. On the other hand, the Iowa commission has held that parties grinding sugar cane for farmers are not agricultural laborers. If, however, decisions by compensation or industrial insurance commissioners are to be regarded as persuasive there is no reason for rejecting the decision of the Utah commission in the present case. The Industrial Commission of Utah has made a study of conditions in this state; it has made a survey of the industrial situation here. The Industrial Commission law is of recent enactment. The present commission constitute the first appointees to such body. They were residents of the state at the time of the enactment of the law; they were familiar with the propaganda in favor of its enactment; they were familiar with its legislative history, and were conversant with the public discussions and debates that preceded its enactment. In determining a question like the one in this case,

to their establishment. On the particular day in question, claimant was to go on duty at 4 o'clock, at which time it was suggested to her by petitioner she might do laundry work of her own in spare moments. Instead, claimant returned to the sanitarium at 3 o'clock and was making ready to do her washing when, walking across a kitchen floor which had been scrubbed by another attendant, and was still wet, she slipped and fell, injuring her arm. While the court annulled the award of the industrial accident commission on the ground that claimant at the time of the accident was engaged in an act wholly for her own benefit, and not upon business of her employers, it said: "We are of the opinion that the service for which Mrs. Ottesen [claimant] was engaged was not one falling within an exception of the Workmen's Compensation Act, which exception excludes from the benefits of the act 'any employee engaged in household domestic service.'" Gernhardt v. Industrial Acc. Commission of California, — Cal. App. —, 185 Pac. 307 (1919).

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concededly close, and one that may be termed "a border line case," the opinion of our commissioners is entitled to serious, if not binding, consideration.

I am authorized to say that MR. JUSTICE WEBER concurs in this dissent.

IV. Necessity for negativing exempted occupations in pleading.

Defendant employer, who operated a smelting furnace, by its foreman ordered plaintiff to clear away debris which covered the railroad track in front of the furnace. While performing this duty plaintiff stepped on a crust formed by molten hot lead which had escaped from the furnace, cooled and become hard. The crust broke and plaintiff's foot was projected down into the molten lead beneath the crust, severely burning the flesh of the foot to the bone. Upon appeal from an order granting defendant a new trial, it was contended by the plaintiff that it was necessary for an employer, who sought to defend on the ground that the case was within the purview of the Workmen's Compensation Act, to plead and prove that he was not engaged in farming or any of the occupations excepted from the operation of the act. The court held that this contention could not be maintained. Mitchell v. St. Louis Smelting and Refining Co., — Mo. App. —, 215 S. W. 506 (1919).

F. A. D.

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GREAT NORTHERN RY. CO. v. DONALDSON, ADMINISTRATRIX OF THOMS.

[Supreme Court of the United States, March 4, 1918.]

246 U. S. 121, 62 L. Ed. 616, 38 Sup. Ct. 230, aff'g 89 Wash. 161, 154 Pac. 133.

1. **Appeal and error—Federal Supreme Court—Review—Weight of evidence.**
It is not the province of the Federal Supreme Court on writ of error to weigh conflicting evidence; to ascertain whether the record shows testimony supporting the verdict is as far as such court enters upon a consideration of such question.

2. **Federal Employers' Liability Act—Assumption of risks—Violation of statute enacted for safety of employees—Boiler Inspection Act.**
The Federal Boiler Inspection Act was enacted for the safety of employees within the meaning of section 4 of the Federal Employers' Liability Act, providing that an employee shall not be held to have assumed the risks of his employment in any case where the violation by the carrier of any statute enacted for the safety of employees contributed to such employee's injury or death.

3. **Federal Employers' Liability Act—Boiler explosion—Assumption of risk—Instruction.**
Charge on assumption of risk, requested by the defendant carrier, sued under the Federal Employers' Liability Act for the death of one of its engineers as the result of the explosion of an engine boiler, held inconsistent with the provisions of section 4 of the Federal Employers' Liability Act and section 2 of the Federal Boiler Inspection Act.

CASE NOTE.

Assumption of risk of injury through violation of safety statutes, under Federal Employers' Liability Act.

I. Violation of municipal ordinance as bar, 391-393.
II. Breach of Safety Appliance Act, 393-403.
A. Coupler out of order, 393-397.
B. Improper use of coupler, 397.
C. Temporary defect in coupler, 397-398.
D. Effect in abandoning claim under act, 398-402.
E. Defective grab iron, 402-403.
III. Defects in engine, 403-406.
A. Depression in cab floor, 403-404.
B. Power brake lacking, 404-406.

Cross-references. Risks assumed under the Federal Employers' Liability Act, see 8 N. C. C. A. 834-871; origin, history of development, validity, interpretation, scope and effect of Federal Safety Appliance Act and amendments, see 12 N. C. C. A. 1083-1100; liability to employee for injury sustained in coupling cars not properly equipped with couplers as required by state or federal statute, see 4 N. C. C. A. 479-501; voluntary assumption of risk by servant as defense to master's breach of statutory duty, see 1 N. C. C. A. 828-867; instructions as to assumption of risk in actions under Federal Employers' Liability Act, see 7 N. C. C. A. 685-700.

I. Violation of municipal ordinance as bar.

The plaintiff, a yard clerk, had been directed by his yardmaster to call a certain train crew, asleep in a caboose

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4. **Federal Employers' Liability Act—Boiler explosion—Assumption of risk—Instruction.**

Charge on assumption of risk, given in an action against a carrier, sued under the Federal Employers' Liability Act for the death of one of its engineers as the result of the explosion of an engine boiler, held more favorable to the defendant than the law required.

5. **Federal Employers' Liability Act—Explosion of boiler on oil-burning engine—Approval of type of button-head used—Sufficiency of evidence.**

In an action, under the Federal Employers' Liability Act, against a carrier for the death of one of its engineers as the result of the explosion of the boiler on an oil-burning engine, held that the testimony did not show an approval by government inspectors of the use of the large type of button-head upon an oil-burning engine, the actual use of which was alleged by plaintiff to have made the engine unsafe to operate.

6. **Federal Boiler Inspection Act—Button-heads—Necessity of inspector's disapproval of type used.**

The fact that the use of a certain type of button-bead on the boiler of an oil-burning engine has not been disapproved by the government inspector is not conclusive of the sufficiency of such type, since there is nothing in the Federal Boiler Inspection Act to warrant the conclusion that there is no liability for an unsafe locomotive, in view of the provisions of section 2 of the act, because some particular feature of construction, which has been found unsafe, has not been disapproved by the federal boiler inspector.

Error to the supreme court of the state of Washington to review a judgment affirming a judgment for the plaintiff in an action under the Federal Employers' Liability Act for the death of a locomotive engineer. Affirmed.

about 75 feet away. The approach to the caboose was blocked with a string of cars. The plaintiff consequently climbed between the cars, which were coupled, and while he was doing so they were pushed together, catching his right foot between the steel bumpers and crushing it. The cars were bumped together as the result of a car being kicked in from the south against the other cars. It appeared that the plaintiff knew there was an engine at work a block away; that cars were being shoved towards the spot where he was crossing; that the cars in question extended about 30 car lengths north and several car lengths south. From a verdict and judgment for $1,850, the defendant appealed. The court, in reversing the judgment, held that the violation of a municipal ordinance by the defendant did not remove the defense of assumption of risk, since a municipal ordinance was not a statute within the meaning of the Federal Employers' Liability Act; (2) that the defense of assumed risk still remained under the federal act; (3) that as the plaintiff placed himself in a position which he knew was dangerous from his experience, he assumed the risk thereof and was barred of recovery. Mitchell v. Louisville & N. R. Co., 194 Ill. App. 77 (1915).

The plaintiff's decedent, a flagman, was struck and killed by a car that was being "shunted" on the switch tracks where he was stationed. The deceased was, at the time of the accident, trying to stop a horse and vehicle that was on the street crossing driving across the tracks. Two different railroads crossed each other at the point where the deceased was stationed, and by municipal ordinance, gates were required at that point, but these being out of order at the time,

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For plaintiff in error—F. G. Dorety (E. C. Lindley and F. V. Brown, on the brief).

For defendant in error—James McCabe (Hyman Zettler and John C. Higgins, on the brief).

The following are the pleadings in the action:

Amended Complaint.

For a cause of action against defendant, plaintiff alleges:

I.

That the defendant, Great Northern Railway Company, is a corporation duly organized and existing under and by virtue of the laws of the state of Minnesota, owning and operating an interstate railroad system as a common carrier in the state of Washington, and between that state and the state of Idaho and other states.

II.

That the plaintiff is the duly appointed, qualified and acting administratrix of the estate of Vance H. Thoms, deceased, having heretofore been appointed by this court on the 27th day of December, 1913, and that this action is brought under the Federal Employers' Liability Act of April 22, 1908, c. 149, as amended by the Act of April 5, 1910, c. 143.

III.

That Vance H. Thoms previous to and at the time of his injury and death,

the deceased had been ordered to perform the duties of flagman. From a verdict and judgment for $3,150, the defendant appealed. The court, in reversing the judgment and remanding the case, held that the municipal ordinance for violation of which the plaintiff relied to eliminate the defense of assumption of risk was inapplicable. As the court pointed out, such a defense existed except where the employer contributed to the injury by a violation of some statute enacted for the safety of the employee, but "any statute enacted for the safety of employees" meant federal statutes, and not state statutes or municipal ordinances, since to include such would in effect relegate to state control the entire subject of responsibility of employer for injuries to his employees. Dunlavy v. Chicago, B. & Q. R. Co., 200 Ill. App. 75 (1915).

II. Breach of Safety Appliance Act.

A. Coupler out of order.

The plaintiff, a brakeman, was injured in jumping from a car which had become uncoupled by the use of a defective coupler. The necessity for the plaintiff's jumping from the car was due to the speed of the car at the time it became uncoupled. But for the defective coupler, the cars would have been under perfect control; they would not have run at an excessive rate of speed, and there would have been no injury. The trial court struck out the defense of assumption of risk, and this was alleged as error on appeal by the defendant from a judgment for the plaintiff. The court, in affirming the judgment, held that as the injury resulted from the violation of the Safety Appliance Act, which was a statute enacted for the safety of employees, the defense of

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as hereinafter set forth, was a locomotive engineer employed by the defendant railroad company; that on November 5, 1913, the said Vance H. Thoms while in the performance of his duties as such locomotive engineer, and while employed and engaged in such interstate commerce in operating defendant's engine No. 1902, in hauling loaded freight cars in transit between the several states of the Union, was fatally injured by the explosion of the boiler of said defendant's engine No. 1902; that said injuries directly resulted in the death of said Vance H. Thoms on the same day, at Everett, Snohomish County, Washington.

IV.

That said injury occurred on defendant's tracks between Tonga and Nippon, Washington; that said injury and death was directly caused by the negligence of the said defendant railroad company, its officers and employees, in that said locomotive boiler on said defendant's engine No. 1902 was insufficient and defective in the following particulars: that the button-heads of the crown-bolts of said boiler were excessively and unnecessarily large and consequently unduly exposed to the direct heat produced by the oil fuel used on said locomotive; that said boiler was not provided with safety fusible plugs, and that scale was negligently allowed by said defendant, its officers and employees, to accumulate upon the crown sheet in said boiler; that for a long time prior to said injury and death the defendant railroad company knew of said defects and insufficiency and of the resulting great danger therefrom.

V.

That the said Vance H. Thoms was, prior to and at the time of his death, an able-bodied man 30 years of age, earning one hundred and eighty ($180) dollars per month, and left surviving him and dependent upon him his mother, Adaline Donaldson, the plaintiff herein, and a niece, Irene Raleigh, aged six years; that said deceased left surviving him no widow, children nor father.

assumption of risk was not available under the terms of the Federal Employers' Liability Act. Potter v. Los Angeles & S. L. R. Co., — Nev. —, 177 Pac. 933 (1919).

The plaintiff was injured while he and the yard conductor, his superior, were attempting to couple two passenger cars which were provided with automatic couplers. The plaintiff had, in pursuance of the order of the yard conductor, gone upon the platform of the car and turned the lever which would pull the lock and enable the knuckle of the coupling to be opened. The yard conductor remained on the ground to open the knuckle after the lock was released by the plaintiff and to effect the coupling. He failed to open the knuckle, however, and when the cars came together while the plaintiff was holding the lever, it was forced around so suddenly and violently by the impact of the cars that the plaintiff's wrist was injured. He stood in such a position upon the platform of the car that it was impossible to see whether the knuckle was opened. If such could not be opened because of defective condition, the fellow employee on the ground, according to custom, was to warn him. To avoid the rebound, when the cars came together the conductor should, furthermore, have given a signal as to when he was to let loose of the lever. Neither warning nor signal was given, and as a result the injury occurred. The plaintiff alleged the coupling was defective. From a judgment for the plaintiff, the defendant appealed. The court reversed the judgment, holding there was no sufficient proof that the plaintiff's injury resulted from any defect in the coupling, and that the conductor may not have performed his duty in opening the knuckle. Upon the question of

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VI.

That by reason of said injury and death the said mother and niece, and therefore the plaintiff, have been damaged in the sum of twenty thousand ($20,000) dollars.

Wherefore, plaintiff prays judgment against said defendant for the sum of twenty thousand ($20,000) dollars, and costs.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, that the plaintiff be permitted to amend the fourth paragraph of her complaint so as to read as in the attached amended complaint.

It is further stipulated that the answer of defendant railway company heretofore interposed to the complaint in this action to be considered as the answer to the attached amended complaint so that all the new matter contained in said amended complaint be considered denied.

Answer to Amended Complaint.

Now comes the defendant and answers the amended complaint of the plaintiff herein as follows:

I.

Defendant admits paragraph 1 of said amended complaint.

II.

Defendant denies that it has any knowledge or information sufficient to enable it to form a belief as to the matters and things alleged in paragraph 2 of said amended complaint and on said ground denies said paragraph and each and every allegation therein contained.

assumption of risk where injury results from defective appliances, the court said, however: "Under the federal statutes known as the Employers' Liability Act and the Safety Appliance Acts, proof by plaintiff of a violation of the Safety Appliance Acts, by the use of a defective coupler, and that its use was the proximate cause of the injury, makes a case of absolute liability, for the duty to furnish such appliances as are prescribed by the acts is absolute, and not limited by the exercise of due care and diligence on the part of the carrier; and the defenses of contributory negligence and assumption of risk will not defeat recovery for an injury so caused." Steele v. Atlantic Coast Line R. Co., 103 S. C. 102, 7 S. E. 639 (1916).

The plaintiff, a switchman, due to the fact that the automatic coupler on a car did not work, went between the cars to remedy the defect. While so engaged, one of the cars that had been pulled a short distance away, either of its own weight or moved by another engine, ran down upon him, crushing his hand in the coupling so severely that amputation followed. After a verdict for the plaintiff, the defendant moved to set aside the verdict and grant a new trial. The court in denying the motion, held that though the employee assumes the risk of defects arising even from the negligence of the employer, when he knows and appreciates the risk arising from such defects, nevertheless when an injury arises from the failure of the employer to equip his cars with workable automatic couplers, the employee does not assume the risk, even though he knows of such defect, since such a breach of duty on the part of the employer consti-

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III.

Defendant admits paragraph 3 of said amended complaint.

IV.

Defendant admits that the boiler referred to in paragraph 3 of said amended complaint was not provided with safety fusible plugs and that the injury referred to occurred between Tonga and Nippon, but defendant denies said paragraph 4 and each and every allegation therein contained except as herein expressly admitted.

V.

Defendant denies that it has any knowledge or information sufficient to enable it to form a belief as to the matters and things alleged in paragraph 5 of said amended complaint and on said ground denies said paragraph and each and every allegation therein contained.

VI.

Defendant denies that the plaintiff has been damaged by defendant in the sum of twenty thousand dollars ($20,000) or in any sum.

And for a further, separate and affirmative defense to the supposed cause of action set forth in said amended complaint, defendant alleges that the death of Vance H. Thoms, referred to in said complaint was contributed to by the negligence, imprudence and want of care of the said Vance H. Thoms in that he had allowed the water in the boiler of the locomotive operated by him to become too low, thus allowing the crown sheet confining said water to become overheated, thereby causing the explosion of said engine.

And for a further, separate and second affirmative defense to said supposed cause of action defendant alleges that the explosion referred to in the amended complaint herein was caused by risks and hazards which were incident

tutes a violation of the Safety Appliance Act and removes the defense of assumption of risk under the Federal Employers' Liability Act. Clark v. Erie R. Co., 230 Fed. 478 (1916).

The plaintiff, a switchman, had gone between two cars in order to effect a coupling, the automatic coupler having failed to work because the lock-pin was half broken off. When he was at the point of leaving his place of danger between the cars and after he had given the signal for the car to be backed up, he found that his foot was caught in the frog of a switch. He was unable to remove it in time, and as a result the front portion of the left foot was cut off and the right foot and ankle severely injured. From a judgment for the plaintiff, the defendant brought error. The court, in affirming the judgment, held that the injury would not have resulted but for the defective coupling, and as the maintenance of the appliance in that condition was a violation of the Safety Appliance Statute, the plaintiff could not be considered as assuming the risk under the Federal Employers' Liability Act. St. Louis Merchants' Bridge Terminal R. Co. v. Schuerman, 150 C. C. A. 203, 237 Fed. 1 (1916).

The plaintiff, a switchman, was ordered as one of the switching crew to cut out a certain car of the train which was out of order. The plaintiff, in performing such work, stood on the rear footboard of the switching engine, and while attempting to make the coupling between the engine and the car his foot was caught between the bumpers and was so severely crushed that eventually it had to be amputated. It was alleged that the injury arose from a defect in the footboard and defects in the coupling. From a judgment for the plaintiff, the

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to the occupation in which the said Vance H. Thoms was then and there engaged, and that said risks and hazards and the negligence of the defendant, if any, were known to and assumed by the said Vance H. Thoms at and prior to the time of the said explosion.

Wherefore having fully answered, defendant prays that it may be hence dismissed with judgment for its costs and disbursements herein, and that the plaintiff may take nothing by her complaint.

F. G. Dorety, being duly sworn, says: That he is the attorney for the Great Northern Railway Company, the defendant in the within entitled action; that he knows the contents of the within answer to amended complaint, and that he believes the same, and the whole thereof, to be true; that the said defendant is a corporation organized under the laws of the state of Minnesota; that no officer thereof resides or is within the state of Washington.

Reply.

Replying to the first and second affirmative defenses contained in the answer of the defendant herein, plaintiff denies each and every allegation therein contained.

Wherefore, plaintiff prays for judgment as in her complaint demanded.

MR. JUSTICE DAY delivered the opinion of the court.

Adaline Donaldson, as administratrix of the estate of Vance H. Thoms, deceased, brought suit in the superior court of Snohomish county, Washington, under the Federal Employers' Liability Act, to recover damages for injuries received which resulted in the death of Vance H. Thoms, by reason of a boiler explosion upon

defendant appealed. The court, in affirming the judgment, said: "The jury having found that the plaintiff was injured by a defective coupling, the defense of assumption of risk and contributory negligence were eliminated both under the federal and state law." Sears v. Atlantic Coast Line R. Co., 169 N. C. 446, 86 S. E. 176 (1915).

B. Improper use of coupler.

The plaintiff's decedent, a switchman, was upon the footboard of the engine just previous to the accident, and in attempting to draw the pin from the coupler to make a flying switch of a car pushed ahead of the engine, he fell from the footboard between the engine and the car and was killed. Both the engine and the car were equipped with automatic couplers, but a "flying switch" made by the employee standing on the footboard in front of the moving engine could not be accomplished without standing between the engine and the car, or without hanging to the end of the car by placing one foot in a stirrup and reaching some part of the body around between the two. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that there was a violation of the Safety Appliance Act and that no question of assumption of risk could consequently be involved under the Federal Employers' Liability Act. Christy v. Wabash R. Co., — Mo. App. —, 191 S. W. 241 (1917).

C. Temporary defect in coupler.

The plaintiff, a switchman, while assisting the crew with whom he was working in making up a freight train,

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one of defendant's engines upon which decedent was employed as an engineer.

The charges of negligence, in the amended complaint alleged to have resulted in the injury and death of the decedent, were: That the boiler on the engine was insufficient in that:

1. The button-heads of the crown-bolts of the boiler were excessively and unnecessarily large and consequently unduly exposed to the direct heat produced by the oil fuel used on the locomotive;

2. That the boiler was not provided with fusible safety plugs;

3. That scale was negligently allowed by defendant company, its officers and employees, to accumulate upon the crown-sheet in the boiler.

The answer of the company denied negligence, and specifically set up the defense of contributory negligence and assumed risk on the part of the deceased. In the trial court the plaintiff recovered a verdict and judgment, and the judgment was affirmed in the supreme court of the state of Washington. 89 Washington, 161.

The ground of reversal principally urged here is that the testimony did not warrant a recovery by the plaintiff, and when properly considered required an instruction to the jury to find a verdict in favor of the company.

went between the cars to fix an automatic coupler which failed to work. While so engaged, the cars were backed upon him without warning, his right wrist was caught and injured, and amputation about 5 inches below the elbow was necessary. From a verdict and judgment for the plaintiff in the sum of $6,525, the defendant appealed. The court, in affirming the judgment, said: "It seems to follow from the federal cases that a temporary defect and failure to work of an equipment required by the Safety Appliance Act creates a liability and subjects the defendant to the penalties and burdens imposed by that act, even though such failure arose from some defect unknown to the employer, which in the exercise of reasonable care he could not have ascertained and remedied. Under sections 3 and 4 of the Employers' Liability Act neither the defense of contributory negligence nor of assumed risk is available to appellant. An averment in the declaration of due care of the plaintiff is surplusage." Davidson v. Peoria & P. U. Ry. Co., 203 Ill. App. 498 (1916).

D. Effect of abandoning claim under act.

Basing his cause of action upon the Federal Employers' Liability and Safety Appliance Acts, plaintiff sued to recover damages resulting from injury alleged to have been occasioned by the negligence of the defendant while he was in its employ and engaged in interstate commerce. It appeared that plaintiff was the head brakeman of a local freight train crew engaged at the time of the accident in suit in making up an extra freight train to be taken out by another crew on a run in interstate commerce. The cars intended for the train were being placed on an east and west track, east of a switch con-

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An examination of the record discloses that there was testimony tending to support the allegations of negligence set forth in the amended complaint. That the engine upon which the deceased was working had been a coal-burning engine, but that at the time of the explosion the fuel used in its operation was, and for some time had been, oil. That the button-heads on the bolts of the crown-sheet at the top of the fire-box (this sheet also formed the bottom of the water compartment over the fire-box) were large ones when the engine was fired with coal, and were not changed with the change of fuel from coal to oil. That these button-heads because of their size became overheated when oil was used for fuel, resulting in the deterioration and weakening of the strength of their material, and from the consequent giving away of the button-heads, the crown-sheet came down and the explosion resulted. There is also testimony tending to show that there was an accumulation of scale and a want of use of fusible plugs.

On the part of the company there was testimony tending to meet and refute that introduced by the plaintiff, and a considerable amount of testimony was introduced tending to show that the water in the boiler was too low, thereby causing the explosion from the fault of the deceased engineer in allowing it to become so. There

necting a spur track which ran in a northeasterly direction. After placing some cars from the spur track on the passing track the engine returned to the spur track with several cars, some of which were to be left at the mill and the remainder brought out and coupled to those already selected for the train and standing on the passing track. Plaintiff accompanied these cars, and after cutting off those intended for the mill gave the engineer a signal to go ahead, the engine being headed west, and when the car approaching the switch came opposite the car on the passing track to which the coupling was to be made, plaintiff crossed over from the spur track to the passing track to adjust the coupler on the car standing there. Finding the knuckle of the coupler closed, he attempted to open it with the lever at the side of the car, but it did not work. He then tried to manipulate the knuckle with his hand but could get it only part way open, and closing it stepped out to the engineer's side, which was the north side of the track. As the last car coupled with the engine was then just clearing the switch, he gave the engineer a stop signal and walked west to the switch stand to set the switch so that the engine and cars might be backed to make a coupling. By the time he had walked a short intervening distance the engine had come to a stop with the rear car a few steps west of the switch. Intending them to adjust the coupler on the end of this car, plaintiff gave the engineer, who was watching him, a signal intended to indicate that he should not move the engine until a further signal was given, and crossing over to the south side of the track attempted to use the lifting pin to open the knuckle of the coupler. When the lever failed to work he sat behind the car, and was about to try to open the knuckle

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was testimony for the plaintiff to the effect that the water was not too low at the time of the explosion. The trial court submitted these issues to the jury, with the result that a verdict was found in favor of the plaintiff. The trial court held that there was evidence sufficient to sustain the verdict, and refused to disturb it. The supreme court of Washington affirmed the judgment. In this situation it is enough to say that it is not the province of this court to weigh conflicting evidence. The record shows testimony supporting the verdict, and that is as far as this court enters upon a consideration of that question.

Complaint is made that the trial court failed to give an instruction requested by the company as to assumption of risk, and as to the effect of the Federal Boiler Inspection Act.

Section 4 of the Federal Employers' Liability Act (35 Stat. 65) provides:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of

with his hand when he heard the cars ahead of him move. He at once turned to leave the track but was struck and knocked down by the car which was backed in disregard of his former signal, and his feet were caught under the wheels and crushed. At the close of the testimony plaintiff withdrew his claim under the Safety Appliance Act and the case was submitted to the jury upon the Federal Employers' Liability Act alone. There resulted a verdict and judgment for the plaintiff, which was affirmed by the state court. On the writ of error then sued out defendant contended in part that in view of the action of plaintiff in abandoning his claim under the Safety Appliance Act it was error for the trial court to give the following instruction: "You are instructed that, by accepting employment as a brakeman with the defendant, the plaintiff assumed the risk of such dangers as are ordinarily incident to the occupation he was engaged in, and if you find that his injury was occasioned by one of the incidents ordinarily attending the occupation upon which he was engaged, you should return a verdict for the defendant; but you are instructed in this connection that the plaintiff only assumed the risks that are ordinarily incident to the occupation in which he was engaged, and that he did not assume the risks that were attendant upon the negligence of a fellow-servant." In support of this contention it was argued by defendant that the abandonment of a claim as to the violation of the Safety Appliance Act necessarily withdrew all evidence tending to show that the couplers were defective, and in the absence of such evidence the proof established as a matter of law that plaintiff assumed the risk and the court should have directed a verdict in favor of the railroad. In affirming the judgment the supreme court passing upon points here raised spoke in

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any statute enacted for the safety of employees contributed to the injury or death of such employee."

That the Federal Boiler Inspection Act was enacted for the safety of employees is obvious. Section 2 of that act, 36 Stat. 913; 8 U. S. Comp. Stats. 1916, § 8631, provides:

"That from and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this Act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereto are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this Act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

Counsel for the company at the trial upon assumed risk requested the following charge:

"You are instructed that even where an employer, such as a

part as follows: "We think the proposition is plainly without merit. The testimony concerning the condition of the couplers was clearly admissible under the issues based on the Employers' Liability Act as explaining the occasion for Brown's being on the track, and as negativing negligence on his part. In so far as the contention applies that the withdrawal of the claim was a concession that the testimony relating to the couplers was false, we think the conclusion is wholly unwarranted. If we were to conjecture as to the reason for the abandonment of the claim under the Safety Appliance Act, we think it at least quite as probable that plaintiff's counsel were of opinion that, in a situation disclosed by the plaintiff's testimony, the Safety Appliance Act was inapplicable. In the court below, it would seem that the correctness of the general instruction as to the assumption of the risk which we have quoted as given by the trial court was challenged on a ground which has been abandoned because not here pressed. But it is said reversible error exists because the court below, in passing upon such objection, remarked that as the 'defendant's liability to plaintiff grows out of a violation of a statutory duty, arising under an act of Congress,' assumption of the risk was not a defense. This, it is said, was erroneous, first, because so far as the Safety Appliance Act was concerned, it was inapposite, as reliance upon that law by the plaintiff had been disclaimed, and second, because, under the facts, it was open to find the existence of assumption of the risk depending upon conditions of fact not involved in the Safety Appliance Act. But we fail to see the pertinency of this objection, as there is now no contention concerning the correctness of the charge as to assumption of the risk upon which the case was submitted to the jury for their verdict. At best,

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railroad company, is negligent in the construction or maintenance of its tools or equipment, such as a locomotive, yet an employee who accepts, or continues his employment, knowing of the existence of such defects or negligence, and knowing the danger therefrom, assumes the risk of the injury to himself from such defects and cannot recover if he is injured as a result of them. This would not be true in the present case, if the negligence or defects involved some violation of a United States statute, but there is no evidence of any violation of such a statute in this action, so that the rule which I have just given to you would apply in this case. Therefore, even if you find that the defendant company had been negligent in adopting an improper type of bolt, or in failing to install fusible plugs, or in some other particular in the construction or maintenance of this boiler, and even though you should also find that such negligence caused the explosion, still, the plaintiff cannot recover in this action, if you should also find that the deceased, V. H. Thoms, was familiar with the type of construction used, or the particular form of negligence involved, and knew the danger likely to arise therefrom, or if, in the exercise of a reasonable care, he should have known of these things prior to the time of his injury."

But the court charged upon this subject:

"You are instructed that the law provides that it shall be un-

therefore, the error asserted simply amounts to contending that because the court below may have inaccurately expressed in one respect its reasons for affirmance, that inaccuracy gives rise to the duty of reversing the judgment although no reversible error exists." St. Louis & S. F. R. Co. v. Brown, 241 U. S. 223, 60 L. Ed. 966, 36 Sup. Ct. 602 (1916), aff'g 45 Okla. 143, 144 Pac. 1075 (1915).

E. Defective grab iron.

The plaintiff, a conductor, in attempting to board his caboose while in motion failed to obtain a hold upon the rear grab iron, bolted to the side of the caboose, and fell so that his left arm lay across the adjacent rail of the track, with the result that it was practically severed between the elbow and wrist by the wheel of a defective car passing over it. The car in question was in need of repair, and, pursuant to orders from a superior, it had been coupled to the rear end of the caboose. The lights at the rear end of the caboose had been moved to the rear of the freight car, thus making it darker and more difficult to see in boarding the caboose. It was clear that but for the car being transported at the rear of the caboose the accident would never have happened. The plaintiff alleged that the injury was caused by the violation on the part of the defendant of the Safety Appliance Act in transporting a defective car, which ran over the plaintiff's arm, and in maintaining an improper grab iron on the caboose. From a judgment for the plaintiff, the defendant appealed. The

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lawful for any common carrier, as was the defendant, engaged in interstate commerce, to use any locomotive engine propelled by steam power, unless the boiler of the locomotive engine and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of said carrier in moving traffic, without unnecessary peril to life and limb; and that no employee shall be deemed to have assumed any risk of death by reason of any locomotive engine operated in violation of said law, and that no employee injured or killed by reason of a locomotive engine operated in violation of said law shall be held to have been guilty of contributory negligence.

"Therefore, if you shall believe, from a fair preponderance of all the evidence in the case, that the boiler of the locomotive engine No. 1902 or the appurtenances thereof were not in proper condition and safe to operate in the active service of the defendant in moving traffic without unnecessary peril to life or limb, by reason of the negligence of the defendant, in any one or more of the three respects alleged in the complaint, then and in that case Vance H. Thoms assumed no risk of death and was guilty of no contributory negligence, and the affirmative defenses must fail.

"However, if such boiler and appurtenances were in proper condition and safe for such use in moving traffic, but due to defend-

court, in affirming the judgment, held that where the injury was occasioned, as here, by the failure of the carrier to comply with the Safety Appliance Act, the employee was relieved alike from the rules of contributory negligence and assumption of risk. Erie R. Co. v. Schleenbaker, — C. C. A. —, 257 Fed. 667 (1919).

The plaintiff's decedent, while on top of one of defendant's cars pursuing his duty as a brakeman, fell to the ground and was so severely injured that his death ensued. His fall was the result of a grab iron at the top of the ladder which extended down the side of the car and to which he was holding, suddenly giving way. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, pointed out that the failure on the part of the defendant to have the grab iron absolutely secure was a violation of the Safety Appliance Act, and as such the deceased, though knowing of the defect, did not assume the risk, under that exception to the Federal Employers' Liability Act which provides that a servant does not assume the risk of injury caused by the violation of a statute enacted for the safety of employees. Cook v. Union Pac. R. Co., 178 Iowa 1030, 158 N. W. 521 (1916).

III. Defects in engine.

A. Depression in cab floor.

The plaintiff, a locomotive engineer, was compelled in the operation of his engine to reverse the lever applying the power, and for that purpose placed his right foot on a peg within the

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ant's negligence were defective in one or more of the respects alleged in the complaint and Vance H. Thoms had actual knowledge of such defect or defects, or such defects were so plainly observable that in the reasonable exercise of his faculties he should have known of such and may be presumed to have known thereof and the dangers that surrounded him, then Vance H. Thoms assumed the risks of injury and the plaintiff cannot recover in this action."

The charge requested is inconsistent with the provisions of § 4 of the Federal Employers' Liability Act and § 2 of the Boiler Inspection Act. As given it is enough to say that it is more favorable to the company than the law requires. See Chesapeake & Ohio Ry. Co. v. Proffitt, 241 U. S. 462, 468, 60 L. Ed. 1102.

The further contention is that the effect of this charge was to leave to the jury to determine the type of boiler construction, in respect to the use of the large button-heads which are alleged to have made the engine unsafe to operate. And it is contended that there is testimony tending to show that the use of either the large or small kind of button-heads was approved by the Federal Department of Boiler Inspection. Attention is directed to the testimony of an expert witness, offered by the defendant for the pur-

cab, his left foot on the floor, and both hands upon the lever. In order to move the lever, it was necessary for him to use considerable force, and in so doing his foot slipped in a depression which had been worn in the floor of the cab. The depression in question was from 1 to 2 feet in circumference, about 1 to 1½ inches deep, and due to the day being damp and rainy, water had collected in the hollow place. As a result of his foot slipping on the floor, the plaintiff was thrown to the floor and received the injuries in question. From a judgment for the defendant upon a verdict rendered upon an instruction that the plaintiff assumed the risk, if he knew and was familiar with the depression, the plaintiff appealed. The court, in reversing the judgment and ordering a new trial, held that the floor of the locomotive cab was an appurtenance to the boiler within the Boiler Inspection Act, Feb. 17, 1911, § 2 (U. S. Comp. Stat. § 8631) requiring boilers and their appurtenances to be kept in a safe condition, and since the defendant had violated this statute enacted for the safety of its employees, it could not assert the defense of asumption of risk under the Federal Employers' Liability Act. Brown v. Lehigh Valley R. Co., 108 N. Y. Misc. 384, 177 N. Y. Supp. 618 (1919).

B. Power brake lacking.

Hodgman v. Sandy River & R. L. R., — Me. —, 107 Atl. 30 (1919), was an action under the Federal Employers' Liability Act to recover damages for the fatal injuries sustained by the plaintiff's intestate when the engine which he was operating as an employee of the defendant was derailed on a curve. The circumstances under which the accident occurred were as follows: The derailment took place on a deep curve at the base of a sharp upgrade, immediately following a long downgrade stretch of track.

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pose of showing that low water was the cause of the explosion, in which he spoke of the use of the button-heads of the larger and also of the smaller or taperhead kind, and was asked whether the United States Government made certain requirements as to how boilers and engines should be constructed, to which he answered: "No. Not as long we have the proper factor of safety." * * * "They have a factor of safety, and the factor of safety is five on the shell of the boilers; that is, if we have a 200 pound pressure boiler it should stand up to a test of 1,000 pounds; five to one." Asked whether the government inspects engines and locomotives in general, he answered: "Yes, by the United States inspectors," and that there was a standard to which locomotives must be built in order to pass inspection. Asked as to the type of the crown-bolt permitted, he answered that either type is acceptable when properly applied. It is evident that this testimony, whatever might be its effect, is far from showing an approval by government inspectors of the use of the large type of button-head upon an oil-burning engine.

Nor can we agree with the contention of the plaintiff in error that so long as the large button-head had not been disapproved by

The decedent had come down this grade, working his steam all the way, and had entered the curve on the upgrade with steam still working and without applying the brakes. No sooner had the engine entered the curve than it "rolled up" and over, ditching itself and fatally injuring decedent. Plaintiff relied upon the admitted failure of defendant to have the engine in question equipped with a power brake as required by the Federal Safety Appliance Act, as providing both an act of negligence, proximately causing the accident, and a bar to any attempted defense of assumed risk. Defendant admitted that the case was governed by the Federal Employers' Liability Act, and that it was guilty of a technical violation of the Safety Appliance Act, but it contended that the reckless driving of the engine by decedent, while approaching and taking a curve, and not the violation of the Safety Appliance Act was the proximate cause of the accident. It contended that the absence of a power brake did not in fact contribute to cause the accident. The locomotive in question, like others designed for narrow gauge service, had the engine and tender built on one frame, instead of being built as separate units and coupled together. There were no power brakes on the drive wheels, but there were power brakes on each of the four tender wheels, as well as throughout the train. These were operated from the engine in the usual way. Prior to the accident the engine had been equipped with certain new mechanical devices for equalizing the distribution of weight on its springs; nevertheless, it was shown, the engine rolled and was ditched in taking curves. There was evidence tending to show that had the engine had power brakes, this would have tended to reduce the rocking of the engine on the curves and bad track. The court held, affirming the judgment or ver-

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the government inspector such fact is conclusive of the sufficiency of the type in use. We find nothing in the Boiler Inspection Act to warrant the conclusion that there is no liability for an unsafe locomotive, in view of the provisions of § 2 of the act, because some particular feature of construction, which has been found unsafe, has not been disapproved by the federal boiler inspector.

Other errors are assigned; so far as they are open here we have examined these assignments and find in none of them reason for the reversal of the judgment of the supreme court of Washington, and that judgment is

Affirmed.

dict for plaintiff for $6,650, that the use of the weight equalizing device, "an improvement in no way affecting the speed of an engine," was not a substantial compliance with the requirement of the Safety Appliance Act above mentioned; that the question whether the lack of a power brake contributed to cause the accident was rightly submitted to the jury, as was also the question whether, had such a brake been provided, decedent would have used it; and that the evidence supported the conclusion reached upon such issues.

O. L. C.

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THURSTON v. NORTHERN NAVIGATION CO.

[Supreme Court of Michigan, April 3, 1919.]

205 Mich. 278, 171 N. W. 423.

1. **Carriers — Injuries to passenger — Extraterminal liability — Presumption against—Special contract.**
The presumption against extraterminal liability of a carrier of passengers where the initial carrier sells a passenger a ticket entitling him to ride over the lines of the initial and connecting carrier, but without any stipulations as to liability for accidents, is not applicable where a claim is made upon a special contract for the entire trip.

2. **Carriers—Injuries to passenger—Extraterminal liability—Special contract—Sufficiency of evidence.**
In an action against a navigation company operating lake passenger steamships to recover for personal injuries sustained while riding in an automobile owned by a livery company on a side-trip furnished as part of the cruise, evidence held to establish a special contract by which the navigation company assumed responsibility for the entire trip, so as to render it liable for negligence of the livery company.

3. **Carriers—Passengers—Limitation of liability to carrier's own line—Validity.**
A carrier in selling a ticket beyond its own line may appropriately limit its liability to its own line, there being no obligation on its part to assume extraterminal liability.

4. **Carriers—Passengers—Contract for transportation—Evidence.**
Where a special contract for a lake steamship trip is made by a navigation company pursuant to which the latter agrees to furnish transportation for the round trip, including side trips, but a final coupon ticket is given in exchange, one of the coupons of which provides for a land trip by automobile furnished by a livery company, and contains a stipulation that the navigation company assumes no responsibility beyond its own line, but acts merely as agent, the coupon ticket is not the sole evidence of the contract, and it may be shown that the real contract was for transportation by the navigation company for the entire trip.

5. **Carriers—Passengers—Limitation of liability—Binding effect on passenger of conditions on ticket.**
In case of a full fare ticket a passenger is not bound by conditions thereon, limiting the common-law or contractual liability of the carrier, unless such conditions are called to the attention of the passenger, and are assented to by him.

CASE NOTE.

Liability of carrier for personal injury to or death of passenger on line of connecting carrier.

I. Ticket sold by railroad, 408-424.
- A. Providing for carriage over another railroad, 408-413.
  - 1. No interline relation shown, 408-409.
  - 2. Roads operated as one system, 410-413.
- B. Involving services of terminal company, 413-417.
- C. Including coupon for ferry passage, 417-421.
- D. Containing bus transfer coupon, 421-424.

II. Steamer ticket including trolley car coupon, 425-427.

Cross-references. Liability of carrier for damage to live stock due to defective or inadequate car accepted from connecting carrier, see 11 N. C. C. A. 483-492.

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Action against carrier for personal injuries to passenger. Judgment for plaintiff. Affirmed.

For appellant—Miller, Canfield, Paddock & Perry.

For appellee—R. E. Hofelich.

The following are the pleadings in the action:

First Count in Assumpsit.

The plaintiff says:

1. That at and prior to the time of making the promises and agreements hereinafter mentioned, the defendant was and now is a corporation organized and existing under and by virtue of the laws of the province of Ontario, Canada, and was and is a carrier of passengers for hire, and that it maintained a line of steamships plying on the Great Lakes between Detroit, Michigan, and Duluth, Minnesota, and intermediate ports, and for the pleasure and convenience of its passengers and in order to enhance the popularity of its line of steamships with the traveling public, provided for and advertised to the public that it furnished to its passengers a personally conducted drive about the boulevards of Duluth.

2. That at the time of said promises and agreements, and prior thereto, the plaintiff was the manager of a publication known as "Modern Methods," published by the Richmond & Backus Company, a Michigan corporation, of Detroit, Michigan, under the name and style of Modern Methods Publishing Company. That on, to wit, the 11th day of June, 1917, and on divers days thereafter, at the city of Detroit, the defendant, in consideration of the publication by said Richmond & Backus Company in said "Modern Methods" of certain advertisements for the defendant and the sum of $26.75 to be paid by the plaintiff to the defendant, then and there promised and agreed to and with the plaintiff to carry the plaintiff on the defendant's "Huron-Superior Cruise," so-called, and as a part of said cruise, among other things, to carry the plaintiff on one of the defendant's steamships from Detroit, Michigan, to Duluth, Minnesota, and return to Sarnia, Ontario, to give the plaintiff a 12-mile drive about the boulevards of Duluth in a vehicle to be furnished by the defendant, and to furnish the plaintiff with meals and a berth on the defendant's said steamship during said cruise, the same to commence on a day to be thereafter selected by the plaintiff and to be completed on the sixth day after the commencement thereof, and said defendant, in consideration of the premises then and there further promised and agreed to and with the plaintiff to provide safe means of conveyance and careful and competent servants for the transportation of the plaintiff on said cruise and at all times while she should be on the defendant's said steamship or in the vehicle to be provided by the defendant at Duluth to carry her safely and without injury to herself.

3. That the advertisements to be published by said Richmond & Backus Company for the defendant in said "Modern Methods" and said sum of $26.75 to be paid by the plaintiff to the defendant in consideration of said promises and agreements of the defendant as aforesaid, were duly published and paid by said Richmond & Backus Company and the plaintiff respectively, and that

I. Ticket sold by railroad.

A. Providing for carriage over another railroad.

1. No interline relation shown.

In an action by a husband and wife against two railroad companies, based, apparently, upon a breach of a contract theretofore entered into between the T railroad and the wife, for her transportation over its lines and those of the connecting H railroad, by negligence on the part of the H railroad, a judgment was recovered against

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thereafter, on to wit, the 11th day of August, 1917, at the city of Detroit, the plaintiff, in pursuance of said promises and agreements of the defendant, presented herself as a passenger on one of the defendant's steamships then and there about to set out on said "Huron-Superior Cruise" and was received and accepted by the defendant as such, and was carried by the defendant from said city of Detroit to the city of Duluth, arriving at said last mentioned city on to wit, the 14th day of August, 1917.

4. That the defendant, in violation of its said promises and agreements, failed to provide safe means of conveyance and careful and competent servants for the transportation of the plaintiff, and failed to carry her safely and without injury to herself. That on to wit, the 14th day of August, 1917, at the city of Duluth, while the plaintiff was, at the invitation and direction of the defendant, in the vehicle furnished by the defendant, in pursuance of its said agreement, for the purpose of carrying the plaintiff about the boulevards of Duluth and while the plaintiff was in the exercise of due care on her part, said vehicle was then and there, by reason of the defective nature thereof and the carelessness, negligence and incompetence of the defendant's servant in charge thereof, so negligently managed and driven that it came in collision with another vehicle and was violently overturned and wrecked, and the plaintiff was then and there thrown under the wreckage thereof. By means whereof her left hand was then and there greatly hurt, cut, bruised, wounded and lacerated and the bones thereof crushed and broken, and she was otherwise greatly hurt, cut, bruised and wounded in and about the head, body and limbs, and became and was sick, sore, lame and disordered and so remained and continued for a long space of time, to wit, until the date hereof, during which time she suffered great bodily pain and mental distress and was obliged to undergo medical and surgical treatment and became and was permanently deprived of the normal use of her said hand. And by means whereof also the plaintiff's clothing and other articles of personal use and adornment were torn, lost and ruined.

5. And by reason of the premises also, the plaintiff, instead of deriving great pleasure and enjoyment from her trip, as she had anticipated, lost all pleasure and enjoyment therein, and on the contrary, instead of returning by the same steamer on which she had come and completing her trip in six days, was obliged by reason of her said injuries to remain in a hospital at Duluth, undergoing medical and surgical treatment for the space of to wit, one week, and on her return trip was unable to derive any pleasure or enjoyment therefrom, but was obliged to remain in her stateroom instead of passing her time on deck in the open air and in the company of her fellow passengers. And said defendant, instead of providing the plaintiff with a comfortable and convenient room on said return trip suitable for a person in her injured and disabled condition, provided her with a small, uncomfortable and inconvenient stateroom, and, by reason of her said injuries and the inconvenient and uncomfortable room given her by the defendant and her inability to mingle with her fellow passengers and enjoy the outdoor air and other pleasures usually incident to a voyage on the lakes, she suffered great physical and mental distress, inconvenience and disappointment. And because of her injured and helpless condition, the plaintiff was obliged to have special assistance in dressing, etc., from the attendants on said steamer on said return trip, and was put to expense in the sum of to wit, $5 therefor, and was further obliged to obtain the services of a special attendant to meet her upon her arrival at Sarnia, Ontario, and to accompany her to her home at Ford City, Ontario, at an expense to the plaintiff of to wit, $10.

6. And by reason of the premises also, the plaintiff was for a space of

both defendants. Affirming this judgment the court held that since the undertaking of the T railroad was for the transportation of the plaintiff wife, not only over its own lines, but also over those of its codefendant, the demurrer of the T railroad was properly overruled, the initial carrier as well as the carrier actually guilty of negligence being liable for the consequences of the breach of its undertaking. Texas Cent. R. Co. v. Marrs, — Tex. Civ. App. —, 101 S. W. 1177 (1907).

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to wit, one month next after the date of said injury, thereby hindered and prevented from performing her regular and customary duties as manager of said "Modern Methods" and was also thereby hindered and prevented from performing certain additional duties as an accountant, which she had been regularly performing prior to said injury and from which she had derived a regular income of to wit, $50 per month; that her inability to perform said additional duties has continued up to the present time, and, by reason of the permanent character of her said injuries, will continue as long as she lives, and has resulted and will result in a permanent diminution of her income and earning power of to wit, $50 per month from the date of said injury.

7. And by reason of the premises also, the plaintiff was put to expense, costs and charges, in the whole amounting to a large sum, to wit, $275 in procuring medical and surgical attendance, nursing and hospital treatment and care, and was put to further expense, costs and charges in the sum of to wit, $25 in replacing, repairing and cleaning her clothing and other articles of personal use and adornment, torn, lost and ruined, as aforesaid, and in sending telegrams necessitated by her said injury.

8. And by reason of the premises also, the plaintiff was because of her injured and disabled condition obliged to leave her home at Ford City, Ontario, and take up a temporary residence in the city of Detroit in order to be able to attend to her usual and customary duties, and was put to expense, costs and charges in a large sum, to wit, $104, for board and lodging in said city of Detroit, and will in the future be put to further expense therefor in the sum of to wit, $500. And by reason of the premises also, the plaintiff was for a space of to wit, four weeks after resuming her usual and customary duties as aforesaid, unable by reason of her said injuries to ride in public street cars, and was put to expense, costs and charges in a large sum, to wit, $36 for taxicab hire in going to and from her place of business.

9. And by reason of the premises also, the plaintiff's said hand has become permanently crippled, deformed, and unsightly, and the plaintiff has permanently lost the normal use thereof, and has thereby been rendered permanently unable properly to attend to her personal wants and necessities, and by reason thereof has suffered and, as long as she lives, will continue to suffer great inconvenience, worry, embarrassment and humiliation. And by reason of the premises also the plaintiff has been in various other ways greatly injured.

10. Wherefore the plaintiff claims a judgment for the sum of $10,000.

Second Count in Assumpsit.

1. That at and prior to the time of making the promises and agreements hereinafter mentioned, the defendant was and now is a corporation organized and existing under and by virtue of the laws of the province of Ontario, Canada, and was and is a carrier of passengers for hire, and that it maintained a line of steamships plying on the Great Lakes between Detroit, Michigan, and Duluth, Minnesota, and intermediate ports, and for the pleasure and convenience of its passengers and in order to enhance the popularity of its line of steamships with the traveling public, provided for and advertised to the public that it furnished to its passengers a personally conducted drive about the boulevards of Duluth.

2. That at the time of said promises and agreements and prior thereto, the plaintiff was manager of a publication known as "Modern Methods," published by the Richmond & Backus Company, a Michigan corporation, of Detroit, Michigan, under the name and style of Modern Methods Publishing Company. That on to wit, the 1st day of June, 1917, the plaintiff, as manager of said publication, received a communication from the defendant setting forth

2. Roads operated as one system.

This was an action by a husband and wife to recover damages for personal injuries alleged to have been sustained by the wife in consequence of the derailment of a train operated by one of the defendants, upon which she was riding as a passenger. It appeared that the plaintiff wife had purchased, at the Union Station in E, a ticket from E to K, reading over the lines of the El Paso & S. W. R. Co., the El Paso & N. E. Ry. Co., the El

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in great detail the merits and advantages of its "Huron-Superior Cruise," so-called, and stating that said cruise included, among other things, a trip on one of the defendant's steamships from Detroit, Michigan, to Duluth, Minnesota, and return to Sarnia, Ontario, with meals and berth on said steamship, and a personally conducted 12-mile drive according to said communication, had been arranged for and would be provided by the defendant for the pleasure and convenience of its passengers on said cruise, and stating further that the duration of said cruise was six days from the commencement thereof. That said communication contained an invitation to the plaintiff and her associates to take said cruise and a proposal that if certain advertising matter of the defendant therein mentioned were published in said "Modern Methods," the defendant would accept such advertising in half payment of the cost of said cruise, and would accept the other half, to wit, $26.75 for each person taking said cruise in pursuance of said offer, in cash, and stated further that said proposal could be accepted on behalf of the plaintiff or any member of her family, or of the business organization of which she was a member. That on to wit, the 11th day of June, 1917, the plaintiff, as manager of said "Modern Methods" duly accepted said offer in behalf of herself and others, and thereupon the defendant, in consideration of the premises, promised and agreed to and with the plaintiff that it would provide safe means of conveyance and careful and competent servants for the transportation of the plaintiff on said cruise, and that at all times while the plaintiff should be on the defendant's steamship or in the vehicle to be provided by the defendant for said boulevard drive at Duluth, the defendant would carry her safely and without injury to herself.

3. That said advertising matter of the defendant was duly published in said "Modern Methods" and said sum of $26.75 was duly paid by the plaintiff to the defendant in accordance with said agreement, and that thereafter on to wit, the 11th day of August, 1917, at the city of Detroit, the plaintiff, in pursuance of said promises and agreements of the defendant, presented herself as a passenger on one of the defendant's steamships then and there about to set out on said "Huron-Superior Cruise" and was received and accepted by the defendant as such, and was carried by the defendant from said city of Detroit to the city of Duluth, arriving at said last mentioned city on to wit, the 14th day of August, 1917.

4. That the defendant, in violation of its said promises and agreements, failed to provide safe means of conveyance and careful and competent servants for the transportation of the plaintiff and failed to carry her safely and without injury to herself. That on to wit, the 14th day of August, 1917, at the city of Duluth, while the plaintiff was, at the invitation and direction of the defendant, in the vehicle furnished by the defendant, in pursuance of its said agreement, for the purpose of carrying the plaintiff about the boulevards of Duluth, and while the plaintiff was in the exercise of due care on her part, said vehicle was then and there, by reason of the defective nature thereof and the carelessness, negligence and incompetence of the defendant's servant in charge thereof, so negligently managed and driven that it came in collision with another vehicle and was violently overturned and wrecked and the plaintiff was then and there thrown under the wreckage thereof. By means whereof her left hand was then and there greatly hurt, cut, bruised, wounded and lacerated and the bones thereof crushed and broken, and she was otherwise greatly hurt, cut, bruised and wounded in and about the head, body and limbs, and became and was sick, sore, lame and disordered and so remained and continued for a long space of time, to wit, until the date hereof, during which time she suffered great bodily pain and mental distress and was obliged to undergo medical and surgical treatment and became and was permanently de-

Paso & R. I. R. Co. and the Chicago, R. I. & P. Ry. Co.; that this ticket was sold by a representative of the first-named carrier, acting for itself and as agent of the other carriers; that the form of the ticket was a contract in the name of the El Paso & S. W. system (a name under which the three first-named carriers were at the time operating), to which coupons, representing the right to transportation over the lines of the several constituent carriers, were attached. The present suit was against the three

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prived of the normal use of her said hand. And by means whereof also the plaintiff's clothing and other articles of personal use and adornment were torn, lost and ruined.

5. And by reason of the premises also, the plaintiff, instead of deriving great pleasure and enjoyment from her trip, as she had anticipated, lost all pleasure and enjoyment therein, and on the contrary, instead of returning by the same steamer on which she had come and completing her trip in six days, was obliged by reason of her said injuries to remain in a hospital at Duluth, undergoing medical and surgical treatment for the space of to wit, one week, and on her return trip was unable to derive any pleasure or enjoyment therefrom, but was obliged to remain in her stateroom instead of passing her time on deck in the open air and in the company of her fellow passengers. And said defendant, instead of providing the plaintiff with a comfortable and convenient room on said return trip suitable for a person in her injured and disabled condition, provided her with a small, uncomfortable and inconvenient stateroom, and, by reason of her said injuries and the inconvenient and uncomfortable room given her by the defendant and her inability to mingle with her fellow passengers and enjoy the outdoor air and other pleasures usually incident to a voyage on the lakes, she suffered great physical and mental distress, inconvenience and disappointment. And because of her injured and helpless condition, the plaintiff was obliged to have special assistance in dressing, etc., from the attendants on said steamer on said return trip and was put to expense in the sum of to wit, $5 therefor, and was further obliged to obtain the services of a special attendant to meet her upon her arrival at Sarnia, Ontario, and to accompany her to her home at Ford City, Ontario, at an expense to the plaintiff of to wit, $10.

6. And by reason of the premises, also, the plaintiff was for a space of to wit, one month next after the date of said injury, thereby hindered and prevented from performing her regular and customary duties as manager of said "Modern Methods," and was also thereby hindered and prevented from performing certain additional duties as an accountant, which she had been regularly performing prior to said injury and from which she had derived a regular income of to wit, $50 per month; that her inability to perform said additional duties has continued up to the present time, and, by reason of the permanent character of her said injuries, will continue as long as she lives, and has resulted and will result in a permanent diminution of her income and earning power of to wit, $50 per month from the date of said injury.

7. And by reason of the premises also, the plaintiff was put to expense, costs and charges, in the whole amounting to a large sum, to wit, $275 in procuring medical and surgical attendance, nursing and hospital treatment and care, and was put to further expense, costs and charges in the sum of to wit, $25 in replacing, repairing and cleaning her clothing and other articles of personal use and adornment, torn, lost and ruined, as aforesaid, and in sending telegrams necessitated by her said injury.

8. And by reason of the premises also, the plaintiff was because of her injured and disabled condition obliged to leave her home at Ford City, Ontario, and take up a temporary residence in the city of Detroit in order to be able to attend to her usual and customary duties, and was put to expense, costs and charges in a large sum, to wit, $104 for board and lodging in said city of Detroit, and will in the future be put to further expense therefor in the sum of to wit, $500. And by reason of the premises also, the plaintiff was for a space of to wit, four weeks after resuming her usual and customary duties as aforesaid, unable by reason of her said injuries to ride in public street cars, and was

railroad companies included within the El Paso & S. W. system only, and the accident in which it was charged that the plaintiff wife was injured occurred on the lines of the second connecting carrier, the El Paso & R. I. R. Co. Judgment was entered upon a general verdict for the plaintiffs for $3,585, and from such judgment all of the defendants appealed, assigning numerous errors. Finding none of these meritorious, the court affirmed the judgment. In the course of the opinion the court said, with regard to

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put to expense, costs and charges in a large sum, to wit, $36 for taxicab hire in going to and from her place of business.

9. And by reason of the premises also, the plaintiff's said hand has become permanently crippled, deformed and unsightly, and the plaintiff has permanently lost the normal use thereof, and has thereby been rendered permanently unable properly to attend to her personal wants and necessities and by reason thereof has suffered, and, as long as she lives, will continue to suffer great inconvenience, worry, embarrassment and humiliation. And by reason of the premises also the plaintiff has been in various other ways greatly injured.

10. Wherefore the plaintiff claims a judgment for the sum of $10,000.

Count in Trespass on the Case.

The plaintiff says:

1. That at and prior to the time of the promises and agreements hereinafter mentioned and the acts hereinafter complained of, the defendant was and now is a corporation organized and existing under and by virtue of the laws of the province of Ontario, Canada, and was and is a carrier of passengers for hire, and maintained a line of steamships plying on the Great Lakes between Detroit, Michigan, and Duluth, Minnesota, and intermediate ports, and for the pleasure and convenience of its passengers and in order to enhance the popularity of its line of steamships with the traveling public, provided for and advertised to the public that it furnished to its passengers a personally conducted drive about the boulevards of Duluth.

2. That on to wit, the 11th day of June, 1917, and on divers days thereafter, at the city of Detroit, the defendant, in consideration of the publication of certain advertisements for it by the Richmond & Backus Company, a Michigan corporation, of Detroit, Michigan, and the sum of $26.75 to be paid to it by the plaintiff, then and there promised and agreed to and with the plaintiff to carry the plaintiff on the defendant's "Huron-Superior Cruise," so-called, and as a part of said cruise, among other things, to carry the plaintiff on one of the defendant steamships from Detroit, Michigan, to Duluth, Minnesota, and return to Sarnia, Ontario, to give the plaintiff a 12-mile drive about the boulevards of Duluth in a vehicle to be furnished by the defendant, and to furnish the plaintiff with meals and a berth on the defendant's said steamship during said cruise, the same to commence on a day to be thereafter selected by the plaintiff and to be completed on the sixth day after the commencement thereof.

3. That said advertisements were duly published by said Richmond & Backus Company for the defendant and said sum of $26.75 was duly paid by the plaintiff to the defendant, and thereafter on to wit, the 11th day of August, 1917, at the city of Detroit, the plaintiff, in pursuance of said promises and agreements of the defendant, presented herself as a passenger on one of the defendant's steamships then and there about to set out on said "Huron-Superior Cruise," and was received and accepted by the defendant as such and was carried by the defendant from said city of Detroit to the city of Duluth, arriving at said last mentioned city on to wit, the 14th day of August, 1917.

4. That it then and there became the duty of the defendant to provide safe means and conveyance and careful and competent servants for the transportation of the plaintiff on said cruise and at all times while she should be on the defendant's said steamship or in the vehicle to be provided by the defendant at Duluth to carry her safely and without injury to herself, but that the defendant, in violation of its said duty, failed to provide safe means of conveyance and careful and competent servants for the transportation of the plaintiff and failed to carry her safely and without injury to herself, but on

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the point covered by this note, that the charge of the court, which "assumed the liability of all the defendants for the negligence of any one of them resulting in the injury of the passenger while traveling on any of said lines on said ticket," was correct. El Paso & N. E. Ry. Co. v. Landon, — Tex. Civ. App. —, 124 S. W. 744 (1910).

B. Involving services of terminal company.

Plaintiff and a large excursion

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the contrary, provided unsafe means of conveyance and careless and incompetent servants for the transportation of the plaintiff and caused her to be carried in a careless and negligent manner with resulting injury to herself, as hereinafter more particularly set forth. That on to wit, the 14th day of August, 1917, at the city of Duluth, while the plaintiff was, at the invitation and direction of the defendant, in the vehicle furnished by the defendant, in pursuance of its said agreement, for the purpose of carrying the plaintiff about the boulevards of Duluth, and while the plaintiff was in the exercise of due care on her part, said vehicle was then and there, by reason of the defective nature thereof and the carelessness, negligence and incompetence of the defendant's servant in charge thereof, so negligently managed and driven that it came in collision with another vehicle and was violently overturned and wrecked, and the plaintiff was then and there thrown under the wreckage thereof. By means whereof her left hand was then and there greatly hurt, cut, bruised, wounded and lacerated and the bones thereof crushed and broken, and she was otherwise greatly hurt, cut, bruised and wounded in and about the head, body and limbs, and became and was sick, sore, lame and disordered and so remained and continued for a long space of time, to wit, until the date hereof, during which time she suffered great bodily pain and mental distress and was obliged to undergo medical and surgical treatment. And by means whereof also the plaintiff's clothing and other articles of personal use and adornment were torn, lost and ruined.

5. And by reason of the premises also, the plaintiff, instead of deriving great pleasure and enjoyment from her trip, as she had anticipated, lost all pleasure and enjoyment therein, and on the contrary, instead of returning by the same steamer on which she had come and completing her trip in six days, was obliged by reason of her said injuries to remain in a hospital at Duluth, undergoing medical and surgical treatment for the space of to wit, one week, and on her return trip was unable to derive any pleasure or enjoyment therefrom, but was obliged to remain in her stateroom instead of passing her time on deck in the open air and in the company of her fellow passengers. And said defendant, instead of providing the plaintiff with a comfortable and convenient room on said return trip suitable for a person in her injured and disabled condition, provided her with a small, uncomfortable and inconvenient stateroom, and, by reason of her said injuries and the inconvenient and uncomfortable room given by the defendant and her inability to mingle with her fellow passengers and enjoy the outdoor air and other pleasures usually incident to a voyage on the lakes, she suffered great physical and mental distress, inconvenience and disappointment. And because of her injured and helpless condition, the plaintiff was obliged to have special assistance in dressing, etc., from the attendants on said steamer on said return trip and was put to expense in the sum of to wit, $5 therefor, and was further obliged to obtain the services of a special attendant to meet her upon her arrival at Sarnia, Ontario, and to accompany her to her home at Ford City, Ontario, at an expense to the plaintiff of to wit, $10.

6. And by reason of the premises also, the plaintiff was for a space of to wit, one month next after the date of said injury, thereby wholly hindered and prevented from attending to her regular and customary business, and was also thereby rendered permanently incapable of performing certain duties, which she had been regularly performing prior to said injury, and from which she had derived a regular income of to wit, $50 per month; that her inability to perform said duties has continued up to the present time, and, by reason of the permanent character of her said injuries, will continue as long as she lives, and

party left on a special train of defendant company for W, and arrived at the terminal station of that city. This terminal was under the exclusive control of a terminal company. The defendant company's lines ended at the receiving tracks of the terminal company, and after passing that point the cars, engines and employees were under the exclusive control of the terminal company. The return train was advertised to leave the terminal at 7:10 p. m., and signs of "Express to Reading only" were exhibited at a

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has resulted and will result in a permanent diminution of her income and earning power of to wit, $50 per month from the date of said injury.

7. And by reason of the premises also, the plaintiff was put to expense, costs and charges, in the whole amounting to a large sum, to wit, $275 in procuring medical and surgical attendance, nursing and hospital treatment and care, and was put to further expense, costs and charges in the sum of to wit, $25 in replacing, repairing and cleaning her clothing and other articles of personal use and adornment, torn, lost and ruined, as aforesaid, and in sending telegrams necessitated by her said injury.

8. And by reason of the premises also, the plaintiff was because of her injured and disabled condition obliged to leave her home at Ford City, Ontario, and take up a temporary residence in the city of Detroit in order to be able to attend to her usual and customary business, and was put to expense, costs and charges in a large sum, to wit, $104 for board and lodging in said city of Detroit, and will in the future be put to further expense therefor in the sum of to wit, $500. And by reason of the premises also, the plaintiff was for a space of to wit, four weeks after resuming her usual and customary business as aforesaid, unable by reason of her said injuries to ride in public street cars and was put to expense, costs and charges in a large sum, to wit, $36 for taxicab hire in going to and from her place of business.

9. And by reason of the premises also, the plaintiff's said hand has become permanently crippled, deformed and unsightly and the plaintiff has permanently lost the normal use thereof, and has thereby been rendered permanently unable properly to attend to her personal wants and necessities, and by reason thereof has suffered, and as long as she lives, will continue to suffer great inconvenience, worry, embarrassment and humiliation. And by reason of the premises also the plaintiff has been in various other ways greatly injured.

10. Wherefore the plaintiff claims a judgment for the sum of $10,000.

Notice Under the General Issue.

Dear Sir:

Take notice that at the trial of the above entitled cause, under the general issue pleaded, defendant will show that at the time the plaintiff sustained the injuries (if any were sustained) alleged and set out in the declaration, she was not a passenger of the defendant, but on the contrary, was the passenger of the "Board of Trade Livery," of Duluth, Minnesota, riding in a conveyance belonging to, and under the control of the said "Board of Trade Livery," and the defendant company had no interest in or control over the operations of the said conveyance, all of which was well known to plaintiff.

Dated at Port Huron, Michigan, this 4th day of March, A. D. 1918.

STONE, J. This is an action for damages for personal injuries

gateway entrance. A large number of persons had aggregated, and after some delay the sign was shifted from one gate to another, whereupon the crowd surged in a body to the sign at the new location. In the crush plaintiff was pushed against a metal guard and severely injured. The court, reversing the judgment for the plaintiff for $936, said: "In every case called to our attention in which the carrier has been held liable, it has either direct or implied control over the agencies which produced the plain-

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to plaintiff. The plaintiff was injured at Duluth, Minnesota, on August 14, 1917, while on a cruise, so-called, given by the defendant. At the time of the injury she was riding in an automobile owned by the Board of Trade Livery Company, of Duluth, the automobile ride being given as a part of the cruise.

The plaintiff was the editor and sole manager of a monthly publication known as "Modern Methods," published by the Richmond & Backus Company of Detroit, a corporation, under the name of Modern Methods Publishing Company.

The defendant operates a line of steamers between Windsor, Ontario; Detroit; Sarnia, Ontario, and Duluth, and intermediate ports. About June 1, 1917, there came into the hands of the plaintiff, as such manager, a letter from the advertising manager of the defendant, which, omitting immaterial portions, was as follows:

"MODERN METHODS,
"Detroit, Mich.

"Gentlemen: We want to extend to you the opportunity of taking a six-day, round trip Great Lakes Voyage this summer, paying for one-half of the entire cost of the trip with advertising in your publication.

"The trip is the 1,600-mile Huron-Superior Cruise, starting at either Detroit, Sarnia or Duluth. * * * The entire cost is $53.50 from Detroit or $50.00 from Sarnia, including transportation, meals, berth, side trips—everything.

"The enclosed 'proof' shows you our double column, seven-inch advertisement. If you will run this advertisement in your publication enough times to equal the cost of transportation on the trip—or, in other words, one-half of the entire cost—we will accept the other half, $26.75 or $25.00 in cash as payment for meals, berth, etc. You may accept this offer for yourself, or some member of your family or organization. In case you wish more than one ticket, you should figure on allowing us enough advertising to equal the amount of the transportation. For instance, if you desire two tickets from Detroit to Duluth, you should allow us $53.50 in advertising, and the cruise for two will cost you $53.50 in cash.

"This Huron-Superior Cruise is truthfully called the Greatest Fresh Water Voyage in the world. * * * We could never begin to explain its wonders in this limited space, so we are sending under separate cover a folder, including time table, which will tell you all about it. Please read the enclosed card carefully. Then sign and mail it, being sure to fill out all blank spaces. * * * When we receive the card we will consider the agreement made between us. * * * Come along this year and * * * bring someone in your family or organization with you."

The "proof" referred to in the foregoing letter and enclosed

tiff's injuries. It is bound to use such means as are reasonably necessary to prevent injury to individuals from the conduct and presence of unusual crowds in passing to and from its trains, but the impossible is not required of such companies. And when it is apparent, as it is by this record, that the defendant company had no control or right of control over an unruly crowd that was not on its property, or any property over which it had a contract right of control, the plaintiff cannot recover, for the rea-

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therewith, was an advertisement headed "Northern Navigation Cruises," and contained, among other things, the following:

"1,600-Mile, Six-Day Detroit-Duluth Cruise—Between Detroit, Sarnia, S. S. Marie, Port Arthur, Ft. William and Duluth. Excellent meals, comfortable staterooms, side trips—all included in your ticket. No extras."

The folder referred to in the letter was received by the plaintiff and read by her. She also secured an additional folder and took it home with her. This folder contained a detailed description of the Detroit-Duluth trip with the following references to the Boulevard drive in Duluth:

"To enhance your pleasure, we have added personally conducted side trips, such as visits to Falls, Boulevard Drive, fishing excursions and basket picnics to quaint spots.

"So that none of the most wonderful things may be missed, arrangements have been made by the Northern Navigation Company for a personally conducted trip about the Boulevards, and interesting places of Duluth—a most pleasing and delightful diversion."

After the descriptive portion of the folder and in the portion giving rates of fare, time tables, etc., appears the following:

"NORTHERN NAVIGATION CONTINUOUS CRUISES."

Personally Conducted Tours of the Great Lakes, with Side Trips, Meals, Berths, Afternoon Teas, etc., all included in the Tickets.

"Cruise No. 1. Detroit, Mich., or Sarnia, Ont., to Duluth, Minn., and return. * * * This six-day cruise includes meals, berth, trip to Kakabeka Falls at Port Arthur, drive around the boulevards at Duluth, returning to Detroit six days after embarking. Price of entire cruise (continuous passage) $53.50."

The minimum round trip fare, including meals and berth, is shown by the table of fares to be $53.50. Near the end of the folder is a list of the connecting carriers at the various ports. The Board of Trade Livery Company is not included in this list of connecting carriers, nor is it specifically mentioned anywhere in the folder.

After discussing the trip with members of her family, the plaintiff filled out and returned the card enclosed with, and referred to in, the letter. The material portions of this card read as follows:

son that it could not reasonably have anticipated or guarded against an unexpected movement of an unruly assemblage of excursionists on the property of another company." Bright v. Pennsylvania R. Co., 69 Pa. Super. Ct. 188 (1918).

C. Including coupon for ferry passage.

The plaintiff purchased at the station of the defendant company in G a ticket on which was printed: "West Jersey & Seashore Railroad Company. Good for one passage from Gloucester

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"I accept your proposition as outlined in your letter of June 1st. * * * Please issue ticket (tickets) to Mr. and Mrs. John Ferguson, Miss L. E. Thurston (Editor) and Mrs. J. O. Thurston (Mother). I will arrange the date of sailing and inform you whether I wish to start from Detroit or Duluth when you ask me for this information."

The defendant's advertisements were run in the July and August issues of "Modern Methods," and about July 11th the plaintiff received a letter, enclosing transportation tickets, so-called, the material portions of which are as follows:

"MODERN METHODS,
"Detroit, Michigan.
"Attention: Mr. L. E. Thurston.

"Gentlemen: You will find enclosed transportation tickets for Miss L. E. Thurston * * * all of which will apply on the Northern Navigation exchange contract which you have with us. If you will take these tickets to the office of Mr. Leidich, 69 Fort street, west, he will show you a chart of the boat, so that you may reserve just the accommodation you desire, and these transportation tickets enclosed will apply on your tickets to the values indicated on each ticket." * * *

Enclosed with this letter were transportation tickets for the several persons named in the letter. The material portion of the ticket issued to the plaintiff was as follows:

"Northern Navigation Company, Ltd. Duplicate Advertising Order. Good for One First Class Passage, Meals and Berth Extra. From Detroit to Duluth. For L. E. Thurston account of 'Modern Methods.' * * * Under no circumstances must this ticket be sold or transferred. * * * It will not be accepted for passage unless presented by the person named hereon, whose signature is reproduced on back hereof before presentation for passage. Meals and berth to be paid for in cash at one-half of regular fare for any trip. To be signed in ink before presenting for passage. Side trips which are a part of regular cruise are included in this ticket. If presented by any other person than the one whose name is shown hereon, ticket will be forfeited and purser will collect regular fare."

After the foregoing was a blank for the holder's signature. This ticket was signed by Miss Thurston, and was taken by her to the office of Mr. Leidich, the defendant's agent, where she made her reservation and paid the balance of the cost of the trip in cash. At the time of surrendering the ticket and paying the balance of the money, she received another ticket in booklet form containing seven coupons for the several portions of the trip. The first three coupons were for use on the defendant's boats and did

to Philadelphia, Market Street Wharf." The method of transportation was by rail from G to defendant's station in Camden, thence by ferry across the Delaware river to Market Street Wharf, P. The ticket was taken up by the conductor on the train. When the ferry boat reached the P side of the river a tugboat passed in front of its bow, and in order to avert a collision the ferry was obliged to turn its bow slightly, this resulting in a jar with the piling and consequent injury of the plaintiff.

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not purport to be anything more than tokens evidencing the passenger's right to transportation and accommodations. The fifth coupon was for the Boulevard drive at Duluth and was in the following form:

"Issued by Northern Navigation Company (Limited). Board of Trade Livery. Boulevard Drive at Duluth. On Conditions named in contract. First Class—Not good if detached from contract bearing signature. Duluth, Minn. & Return."

On the inside of the back cover of the ticket were certain conditions in fine print, among which was the following:

"2nd. In selling this ticket for passage over other transportation companies' lines, this company acts only as agent, and assumes no responsibility beyond its own line."

Below the conditions were the words, "I agree to the above," with a blank space marked "Signature," and another marked "Witness." The plaintiff testified that these conditions were not called to her attention at the time the ticket was issued to her; that she did not sign the same; that she was not asked to do so, and that she had no knowledge of their existence. This testimony was not contradicted, and the defendant did not produce the unused portion of the ticket, which had been surrendered by the plaintiff. She had the ticket in her possession for about two weeks before sailing, but according to her testimony she made little or no examination of it, but put it away in a safe place and did not get it out until the morning she started away. When the ticket was called for, she handed it to the purser, or other officer, who took out the necessary coupons and returned it to her, and she put it in her bag.

The plaintiff commenced her trip on August 11th, and was injured on August 14, 1917, while taking the Boulevard drive, called for by her ticket, in a vehicle furnished by the Board of Trade Livery Company, a Minnesota corporation, under an arrangement between the latter and the defendant. This arrangement between the two companies, which are separate corporations having no identity of ownership or management, appears to have been oral,

Defendant's contention was that the ticket purchased by plaintiff did not render defendant liable for the negligence of a connecting carrier, and as the evidence failed to prove that defendant operated the ferry the verdict should be for defendant. Affirming a judgment for the plaintiff for $8,000, the court held: "The ticket purchased by the plaintiff was a single ticket for the whole journey, and there was nothing on its face to indicate that any part of the transportation was to be by means of another

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and was made at the direction of the defendant's general passenger agent, who testified that the cruise was gotten up in as attractive a manner as possible, in order to procure as many tourists as possible, and that the side trips, including the Boulevard drive, were for the purpose of adding to the attractiveness of the cruise. The defendant paid the livery company seventy-five cents for each of the former's passengers carried by the latter. The full name of the Board of Trade Livery Company does not appear anywhere in any of the correspondence, or folder, or the tickets issued to the plaintiff; and the only place where the words "Board of Trade Livery" appear is on the coupon in the ticket, exhibit 7. It further appeared that the plaintiff had twice before taken this same trip, using the same kind of ticket.

At the time of the injury said automobile was being driven by an employee of said Board of Trade Livery Company, nor was there an employee of defendant in the machine. This livery company conducted a general taxi-cab, transfer and baggage business in Duluth.

At the close of the plaintiff's evidence, defendant moved for a directed verdict, on the ground that the plaintiff's proofs show that at the time of the injury alleged in the declaration the plaintiff was not a passenger of the Northern Navigation Company, but was a passenger of the Board of Trade Livery Company; and that she was such a passenger of the Board of Trade Livery appears on the face of the coupon in the ticket entitling her to the Boulevard drive at Duluth; and, further, defendant is not responsible for the injuries received by the plaintiff while taking this Boulevard drive over the line of the Board of Trade Livery by virtue of the provision in the contract of carriage, the second condition being:

> "In selling this ticket for passage over other transportation companies' lines, this company is acting only as agent, and assumes no responsibility beyond its own line,"

—which ticket and contract were accepted by the plaintiff and kept in her possession for approximately two weeks before starting the voyage, and after the commencement of the voyage for three days before taking the Boulevard drive.

carrier. It imported prima facie that the defendant owned or operated all the means of transportation between the points named on the ticket, and no question of the liability of a connecting carrier arose in the case. The plaintiff was a passenger injured through the means of transportation, and she might have rested her case on the proof of these facts." It was not error, the court thus held, to refuse to direct a verdict for the defendant on the ground that there was no proof that the defendant was op-

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This motion was denied by the court, and was renewed at the close of all the testimony, with the additional reason that all the counts of the plaintiff's declaration rely solely upon the contract for transportation made with "Modern Methods,"—a trade name under which the Richmond & Backus Company trade; and that the plaintiff cannot rely upon this contract of transportation because she was not a party to it. The court reserved its decision upon this last motion. Upon the trial the plaintiff recovered a verdict of $1,700.

There was made subsequent a motion for judgment for the defendant non obstante veredicto. This motion was denied, defendant duly excepting, and a judgment upon the verdict was entered for the plaintiff. The defendant has brought error, and the only assignments of error are on the refusal of the court to direct a verdict for the defendant, and to the refusal to enter judgment non obstante veredicto.

The only question upon this record is whether there was any evidence from which the jury might find that the defendant company contracted as principal, to furnish the plaintiff with the Boulevard drive. The legal questions raised and discussed by the appellant are: That it appearing that the accident occurred off defendant's own line, it is not liable.

First. That the defendant, presumptively, is not liable.
Second. That this presumption is not rebutted, and therefore there is no extraterminal liability.
Third. That the ticket (exhibit 7) is the contract, and that the plaintiff is bound by the limitation against extraterminal liability, in the ticket.
Fourth. That the statements in the defendant's folder and in the correspondence between it and "Modern Methods," are no part of the plaintiff's contract, plaintiff not being a party thereto.

1. Upon the first proposition appellant quoted from 10 Corp. Juris, p. 818, the following language:

"Rule of No Extra Terminal Liability. By the weight of authority, in the absence of a special contract for through transportation, the sale by a carrier of an ordinary coupon ticket for transportation over its own, and an independent connecting line, does not give rise to a contract for through transportation, but the initial carrier acts as principal merely with reference to its own line, and as agent of the connecting carrier in contracting for transportation over

erating the ferry. Prethrow v. West Jersey & S. R. Co., 214 Pa. 112, 112 Am. St. Rep. 736, 63 Atl. 415 (1906).

D. Containing bus transfer coupon.

Plaintiff's wife purchased a ticket from the A railway for one continuous trip from B to P over the A, B and C railways. There was attached to the ticket a coupon entitling her to a transfer from the station of the B railroad to that of the C line. Alighting from the train at this station, she inquired of the B railroad's agents

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the connecting line; and the right of the purchaser and the responsibility of the different companies are the same as though separate tickets had been purchased by him from each, and each is responsible only for the acts of its own agents and for injury suffered on its own line, or for the fault or negligence of its employees while running its cars on the connecting line. In such a case the initial carrier discharges its duty when it delivers the passengers at the end of its own line ready to continue the transportation on the connecting line, and it will not be liable for any failure of the connecting carrier to perform its independent contract."

Also, counsel cite Dresser v. Railway Co., 53 C. C. A. 559, 116 Fed. 281; Chicago, etc., R. Co. v. Mulford, 162 Ill. 522, 44 N. E. 861, 35 L. R. A. 599; and Pennsylvania R. Co. v. Jones, 155 U. S. 333, 39 L. Ed. 176, 15 Sup. Ct. 136. We have examined these authorities, and we think they are to the effect that in the absence of any special contract, the mere act of selling tickets of other transportation companies does not make the selling company liable as principal. But this, in our opinion, does not fully meet the question before us. At the close of the section in Corpus Juris, from which appellant's counsel quoted, is the following:

"It has been held, however, that where the initial carrier sells a passenger a ticket entitling him to ride over the lines of the initial and connecting carrier, but without any stipulations as to liabilities for accidents, the initial carrier does not thereby relieve itself from liability for injuries received on the line of the connecting carrier."

It is said by plaintiff, in reply to appellant's contention upon this point, that the presumption against extra terminal liability has no application, because the claim of the plaintiff is founded upon a special contract for the entire trip. In other words, that the presumption contended for by appellant only exists in the absence of a special contract, and that the principle of the cases cited is not applicable to the instant case, in which plaintiff's claim is founded upon a contract by which the defendant assumed the responsibility for the entire trip. We think there is much force in this position of plaintiff's counsel.

2. It is urged by appellant that this presumption is not rebutted by any evidence in the case; that there is nothing in the letter of the defendant, or in what is termed the "proof," or the regular folder of the defendant, that even approximately shows a contract for extra terminal liability, and defendant's counsel, upon this

for the vehicle to transfer her, and was directed to take an autobus, owned and operated by S, which was then in the yards of B railroad, connecting carrier. She presented her ticket to the driver, who tore off the coupon, retained it, and directed her to enter the bus. While being thus transferred plaintiff was injured by falling from such bus by reason of its defective construction and the negligence of the driver. Plaintiff originally brought suit against A and B railways and S, but afterwards dis-

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point, cite Myrick v. Railroad Co., 107 U. S. 102, 27 L. Ed. 327, 1 Sup. Ct. 425, to the effect that such agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence. And counsel insist that without relying on the limitation against extra terminal liability apparent in the ticket, the defendant is entitled to a reversal of the judgment below.

In reply to this position, it is urged by plaintiff's counsel that the evidence clearly established a contract by which the defendant, as principal, assumed the responsibility for the Boulevard drive; that the final ticket issued to the plaintiff is not the sole evidence of the contract, the existence and terms of which are to be determined from the facts and circumstances in the case.

That the jury, under the charge, considered the facts, and found the existence of a contract for through transportation, no doubt from the letter of the defendant, the "proof" enclosed with the letter, the folder, and the first ticket issued to the plaintiff (being the ticket which she exchanged for the coupon ticket), the original ticket having stated that "the side trips which are a part of regular cruise, are included in this ticket." This ticket was issued to the plaintiff with her name written thereon, in the space provided therefor, and she was required to, and did sign it at the time of presentation for the coupon ticket. The fare was the regularly advertised fare. The "side trips" therein referred to as a "part of the regular trip" could mean nothing else than the trips including the Boulevard drive, referred to in the folder.

It is further urged by plaintiff that even if the language used were less plain and unambiguous, any doubt regarding the meaning of the same would, under a well-established rule, be resolved against the defendant—citing Norman v. Railway Co., 161 N. C. 330, Ann. Cas. 1914D 917, 77 S. E. 345, where the following language is used:

"In construing contracts of this kind, language of uncertain or doubtful meaning should generally be taken in its strongest sense against the company by which the ticket was issued and sold, and in favor of the purchaser."

See Georgia Railroad & Banking Co. v. Clarke, 97 Ga. 706, 25 S. E. 368; Baltimore & Ohio R. Co. v. Doyle, 74 C. C. A. 245, 142

missed the suit as to the A railroad and S, and filed an amended petition setting forth that the B railway had made a private arrangement with the owner of the bus to transfer its through passengers from depot to depot. Reversing a judgment sustaining a demurrer to the amended petition, the court held that the averment of the amended petition stated a good cause of action against the B railway. While the A railway, the initial carrier, was not before the court in this suit, the court observed, after

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Fed. 669; Stanard Milling Co. v. Transit Co., 122 Mo. 259, 26 S. W. 704.

It is answered by plaintiff that the fact that she had made the Duluth trip on former occasions and had used a ticket similar to the ticket in this case, is unimportant; that it was merely a circumstance to be considered by the jury in determining whether the plaintiff had actual knowledge of the conditions of the ticket—citing The Majestic, 166 U. S. 375, 41 L. Ed. 1039, 17 Sup. Ct. 597.

We cannot say that the correspondence in connection with the "proof," especially the folder which came into the possession of the plaintiff, outside of the correspondence, and was evidently intended for the use of the public generally, furnished no evidence for the jury to reach the conclusion which it did.

3. It is the proposition of the appellant here, that the ticket (exhibit 7) constituted the entire contract. Counsel there cite 10 Corp. Juris, p. 702, § 1137-b; McWethy v. Railroad Co., 127 Mich. 333, 55 L. R. A. 306, and many authorities from other jurisdictions.

It is claimed by appellant that all authorities, both English and American, agree that the carrier in selling a ticket beyond its own line, may appropriately limit its liability to its own line, there being no obligation on its part to assume extra terminal liability. We agree with this proposition, but think the question involved here is, whether in selling this ticket it appropriately limited its liability to its own line, in explicit terms that were called to the attention of the plaintiff.

In McWethy v. Railroad Co., supra, the question of whether the plaintiff's attention there had been actually called to the terms of the ticket was not involved, and there was no evidence of a special contract. It is the contention of the plaintiff upon this branch of the case, that the ticket is not the sole evidence of the contract; that the real contract may always be shown notwithstanding the issuance and acceptance of the ticket; that the coupon contained no reference to the back cover; that while it is true that the coupon in question did contain the words "on conditions named in contract" and "not good if detached from contract bearing signature," there was nothing which in any way tended to call the

quoting provisions of the Carmack amendment: "While it is unquestionably true that the Colorado Southern Railway Company [the A railroad], the initial carrier, is liable for such injuries as were suffered by the plaintiff's wife, none of the intermediate carriers are liable for any injuries not caused by its own negligent or wrongful act." Gray v. Colorado Southern Ry. Co., — Tex. Civ. App. —, 204 S. W. 347 (1918).

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attention to the inside of the back cover; and it is urged that the ticket was not sold, as claimed by defendant, at a reduced rate. It was sold for the price stated in the letter of June 1st and in the company's folder as a regular fare; and an inspection shows that the ticket itself does not purport to be a reduced rate ticket.

The rule that the ticket is not the sole evidence of a contract is stated in 2 Hutchinson on Carriers (3d Ed.), at section 1050, as follows:

"There is, however, nothing in the employment of such tickets (coupon tickets) inconsistent with the idea of a contract for through transportation by the first carrier, which will make him the responsible party to the passenger for all injuries or losses throughout the entire journey. It may, therefore, be shown that there was such a contract notwithstanding the acceptance of such tickets, and that the tickets were delivered in pursuance of the contract; and whether or not there was such a contract must, in every case of the kind, depend upon the facts."

Plaintiff's counsel also cites Hayes v. Railroad Co., 163 Mich. 174, 31 L. R. A. (N. S.) 229. We invite attention to that case, and especially to the following language of this court:

"Argument is made that the contract between these parties is determined by the ticket issued at the time. * * * The contract of carriage may be shown by parol, and the plaintiff's proof tended to show that it was made several days before the tickets were purchased."

See, also, a leading case upon this point, Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. St. Rep. 461; Hutchins v. Railroad Co., 181 N. Y. 186, 18 Am. Neg. Rep. 189, 106 Am. St. Rep. 537, 73 N. E. 972; New York, etc., R. Co. v. Winter's Adm'r, 143 U. S. 60, 36 L. Ed. 71, 8 Am. Neg. Cas. 690, 12 Sup. Ct. 356; Chicago & Alton R. Co. v. Dumser, 161 Ill. 190 (43 N. E. 698), and many additional cases might be cited from other jurisdictions.

In the Quimby case it was held that a part owner of one of several lines for the transportation of passengers, running in connection over different portions of a route of travel, may contract as principal for the conveyance of a passenger over the whole route, and that such contract may be established by the circumstances, notwithstanding the passenger receives tickets for the different lines signed by their separate agents; and that passage tickets are generally to be regarded as tokens, rather than contracts, and are not

II. Steamer ticket including trolley car coupon.

Plaintiff purchased a ticket from defendant steamboat company entitling her to ride by steamboat from Philadelphia to the pier at Washington Park and also to a ride by trolley from the pier to the center of the park. There was no separate coupon upon which her right to be transported by the car depended, and there was nothing else upon the face of the ticket to suggest that any part of

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within the rule excluding parol evidence to vary a written agreement.

It is further urged by plaintiff that in the instant case the attempted limitation on the inside of the back cover in fine print did not bind the plaintiff, as she might have been bound had it appeared upon the face of the ticket, or had it been called to her attention. The following cases apply the universally recognized rule, that in the case of a full fare ticket a passenger is not bound by conditions thereon, limiting the common law or contractual liability of the carrier, unless such conditions are called to the attention of the passenger, and assented to by him. A very strong case upon this subject, and one which reviews many English and American cases, is The Majestic, supra; and the following cases seem to be to the same effect: Norman v. Railway, 65 S. C. 517, 14 Am. Neg. Rep. 468, 95 Am. St. Rep. 809, 44 S. E. 83; Boyd v. Spencer, 103 Ga. 828, 30 S. E. 841; Louisville, etc., R. Co. v. Turner, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140; The Minnetonka, 77 C. C. A. 217, 146 Fed. 509; Hutchins v. Railroad Co., supra. Without quoting therefrom we especially refer to The Majestic case.

The learned circuit judge, in submitting the case to the jury, laid much stress upon the question whether the plaintiff had, or had not, notice of the condition printed upon the inside of the back cover of the coupon ticket, above referred to, and upon that subject charged the jury as follows:

"If you believe from the testimony in this case and from the circumstances surrounding the purchase of the ticket that the plaintiff actually knew, prior to the time that she boarded the automobile in Duluth, that the ticket contained printing in the form of a contract, then, in that event, plaintiff was not, at the time of the accident sued upon, the passenger of defendant, and defendant is not responsible to her in this action. That raises the question as to whose passenger the plaintiff was when she was injured. Was she the passenger of the defendant, or was she the passenger of the independent corporation? If you believe that the plaintiff was familiar with the contents of the ticket because of having traveled on like tickets on previous occasions, the same rule applies as to liability."

Manifestly, the jury, by its verdict, must have found that the plaintiff had no knowledge or notice of the printed matter in the so-called condition upon the inside of the back cover of the coupon

the contract was to be performed by another carrier than the defendant. While riding in the trolley car, plaintiff was injured through the negligence of the motorman. Some unsatisfactory evidence was introduced to prove that the trolley car was controlled and managed not by defendant, but by the Washington Park Amusement Company. The jury found for the plaintiff, and on overruling a motion for a new trial the court held that from defendant's contract with the plaintiff the presumption arose

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ticket. There the defendant undertook to limit the contractual liability which it had, we think, before that time expressly assumed. We are of the opinion that the position of the plaintiff upon this point is the correct one. Hause v. Insurance Co., 172 Mich. 59.

4. It is lastly urged by the appellant that the preliminary correspondence cannot avail the plaintiff in any event, because the letter was not addressed to her. It is true that the first letter was not addressed to her, but to her employer. However, the card which was sent to the defendant contained the plaintiff's name, and the last letter was directed to the attention of "Mr. L. E. Thurston," undoubtedly meaning Miss L. E. Thurston, whose name is mentioned in the letter.

There is no assignment of error raising objection to the introduction of evidence upon the trial. Whether or not the plaintiff was a party to the first correspondence, she certainly became a party before the contract was closed, and was recognized by the defendant as possessing rights under the contract. It appears also that the plaintiff had access to other copies of the folder, and it must be said that they were addressed to the public generally; and where a contract was made, as appears in the first ticket (exhibit 5) signed by the parties, we think it became controlling as against any language contained on the back cover of the coupon ticket which was not called to, and did not come to, the attention of the plaintiff.

Upon the whole record we are of the opinion that no reversible error appears, and the judgment of the court below is affirmed.

that the plaintiff was to be in legal contemplation under the defendant's care and oversight during the whole trip, and the burden was on defendant to show that such was not the fact. It was further held that the presumption of defendant's liability arising upon the face of the ticket was equivalent to testimony in the plaintiff's favor, and thus presented a controversy concerning the vital fact of the steamboat company's relation to the motorman, which was a question entirely for the jury. Clemmens v. Washington Park Steamboat Co., 162 Fed. 815 (1908).

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TODD et al. v. TRADERS' & MECHANICS' INSURANCE CO. et al.

[Supreme Judicial Court of Massachusetts, June 26, 1918.]

230 Mass. 595, 120 N. E. 142.

1. Torts—Action—Defense—Violation of statute or ordinance.
In actions of tort, while a plaintiff cannot obtain the aid of a court to relieve him from the direct consequence of his own illegal act, the mere fact that he was violating a statute or ordinance when injured does not necessarily prevent his recovery.

2. Torts—Action—Evidence of negligence—Violation of statute.
The violation of a statute, by the plaintiff in a tort action, is considered "evidence of negligence" on his part as to all consequences that the statute was intended to prevent, but if his violation thereof was merely a condition or an attendant circumstance of his injury, and not a proximate contributing cause, he may recover from the wrongdoer.

CASE NOTE.

Negligence of assured as defense on action on insurance policy.

I. Accident, 428-434.
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1. Discharge of revolver, 428-429.
2. Upsetting of automobile, 429-430.
3. Drowning, 430-431.
4. Struck while crossing railway track, 431-432.
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IV. Marine, 438-440.
A. Loss or damage to vessel, 438-440.
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2. Negligently caused stranding, 439.
3. Going to sea with damaged propeller, 439-440.
B. Negligent mooring causing loss of cargo, 440.

I. Accident.

A. Death.

1. Discharge of revolver.

Deceased came to his death through the accidental discharge of a pistol which he had been in the habit of carrying. There was some evidence to show that he had been drinking, and that a short time before the accident he had been staggering around the dining room with the pistol against his left breast, this performance being intended for the amusement of a neighbor's children who were present. The children had left the house and the wife had just stepped into the dining room when she saw a flash, and her husband fell dead. She saw nothing more. The jury found that

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3. **Insurance—Liability of insurer—Defense—Negligence of insured.**
Mere negligence on the part of an insured does not prevent recovery on the insurance policy; one of the objects of insurance is to protect the insured from loss due to carelessness.

4. **Insurance—Liability of insurer—Fraudulent loss.**
An insurer is not liable for a fraudulent loss, due to the intentional destruction of property by the insured or to such reckless and inexcusable negligence as tends to show a fraudulent purpose or design.

5. **Insurance—Action on fire policy—Evidence of negligence.**
In an action on a fire policy, held that the fact that the insured had failed to secure the statutory permit to set out the fire which had spread to the burned buildings might be considered as "evidence of negligence."

6. **Insurance—Action on fire policy—Question for jury.**
In an action on a fire policy, held that it was a question of fact for the jury whether the failure of the insured to secure the statutory permit to set out the fire which had spread to the burned buildings was a contributing cause or merely a condition of the loss.

7. **Insurance—Action on fire policy—Burden of proof.**
In an action on a fire policy, held that the burden was on the defendants

it was not suicide. Defendant contended that there was no liability because the deceased's death was the result of voluntary exposure to danger. Affirming judgment for plaintiff, deceased's wife, for $5,000, the court held, as to the contention of voluntary exposure, that as the acts of voluntary exposure had ended when the shot was fired, the jury would not be authorized to assume that they continued after the children left, and then said: "Even though the evidence required the court to submit the issue, as presented, it was improper. The fact that Wilkes [deceased] voluntarily exposed himself to unnecessary danger would not defeat appellee's [wife] recovery unless his act in so doing was the proximate cause of the accident." Bankers' Health and Accident Ass'n v. Wilkes, — Tex. Civ. App. —, 209 S. W. 230 (1919).

2. **Upsetting of automobile.**

Deceased was driving about the city and while straightening his course after making a turn was killed by reason of the car capsizing. The three other occupants of the car were injured. There was evidence that he had been driving at an excessive rate of speed, 35 to 40 miles an hour; but also some evidence tending to show that the speed had been reduced when the disaster occurred. There was a penal statute providing for a speed limit of 25 miles an hour. Upon action by the wife of the deceased on the accident policy the company defended on the ground (1) that the death of the insured was the result of a violation of law; (2) that it was not accidental and the result of voluntary exposure to danger. Both of these defenses by the terms of the policy absolved the company from liability. Reversing the judgment for the plaintiff because of the trial court's refusal to submit to the jury the question of the plaintiff's violation of law, the court held that the second defense could not be maintained, saying: "Driving the car at a high or unsafe rate of speed, or in a manner to justly convict the insured of negligence, does not necessarily deprive the disaster which he suffered of its character as an accident." Farther on the court continues: "The defense is an affirmative one, and the burden was upon the defendant to establish it by a preponderance of the

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to show that they were relieved from liability by the failure of the insured to secure the statutory permit to set out the fire which had spread to the burned buildings.

8. **Insurance—Action on fire policy—Question for jury.**
In an action on a fire policy, wherein it appeared that the fire which had spread to the burned buildings had been set out by the insured without his having secured the statutory permit, held that the plaintiffs were properly permitted to go to the jury.

Actions on fire insurance policies to recover for loss or damage by fire. Verdicts for plaintiffs. Exceptions overruled.

For plaintiffs—Warner, Stackpole & Bradlee (J. G. Palfrey and R. J. Cotter, of counsel).

For defendants—Harold Williams, Jr., and Edward C. Mason (Barker & Wood, of counsel).

evidence. The burden is not satisfied by showing that the deceased was negligent merely, or that but for his negligence he would not have been injured. He must have known and appreciated the danger, or the risk must have been so apparent that, as an ordinarily reasonable man, he must be held to have known and appreciated it, and with that knowledge have intentionally taken the risk. The act which brings him into danger may be voluntary, yet the exposure be involuntary.'' Rowe v. United Commercial Travelers' Ass'n, — Iowa —, 172 N. W. 454 (1919).

3. **Drowning.**

This action was brought on a policy insuring against accidental injury or death, providing that there should be no liability for injury or death resulting while the assured was not in the exercise of due diligence for his self-protection. Assured was camping at an amusement resort on T river. This river was about 200 feet wide and was normally 6 or 7 feet deep. There was no bridge across it nearer than a mile and a half, but at low stages of water there was a wagon ford about 600 feet from the camping grounds. When the river was too high to be forded, a trolley cable ferry which had been in existence 12 years was used. When the river was at its normal height the car was about 4 feet above the water at the middle of the river. The assured and three others got into the car attempting to cross the river. It ran down to the middle, when the cables upon which the car was running sagged and it was struck by the rapidly flowing current, was broken, and its occupants, including the assured, swept into the river and drowned. The river had been rising and was very high, but a few hours before five others had crossed it in safety. Defendant insisted that assured was not at the time of his death in the exercise of due diligence for his self-protection. Affirming judgment for the plaintiff, assured's wife, the court held that this question was for the jury. ''Whatever a person in the exercise of reasonable care might do is within the limits of due diligence,'' said the court. It was further held that the requirement of due diligence for assured's self-protection covered the whole period of events leading up to and attending the drowning and

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DE COURCY, J. These are six actions upon fire insurance policies, in the Massachusetts standard form, to recover for loss or damage by fire. The plaintiffs owned the premises as trustees under the will of George G. Tarbell, deceased; and the plaintiff Tarbell was the sole beneficiary. The buildings insured consisted of a dwelling-house, barn and shed, situated in the town of Lincoln. It appears that about one hundred feet back from the barn and extending parallel with it was a raspberry bed a few feet wide. Along the side of the bed away from the barn was a two-foot grass path; and beyond this was a garden patch, about seventy by one hundred feet in size.

On March 13, 1915, Mr. Tarbell and his wife drove over to the premises, from Winchester, and he spent most of the afternoon working on the raspberry bed, "raking it over and cleaning out loose ends," etc. A question arose with reference to the grass path,

not only the time the assured was in the river. Tinsman v. Illinois Commercial Men's Ass'n, 235 Ill. 635, 85 N. E. 913 (1908).

Deceased was insured by defendant against bodily injury sustained through accidental means and resulting directly, independently, and exclusively of all other causes, in death. Deceased while bathing in the surf was accidentally drowned. The wife brought this action, and the court instructed the jury that if they found that the deceased was drowned as the result of an accident, it was immaterial for the purpose of the case how he came to drown, provided it found that such drowning was the proximate result of the accident. Upon appeal it was held that this instruction was correct. Kinsey v. Pacific Mut. Life Ins. Co. of California, — Cal. —, 172 Pac. 1098 (1918).

4. Struck while crossing railway track.

The insured, while crossing a railroad track at a place where there was no crossing, was hit by a passenger train. He was on his way to visit a friend who resided on the opposite side of the railroad. There was a regular crossing within 300 feet of the point of the accident. In an action upon a policy of insurance it was contended by the company that the insured met his death while walking or being on the roadbed of a railway, and that death was caused by unnecessary exposure to danger, both of which relieved the company from liability by the terms of the policy. Reversing judgment for the plaintiff, the court held that not being at a crossing, the insured at the time of his death was on the roadbed of a railway within the meaning of the policy, and that his death was caused by an unnecessary exposure to danger. The court recognized a distinction between the words "voluntary" and "unnecessary" exposure, saying that by the word "voluntary" the negligence contemplated was a conscious exposure to danger, gross negligence, but that the words "unnecessary exposure" include all cases where the exposure is attributable to negligence of the assured. "The claim in the policy must be held to apply," says the court, "whenever the insured is injured in a manner that should have been anticipated, while voluntarily doing something that ordinary prudence would forbid." Wilcox v. Cen-

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and some discussion as to whether it would be better to burn it over rather than rake it. To Mrs. Tarbell's question, "wouldn't you scorch the raspberries?" he said, "I don't believe so; let us go and see." He further testified, "I took a match and when I lit the match the grass was hanging over into the bed, and I lit the grass hanging over into the bed to see if it would scorch the raspberries." Flames flared up and Mr. Tarbell, being satisfied with his experiment, stamped them out. Then, looking up, he saw a little flame starting fifteen or twenty feet the other side of the raspberry bed. He summoned help to his assistance, and they used every effort to extinguish the fire; but when the fire department arrived ten minutes later the barn was on fire.

The contention of the defendants is that the plaintiffs cannot recover on the policies because the fire was started by Mr. Tarbell in violation of St. 1911, c. 244, § 1, which reads as follows:

tral Accident Ins. Co., 234 Pa. 58, 82 Atl. 1093 (1912).

5. Falling under train.

Plaintiff's husband was coming from a restaurant to a railroad platform when he found that the train he intended to take was beginning to move out. Trying to attract the attention of a porter, who was standing in the vestibule of a car, in order to get him to open the door so that he might board, he slipped and fell under the train, his foot being cut off, from which injury he died a short time thereafter. Action was brought on deceased's accident policy providing that no liability should attach for injury caused from voluntary exposure to danger. Defendant company contended that the accident resulted from conduct on the part of the deceased and under conditions exempting the company from liability, and objected to an instruction charging the jury "that it is not sufficient for the defendant to show that the deceased was guilty of a want of ordinary care or a lack of prudence, but that it is necessary to show that the deceased went into the danger, and received his injury as a result thereof, and that while going into the danger, if any, the deceased had knowledge of the particular danger and cause to apprehend it, and that he went into the danger, if any, with the intention to expose himself to it, and that he received his injury as a result thereof, and a failure to so show by a preponderance of the evidence would not entitle the defendant to a verdict on this issue." Affirming judgment for plaintiff for the sum of $7,720, the court held that the instruction as given was a correct statement of the law. Travelers' Ins. Co. v. Harris, — Tex. Civ. App. —, 178 S. W. 816 (1915).

6. Falling from top of train.

Deceased, 42 years old and a car repairer, was insured under an accident policy containing a provision that the defendant company should not be liable for death or injury resulting from unnecessary exposure to danger. Deceased had ridden, by implied permission, on one of O railway's freight trains into M. On arriving there this train was coupled on to some cars on a siding. Immediately thereafter deceased climbed on top of the cars, 25 in number, and

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"It shall be unlawful within any city, or within any town which accepts the provisions of this act, for any person to set a fire in the open air between the first day of March and the first day of December except by the written permission of the forest warden, or the chief of the fire department, or, in cities that have such an official, the fire commissioner: Provided, that debris from fields, gardens and orchards, or leaves and rubbish from yards may be burned on ploughed fields by the owners thereof, their agents or lessees: And provided, further, that persons above eighteen years of age may maintain a fire for a reasonable purpose upon sandy or barren land, if the fire is enclosed within rocks, metal or other noninflammable material. In every case such fire shall be at least two hundred feet distant from any forest or sprout lands, and at least fifty feet distant from any building, and shall be properly attended until it is extinguished. The forest warden shall cause public notice to be given of the provisions of this section, and shall enforce the same. Whoever violates the provisions of this section shall be punished by a fine of not more than one hundred dollars, or by imprisonment for not more than one month, or by both such fine and imprisonment."

It is undisputed that the town of Lincoln had duly accepted this statute, and that Mr. Tarbell had no "written permission." Although the meager bill of exceptions does not disclose the special

was last seen alive walking towards the end of the train which was at the time going downgrade around a sharp curve, pushed by a switch engine. His motive in so doing did not appear. About five minutes thereafter his body was found cut to pieces lying across a frog, having been run over by said train. Action was brought by the administrator of deceased's beneficiary. While the court reversed judgment for the plaintiff for $2,000 on account of irregularities as to the jury, it held that there was no error in the trial court's refusal to peremptorily instruct the jury that deceased had died from "unnecessary exposure to danger," declaring that such a clause was satisfied by the same acts that would constitute contributory negligence. Quoting, the court said: "It plainly includes all cases of exposure to unnecessary danger where such exposure is attributable to negligence on the part of the assured; that is, the exception was intended to hold the insured responsible for the exercise of ordinary care and to except from the provisions of the policy all cases of injury occurring in whole or in part through a failure to exercise such care." Pacific Mut. Life Ins. Co. v. Adams, 27 Okla. 496, 112 Pac. 1026 (1910).

7. Fall while removing automobile tire.

Insured was removing a tire for the purpose of mending a puncture. It resisted his efforts, and kneeling upon one knee he took hold of the casing with both hands, pulling and jerking it for some time, when it came off with a snap and with such suddenness as to cause him to slip or stagger back, with the tire in his hands. He immediately turned pale, complained of being very ill, lay down on the ground, and, having been removed to a hospital, died an hour later. Post-mortem examination showed that death was due to a blood clot in an artery near the heart. In an action on the policy the company contended that the insured's death resulted from natural causes, disease or bodily infirmity or voluntary overexertion, and that for death so resulting there was no liability under the terms of the policy. Upon rehearing the court reversed judgment for the defendant on a directed verdict, and held that the jury might have found that the insured's death was

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questions which were submitted to the jury, and does not purport to contain all the material evidence, we assume that the fire was not set on "ploughed fields," within the meaning of the statute, and that the question whether said violation of the statute prevents a recovery on the policies as matter of law is open to the defendants on their motions for directed verdicts.

In actions of tort (where the question generally arises), while a plaintiff cannot obtain the aid of a court to relieve him from the direct consequence of his own illegal act (see Banks v. Highland St. Ry., 136 Mass. 485; Brunelle v. Lowell Electric Light Corp., 188 Mass. 493, 74 N. E. 676), the mere fact that he was violating a statute or ordinance when injured does not necessarily prevent his recovery. Such violation is considered "evidence of negligence" on the part of the violator, as to all consequences that the

the result of an accident. The court said: "When injury or death follows or results from a voluntary act of the insured, and the act is one which is not manifestly dangerous, but which is ordinarily done or performed, without serious consequences to the doer, such result is caused by accidental means." Farther on the court continues: "The mere fact that the insured may have been negligent, and that such negligence may have contributed to his injury, is no defense to the action on the policy." Lickleider v. Iowa State Traveling Men's Ass'n, — Iowa —, 168 N. W. 884 (1918), modifying — Iowa —, 166 N. W. 363 (1918), which reversed — Iowa —, 151 N. W. 479 (1915).

B. Injury by jumping to escape peril of collision.

Plaintiff was insured under an accident policy providing for double indemnity where an injury was sustained while insured was on any car as a passenger, and stipulating that double liability should not be payable for injuries sustained while getting on or off any car. Plaintiff was a passenger on a trolley car on a cross-country line. A collision appeared to be imminent between the car and a threshing machine, and in his alarm plaintiff went to the platform and jumped off, fracturing his leg by the force with which he struck the ground. A collision of slight violence occurred. The passengers who remained in the car as well as some others who jumped were unhurt. Defendant insurer offered single indemnity but plaintiff demanded double, and the lower court granted his demand upon the theory that with these provisos the parties did not intend to excuse the company from liability for a hurt inflicted in leaving a car to escape violent injury or death, but only to excuse it if the insured was hurt when he was not riding as a passenger and securely in or upon a car. Upon appeal, the court reversed judgment for double and granted single indemnity, saying: "An attempt is made to bring this case within the rule of law which will not permit a plaintiff to be charged with contributory negligence when he hurts himself in an effort to escape sudden peril; but that principle has no application, because contract law must control the decision, not the law of torts." Banta v. Continental Casualty Co., 134 Mo. App. 222, 113 S. W. 1140 (1908).

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statute was intended to prevent. Bourne v. Whitman, 209 Mass. 155, 2 N. C. C. A. 318, 95 N. E. 404, 35 L. R. A. (N. S.) 701; Berdos v. Tremont & Suffolk Mills, 209 Mass. 489, 95 N. E. 876, Ann. Cas. 1912B, 797. If, however, his violation of law was merely a condition or an attendant circumstance of his injury, and not a proximate contributing cause, he may recover from the wrongdoer. Newcomb v. Boston Protective Department, 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354. For instance, in Moran v. Dickinson, 204 Mass. 559, 90 N. E. 1150, 48 L. R. A. (N. S.) 675, it was held that a boy less than sixteen years of age, who was injured by reason of a defect in an elevator which he was operating in violation of a statute, was entitled to go to the jury. The plaintiff in Damon v. Scituate, 119 Mass. 66, 20 Am. Rep. 315, was traveling on the wrong side of the road, in violation of the statute, when in-

II. Fire.

A. Failure to safeguard burned automobile.

A policy of insurance covered an automobile and its equipment against loss or damage by fire to the amount of $1,000. While the policy was in force, the automobile was damaged and practically destroyed by fire, being burned twice about two or three days apart. The defendant company pleaded, as a defense, failure and neglect of the insured to protect and safeguard the automobile from further damage after the first fire occurred. Affirming judgment of $850 for the plaintiff, the court held that this defense could not be maintained, the company not being entitled, by the terms of the policy, to claim a forfeiture for negligent failure of the insured to properly safeguard the machine from further damage; that the fire, and not the negligence, must be considered the proximate cause of the loss. St. Paul Fire & Marine Ins. Co. v. Huff, — Tex. Civ. App. —, 172 S. W. 755 (1915).

B. Negligent use of gasoline in barn.

Plaintiff's barn was destroyed by fire. The defendant company, insuring this property, had a rule in its constitution which provided that it would not insure barns, etc., with stoves in them. Defendant's answer to plaintiff's complaint, in its first paragraph, charged that the plaintiff with knowledge of this rule placed stoves in the barn, filled them with gasoline and oil, lighted them, and negligently and carelessly left them burning and unprotected. The second paragraph added that these acts were done "wilfully and carelessly." Affirming judgment sustaining a demurrer to this answer and awarding $1,432 to plaintiff, on the ground of failure to aver rescission of the contract, the court said: "These averments amount only to an allegation of negligence, and are not sufficient to avoid the obligation of the insurer upon the policy because not coupled with the intention of the insured to destroy such property." Farmers' Mut. Fire Ins. Co. v. Hill, 45 Ind. App. 605, 91 N. E. 361 (1910).

C. Failure to remove perilled property.

This action was brought to recover upon a policy insuring a bank building and the furniture and fixtures, which were all destroyed by fire under the following circumstances: A fire was first discovered in a store about

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jured by a defect in the way. It was held in Biggio v. Boston, 179 Mass. 356, 60 N. E. 938, that the plaintiff was not precluded from recovering for the flooding of his cellar by the fact that he had constructed it below the grade required by law. In McCarthy v. Morse, 197 Mass. 332, 337, 83 N. E. 1109, where the plaintiff was knocked off a temporary bridge which he had erected, it was said:

"The illegal act of the plaintiff in being engaged upon this work without a permit was not necessarily the direct and proximate cause of his injury, nor was he obliged to found his action upon his own violation of law."

And see Farrell v. Sturtevant Co., 194 Mass. 431, 80 N. E. 469; Driscoll v. Boston Elevated Railway, 223 Mass. 533, 112 N. E. 219.

Mere negligence on the part of the insured does not prevent re-

six lots east of the bank building and on the same side of the block. On these lots were several buildings, all of which were destroyed by the spreading fire. The bank was on the corner of the block and across the street was H store, a large establishment, heavily insured. The town, being a small village, had no modern fire apparatus. Shortly after the fire started, a consultation was held between T, cashier of the bank, and the president of village board of trustees and some other citizens. It was agreed that in order to prevent the fire from reaching H store it was necessary to destroy the bank building by burning the same, which they did, saturating it with kerosene and lighting it. Although 35 minutes intervened from the time of the first alarm to the burning, no effort was made to remove the furniture and fixtures. The policy contained a clause against additional insurance, and stipulated nonliability for loss caused by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property should be endangered by fire in neighboring premises. Reversing judgment for the plaintiff, the court held there could be no recovery on the building as it was found that there had been additional insurance of $500 effected on the building by the cashier. As to the furniture and fixtures, it was held no recovery could be had because no proper diligence on the plaintiff's part was exercised to save the same. "If it be conceded (which we do not decide) that the company may be held liable for the loss of a building where it is intentionally burned for the protection of other property, still it would seem plain that at least reasonable care should be exacted in order to minimize the loss as much as conditions will fairly permit of." First Nat. Bank of Nome v. German American Ins. Co., 23 N. D. 139, 38 L. R. A. (N. S.) 213, 134 N. W. 873 (1911).

D. Carelessly building fire in silo.

The policy on which this action was brought covered a silo. It had been filled with ensilage the fall before but it had been fed out down to 10 feet from the bottom when it began to freeze. Plaintiff then cut the ensilage from the center to the bottom, leaving that which had been frozen, about 2 feet in thickness, on the outside, and thus leaving a space in the center. He then cut through this to a door and started a fire in the open space in the center on the concrete silo floor. After the fire had burned

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covery on a policy of insurance. One of the objects of insurance is to protect the insured from loss due to carelessness. In Johnson v. Berkshire Mutual Fire Ins. Co., 4 Allen 388, it was held that the insured could recover for the loss by fire of his barn and contents, where he had lighted some straw under the barn in order to smoke out bees, and the fire rapidly spread and destroyed the property. On the other hand, the insurer is not liable for a fraudulent loss, due to the intentional destruction of property by the insured, or to such reckless and inexcusable negligence as tends to show a fraudulent purpose or design. See cases collected in 6 Ann. Cas. 587, note, and 17 L. R. A. (N. S.) 189, note; Chandler v. Worcester Mutual Fire Insurance Co., 3 Cush. 328; Davis v. Royal Arcanum, 195 Mass. 402, 81 N. E. 294, 10 L. R. A. (N. S.)

a few minutes he went for more fuel, and, upon his return, noticed that the fire had blazed up more than he had anticipated. Fuel was not added, he having apprehended the danger. His son was about to enter the silo to push the fire back and settle it, when it caught the shucks and silks hanging around the ensilage and got into dry material above. The timbers were partly burned, the hoops fell off, and subsequently the silo fell. The defendant contended that the damages were consequent on the reckless conduct of the plaintiff and therefore there was no liability. Reversing judgment on a directed verdict for the defendant, the court held that mere faults or negligence of the insured, unaffected by any fraud or design, did not constitute a defense to an action on an insurance policy, and that it could not be said as a matter of law that the plaintiff was guilty of such gross negligence or recklessness as that the jury could only have found that he acted by design in burning the silo. Nash v. American Ins. Co., — Iowa —, 174 N. W. 378 (1919).

III. Fidelity.

A. Failure to investigate books of bank cashier.

Plaintiff, a bank, brought action against the defendant guaranty company on a bond given by it to indemnify the bank for any loss it might sustain by reason of the dishonesty of any of its employees. The bank had lost $26,220 because of its cashier allowing a customer to "kite checks." After the issue of the bond the cashier had been promoted from the position of assistant cashier. Critical examination of the books of the bank would have revealed the practices of the cashier, which were not revealed by the cursory though ordinarily careful examinations made monthly by the officers and directors. Affirming a judgment for plaintiff of $10,000, the court pointed out that while the issue of negligence had not been raised by the pleadings, the defendant having pleaded the failure of critical examination of the books and the promotion of the employee as breaches of the conditions of the bond, the question of negligence was nevertheless properly before it, and held that a bond given to indemnify an employer against the dishonesty of its employees was to be construed as an insurance contract; and that negligence was not a defense in an action on the bond of a surety corporation, unless it was such that it amounts to fraud or bad faith. First Nat. Bank of Crandon v. United States Fidelity

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722, 11 Ann. Cas. 777; Hatch v. Mutual Life Ins. Co., 120 Mass. 550, 21 Am. Rep. 541 (where there was a special provision in the policy applicable).

In the present case, it is not contended that Mr. Tarbell had any fraudulent purpose or design in setting fire to the grass. Although he was guilty of a violation of the statute in not obtaining a permit, it was not necessary for him and his cotrustees to rely on that violation in making out their prima facie case. His transgression of the statute made him liable to a criminal prosecution. But the legislature expressed no intention to make him also civilly liable to persons suffering special damage from his act, a familiar provision in penal statutes dealing, for instance, with intoxicating liquors. See R. L. c. 100, § 62. O'Connell v. O'Leary, 145 Mass.

& Guaranty Co., 150 Wis. 601, 137 N. W. 742 (1912).

B. Failure to check records of treasurer.

Plaintiff, a fraternal order, brought action against the defendant insurance company on a bond given by the defendant to indemnify the order from any loss it might sustain by reason of the dishonesty of its treasurer, who subsequently embezzled $943.52. The bond provided that (1) the auditing committee of the order should at least once a month make a full and complete examination of the books and accounts of the officials; (2) the order should make this full and complete examination by verifying the bank balance, by comparison of the cash on hand with the check book and the bank book. The evidence showed that the auditing committee complied with the first essential requirement but disregarded the second. Reversing judgment for the plaintiff, the court held that because of the failure of the order to strictly comply with this provision of the bond by verifying the cash on hand with the check book and bank book, the insurance company was not liable. Atlantic City Aerie No. 64, Fraternal Order of Eagles v. International Fidelity Ins. Co., 83 N. J. L. 583, 85 Atl. 325 (1912).

IV. Marine.

A. Loss of or damage to vessel.

1. Negligent filling of water tank.

The tug Seminole, insured under a marine policy against losses occasioned by perils of the sea, had tied up for the night in the harbor of M. This tug was an oil-burner, and had two tanks, known as the port tank and starboard tank, which supplied the boiler of the engine with water. They were filled by means of a sea cock, with cutoff so arranged that either or both of the tanks could be filled by a gravity flow from the outside. At the time in question the starboard tank already had some water in it. Orders were given to fill the port tank to the same capacity as that of the starboard, and then cut off the water entirely. All the crew retired except the watchman, who was instructed to close the sea cock when enough water had been admitted to the port tank. He fell asleep, and after about two hours the crew were awakened by a sudden list of the tug to port. The crew had barely sufficient time to get onto a boat lying alongside when the tug sank stern first. This action is brought to re-

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311, 14 N. E. 143. The defendants ask us, in effect, to read into this statute what the legislature has seen fit to omit, namely, a provision that a statutory violation shall create a civil liability on the part of the violator, or deprive him of his civil rights. As was said by Knowlton, C. J., in Bourne v. Whitman, 209 Mass. 155, 169, 2 N. C. C. A. 318, 95 N. E. 404, 35 L. R. A. (N. S.) 701:

"The fact that the number of punishable misdemeanors has multiplied many times in recent years, as the relations of men in business and society have grown complex with the increase of population is a reason why the violation of a criminal statute of slight importance should not affect one's civil rights, except when this violation, viewed in reference to the element of criminality intended to be punished, has had a direct effect upon his cause of action."

In accordance with our law Mr. Tarbell's violation of the statute may be considered as "evidence of negligence." The illegal element

cover the cost of raising and repair. Defendant contended that the injury was not caused by a peril of the sea, but by the negligence of the watchman, admitting too much water into the port tank. Affirming judgment of the trial court for the plaintiff, the court held that the loss was occasioned by a peril of the sea, and that marine insurance embraced, in the absence of a contrary stipulation, losses arising from negligence of the owner or his agent, if contributed to by a peril of the sea; that where a peril of the sea is a contributing cause such negligence is not a proper subject of inquiry. Charles Clarke & Co. v. Mannheim Ins. Co., — Tex. —, 210 S. W. 528 (1919).

2. **Negligently caused stranding.**

Libelant had chartered his vessel to respondent under a contract stipulating that respondent should be liable for all damages to the vessel except those covered by certain insurance policies held by the libelant. The chartered vessel while proceeding up a river, towed by another vessel was struck and stranded. Libelant contended that the loss was not covered by the policies, it not having been caused by a peril of the sea against which the policy insured, but by the negligence of an employee operating the vessel which was towing the injured vessel, and hence respondent was liable under the contract. The evidence as to the negligence was meager. Affirming a decree for the respondent, the court held that the loss was caused by a peril of the sea, and assuming that there was negligence on the part of the employee, that "a policy of insurance against perils of the seas covers a loss by stranding or collision, although arising from the negligence of the master or the crew, because the assurer assumes to indemnify the assured against losses by particular perils, and the assured does not warrant that his servants will use due care to avoid them." American-Hawaiian S. S. Co. v. Bennett & Goodall, 125 C. C. A. 172, 207 Fed. 510 (1913).

3. **Going to sea with damaged propeller.**

On her voyage from one port to another the propeller of plaintiff's ship was damaged, breaking two blades. Arriving in port, the ship received orders to have repairs made, but these were disregarded, and on a subsequent voyage 15 days thereafter, the two remaining blades of the propeller struck a submerged object and the ship was rendered helpless. Having been rescued, salvage was recovered

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of his conduct was the lack of a permit; and it was a question of fact for the jury whether this was a contributing cause or merely a condition of the loss. The jury might well say that the loss would have happened if in fact he had a permit, or that the loss really was due to his misjudgment or carelessness in caring for the fire after it was set. The damage by fire to the buildings of the plaintiffs was a lawful risk which was covered by the policies issued by the defendants. The burden was on them to show that they were relieved from liability by the acts of Mr. Tarbell. For the reasons already stated, and in the absence of any authority to the contrary, we are of opinion that on the facts disclosed the plaintiffs were permitted to go to the jury rightly.

Exceptions overruled.

by the rescuing ship, and for the amount so paid this action was brought on a policy of the defendant insurance company. The company contended that it was negligence for the ship to proceed after its propeller had been damaged, and that this would avoid liability, as the policy exempted the company from losses arising from the negligence of the master. Affirming judgment for the plaintiff, the court held that the ship, having proceeded in safety for 15 days with the broken propeller, then striking a submerged object making the ship helpless, the loss must be regarded as having been caused by a peril of the sea; and that conceding it to have been negligence for the ship to proceed in her damaged condition, it was not a defense, not having been the negligence of the owners or manager. New York & P. R. S. S. Co. v. Aetna Ins. Co., 122 C. C. A. 523, 204 Fed. 255 (1913), affirming 192 Fed. 212 (1911).

B. Negligent mooring causing loss of cargo.

This was an action to recover on a policy of marine insurance on a cargo of corn. Plaintiff was engaged in carrying merchandise on scows in the port of B, operating 27 scows, all of which were insured under one policy. Plaintiff received on board one of these scows 6,144 bushels of corn, which was to be carried from elevator No. 1 to the steamship M. Being loaded, the scow pulled out to make room for another. When at the end of the wharf, a line slipped from the bitt and the scow drifted out into the stream, where the wind and the swell made by a passing ship caused it to roll, shifting the corn, in consequence of which the scow was upset and the corn lost. There was conflicting evidence as to the seaworthiness of the scow. Affirming judgment for the plaintiff for $2,000 with interest, the court held that the seaworthiness of the scow was a question for the jury; and that, if by reason of the negligence of the crew the scow was permitted to drift, the defendant was nevertheless liable, as the loss was caused by a peril insured against. The court quoted the following: "It is now, however, settled both in England and in this country, that if the loss is caused by a peril insured against, the underwriters are liable, although the remote cause be the negligence of the master and crew, and that whether barratry be insured against or not." Western Assur. Co. v. Chesapeake Lighterage and Towing Co., — Md. —, 65 Atl. 637 (1907).

F. A. D.

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PEORIA RY. CO. v. INDUSTRIAL COMMISSION et al.

[Supreme Court of Illinois, October 27, 1919.]

290 Ill. 177, 125 N. E. 1.

Rehearing denied December 5, 1919.

Workmen's compensation—Illinois Act—Award—End of disability—When petition for review may be maintained.

A petition for review of an original award for compensation payable in in-

CASE NOTE.

Lump sum awards under compensation acts.

I. Death claims, 442-447.
- A. Widow alone, 442-443.
  - 1. Fund to conserve income producing property, 442.
  - 2. Necessity for joining children, 442-443.
- B. Widow and children, 443-445.
  - 1. Lacking means of support, 443.
  - 2. Necessity of agreement of parties, 443-444.
  - 3. Necessity for notice to insurer, 444-445.
- C. Parent, 445-447.
  - 1. Conclusiveness of award upon court, 445-446.
  - 2. Necessity of notice to employer, 446.
  - 3. Basis of computation of present worth, 446-447.

II. Total incapacity, 447-451.
- A. Conditions justifying commutation, 447 449.
  - 1. Failure to pay award as made, 447.
  - 2. Need of extraordinary care, 448-449.
- B. Conditions justifying partial commutation, 449-450.
- C. Propriety of disregarding probability of death, 450-451.

III. Permanent partial disability, 451-454.
- A. Necessity of agreement of parties, 451.
- B. Discretion to grant or deny commutation, 451-453.
- C. Survival of assigned judgment for lump sum, 453-454.
- D. Consideration of probable wage increase, 454.

IV. Temporary disability, 454-457.
- A. Jurisdiction to consider recurrence after lump sum award, 454-456.
- B. Jurisdiction of court on trial de novo, 456.
- C. Discretion of commission, 456-457.
- D. "Ascertainable by objective examination," 457.

V. Commutation as penalty for default in instalments, 457.

VI. Amendment of act as affecting prior agreement of self-insurer, 458.

VII. Legislative discretion as to conditions of commutation, 458-459.

VIII. Award for total of sums past due as lump sum award, 459-460.

Cross-references. Apportionment of awards under compensation acts, see 19 N. C. C. A. 546-558; lump sum awards under compensation acts, see 14 N. C. C. A. 346-354.

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stalments may be maintained by the employer under paragraph (h) of section 19 of the Illinois Workmen's Compensation Act [Call. 1916 Stat., par. 5475 (19)], on the ground that the disability of the employee has ended, where such petition is filed within 18 months of the original award, although an order for commutation to a lump sum has been entered by the industrial commission and not rejected by either party within the 10 days provided by the act.

Writ of error to review a judgment quashing a writ of certiorari to

I. Death claims.

A. Widow alone.

1. Fund to conserve income producing property.

The widow of a deceased employee petitioned the industrial board for commutation to a lump sum of an award for compensation, and, after proper notice and hearing, the board commuted the compensation to a lump sum of $2,728.60. She then filed her petition in the circuit court to have judgment entered upon the award. Before the hearing the employer filed a bill in chancery to review the award, the two cases were consolidated, the court confirmed the award, entered judgment and certified the case for review by the supreme court. The sole question was as to the power of the board to commute the compensation to a lump sum, the employer contending there was no proof in the record that the commutation was for the best interests of the parties. In support of her petition the widow showed that deceased left her a house and lot which had been divided into 5 apartments, in one of which the family lived, the others being rented and netting a small income; that the condition of the property was such that about $800 must be spent upon it to make it tenantable, and that, by the expenditure of $800 more, it could be converted into a rooming house which she was competent to run, and which would bring a much larger income than it would as an apartment house. The court held that the discretion to commute an award to a lump sum is lodged entirely in the board, and that when any facts are shown which in its judgment warrant commutation, its action is final, and can be reviewed only as in other cases for errors of law; that it was only when it is alleged that there was no competent evidence to support the decision of the board that the evidence was reviewed by the court on the question of law thus raised; and that it was not incumbent upon the widow to show it to be for the best interests of both parties to have the compensation commuted. Judgment was affirmed. Schwarm v. George Thompson & Sons Co., 281 Ill. 486, 118 N. E. 95 (1917).

2. Necessity for joining children.

In Lovasz v. Carnegie Steel Co., — Pa. —, 109 Atl. 601 (1920), an award was made by the compensation board commuting compensation payments which on appeal to the court of common pleas was reversed, and from that judgment this appeal was taken. The commutation order was made on petition of the widow of deceased without joinder of a representative of three minor children, and this appeal involved the authority of the board to commute compensation in which minors have an interest and direct payment to the widow without protecting those interests. The court pointed out that commutation is an exception to the rule of periodic payments for the reason that lump sum payments are often quickly dissipated and do not afford the regular relief so necessary to the widow and orphans, and is permitted

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review the dismissal of a petition for review of an award under the Illinois Workmen's Compensation Act. Reversed and remanded with directions.

For plaintiff in error—J. T. Hunter, G. H. Page and R. J. Kavanagh.

only when it appears that the best interests of the employee and his dependents are to be served and when it will avoid undue hardships, and, in affirming the decree of the court of common pleas, said that the standing of the children is just as high as that of the widow when commutation is asked, and, while the fund as such may not be divisible, the children's interest is nevertheless such as will entitle them to be party to any proceeding looking to commutation, and, as the compensation act is silent as to what should be done under the circumstances, and has not declared that the mother, as the natural guardian, should act for the children, binding them and the employer, the only course that can be followed is that outlined by the law when the estate of minor children is under consideration and the widow is not entitled to have the payments commuted without the joinder of a guardian acting under the authority of the court.

B. Widow and children.

1. Lacking means of support.

An award was made under the compensation act to the widow and two minor children, and a daughter by a former marriage, of a deceased employee, amounting to $11.15 per week for 360 weeks, from which attorney's fees were to be deducted. The insurer filed suit in the district court to have the award set aside. The court set aside the award of the industrial accident board, but rendered judgment in favor of the widow and her two children for a lump sum of $3,446.75, less one-third for attorney fees. Appeal was taken by the insurer, one of the grounds being that the court erred in adjudging the case to be a special case under the statutory provision that where "in the judgment of the board, manifest hardship and injustice would otherwise result, the board may compel the association" to redeem their liability by payment of a lump sum. The evidence showed that the widow had no means of supporting herself and children except by running a rooming house, the returns from which were not shown, but were assumed by the court to be meager, and that the children were of school age and earned nothing. The court pointed out that the weekly award as it would be divided according to law would amount to $3.72 for the widow and $1.86 for each child, and held that, taking into consideration the high cost of living, and the ever changing conditions and vicissitudes incident to the life of a widow with a family to support, the lower court was correct in concluding that a lump sum ought to be awarded, it being a case in which hardship would result from continuing the award in weekly payments. Texas Employers' Ins. Ass'n v. Boudreaux, — Tex. Civ. App. —, 213 S. W. 674 (1919).

2. Necessity of agreement of parties.

Deceased was injured by a boiler explosion and died a day later, leaving a widow and a child 2 years old. The widow was appointed administratrix and instituted this proceeding before the compensation commissioner,

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For defendant in error—Mansfield & Cowan.

MR. JUSTICE DUNCAN delivered the opinion of the court.

The Industrial Commission on December 16, 1917, confirmed the award of the arbitrator in favor of William Wade, who was injured in the course of his employment by plaintiff in error, the Peoria

and applied for an order commuting the statutory compensation and requiring payment in a lump sum. The application was overruled, and she appealed to the district court, where judgment was rendered in her favor for $12 a week for 350 weeks and $100 for funeral expenses, but, the application for commutation being resisted by the employer, was overruled on the ground that such relief could not be granted without the consent of both parties. The administratrix appealed, the only question involved being the right to a lump sum, as the employer admitted she was entitled to the weekly payments and funeral expenses awarded. The statute relating to commutation of payments provided that "the amounts of compensation payable periodically under the law, by agreement of the parties with the approval of the compensation commissioner, may be commuted to one or more lump sum payments, except compensation due for death and permanent disability, which may be commuted only upon the order or decision of the district court, provided, that where commutation is agreed upon, or ordered by the court, the lump sum to be paid shall be fixed at an amount," etc. In holding that the district court could commute periodical payments only when the parties had agreed upon such commutation, the court said: "This legislation was enacted to protect the dependents of employees. The regular method of exacting compensation is the requiring of periodical payments for a definite period. The system does not contemplate payments in large sums to dependents who may be improvident. The law was not framed to defeat the legislative aims. To prevent dependents from dissipating or losing their means of support, payments at stated times are required for definite periods. An unnecessary construction which would defeat the intention of the lawmakers should be avoided. Payment in a lump sum is a departure from the general rule. When this method is followed, the authority for such a course should be found in the language relating to the exception. In the light of all the legislation on this subject, the discretion of the district court in passing on applications for commutation seems to be invokable only where both parties have agreed to such a course." Judgment was affirmed. Myers v. Armour & Co., — Neb. —, 172 N. W. 45 (1919).

3. Necessity for notice to insurer.

Deceased was killed by a train while driving a wagon belonging to his employer. An award of $11 per week for 300 weeks was made in favor of his widow and dependent son. After payment for 49 weeks an agreement for a lump sum settlement was made, the agreement presented to and approved by the industrial board, for $2,572.34 as the amount by which the remaining payments should be redeemed in cash. The insurance carrier petitioned that the lump sum settlement be set aside; 1st, because the case was not extraordinary or unusual within the meaning of the compensation act; 2d, because petitioner had no knowledge of nor was it a party to such agreement. The board

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Railway Company, on January 2, 1915. Following that confirmation the plaintiff in error paid the compensation awarded, in installments, until the total sum of $830.83 had been paid. On March 25, 1918, the commission, acting upon the petition filed by Wade on March 1, 1918, entered an order commuting the balance of the compensation to a lump sum, amounting to $1227.99. Plaintiff in error did not

heard the evidence on the petition and denied the same, and this appeal was granted. The court said that, while it was not required to review the questions of fact as to the case being extraordinary and unusual, it had done so, and in its opinion the evidence fully sustained the finding of the board. It was also held that the compensation act did not contemplate notice to, or knowledge on the part of, the insurance company, and that such an order of settlement would not be set aside and vacated in the absence of a showing of fraud, mistake or gross irregularities. The order of the board was affirmed. Hartsock v. Long, — Ind. App. —, 124 N. E. 509 (1919).

C. Parent.

1. Conclusiveness of award upon court.

A minor son of appellant, while in the course of his employment for a pipe line company, received injuries which appellant claims ultimately caused his death. Appellant filed a claim for compensation for the death of the son with the industrial accident board against the Texas Employers' Insurance Association and the employer. The board decided in favor of appellant, and he brought this suit based on that decision to have the court enter a decree and to enforce payment, on the ground that the insurance association had failed and refused to pay any part of such compensation. Appellant alleged that, in the proceedings before the board, the insurance association had consented to submit all matters in dispute to the board for final decision; that both parties had presented full evidence on the merits, and that the board had made its final ruling and decision in adjustment of the claim. The petition pleaded in the alternative that the plaintiff have judgment as on an original cause of action against the insurance company for the compensation provided for by the act. Demurrers were sustained to the petition as it related to the decision of the industrial board, the case was tried before a jury on the alternative count, and the jury found, on special issues, that deceased was injured while in the employ of the pipe line company, but that his death did not result from such injury, and on the verdict the court entered judgment for defendant. On appeal, it was held that the facts alleged, if proven, would show that the parties had exercised their option and agreed to proceed before the board, and the claim had ripened into an award, and that the court erred in sustaining demurrers to appellant's first count. It was further held that appellant would have to recover on the award according to its terms and not in a lump sum. As he could recover under the award only such sum as was due at the time of the suit, it was suggested that the jurisdiction of the district court was involved as to amount. The court said, however, that the question would not arise on a new trial if the payments then due were sufficient to give the court jurisdiction and the petition was amended to include such amounts as were then due. Judgment was reversed and remanded for a new trial.

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pay the lump sum awarded and neither party filed a rejection thereof within the ten days provided by section 9 of the Workmen's Compensation act. The unpaid lump sum award was not reduced to judgment. Within eighteen months from the date of the last payment plaintiff in error filed its petition in accordance with the provisions of paragraph (h) of section 19 of the Workmen's Compensa-

Roach v. Texas Employers' Ins. Ass'n, — Tex. Civ. App. —, 195 S. W. 328 (1917).

2. Necessity of notice to employer.

In Tazewell Coal Co. v. Industrial Commission, 287 Ill. 465, 123 N. E. 28 (1919), plaintiff in error objected to the commutation to a lump sum of an award for the death of an employee, alleging that it had no notice of the pending of the petition and no opportunity to appear and oppose, by evidence or otherwise, the commutation of the award. Plaintiff in error prayed for a writ of certiorari commanding the industrial board to certify a full and complete record of the proceedings. The writ was issued and a return was made, certified as a full and complete record which showed a petition for the commutation, alleged facts upon which the petition was based and recited that the board, having given proper notice to the parties, and upon proper showing of the parties and careful investigation of the matter, found that it was for the best interest of the parties that the compensation was paid in a lump sum. The circuit court quashed the writ, rendered judgment against plaintiff in error for costs, and certified the cause as one proper to have been reviewed by the supreme court. Section 9 of the compensation act provided that if, upon proper notice to the interested parties and a proper showing, it appeared for the best interest of the parties, the board might order commutation of an award to an equivalent lump sum, but the statute did not prescribe the character of the notice to be given and the record showed no rule or regulation of the board as to what notice was to have been given. The court held that the constitution afforded protection against the imposition of any liability without notice, and also an opportunity to be heard; that there was no presumption of jurisdiction in favor of a body such as the industrial board, but that the facts upon which jurisdiction was founded must appear in the record; that the record in question did not show what notice was given to plaintiff in error and failed to show jurisdiction over it or any authority to hear and decide the question presented by the petition; that plaintiff in error had a right to a judicial review, and the record must have shown that the board acted upon evidence and contained the testimony upon which the decision was based, so that the court might determine if there was any evidence fairly tending to sustain the order; and that, as the record contained only the conclusion of the board, it practically denied plaintiff in error any review of the proceeding. The judgment of the circuit court was reversed and the cause remanded.

3. Basis of computation of present worth.

Bailey v. Columbian Rope Co., 184 N. Y. App. Div. 718, 172 N. Y. Supp. 566 (1918), was an appeal from a decision of the state industrial commission directing payment to the state insurance fund of the present value of future instalments of compensation

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tion act, claiming that the disability of Wade had diminished and ended since the award was made and prayed that the award might be reviewed and payments of compensation ended. On January 9, 1919, the commission sustained the motion filed by Wade on October 8, 1918, to dismiss the petition for review, on the ground that neither party had rejected the order for commutation to a lump sum within

awarded to the dependent mother of a deceased employee. Under the statute an award to a dependent mother is payable only during dependency. The commission apparently treated the award as one payable during life. It was held that neither the survivorship annuitants' table of mortality nor the remarriage tables of the Dutch Royal Insurance Institution (used as the basis for the commutation of awards to widows), nor the life tables, would furnish any basis for commutation in the present case, and that the commission could not determine that the award was of a value equal to a life award and compute it on that basis. The decision of the commission was reversed.

II. Total incapacity.

A. Conditions justifying commutation.

1. Failure to pay award as made.

Plaintiff was awarded compensation of $15 per week for a period not to exceed 401 weeks for an injury which the board found had totally incapacitated him from work, such award being the maximum for total incapacity. Plaintiff attempted to procure an order allowing compensation in a lump sum, and within 20 days after refusal gave notice to the board and the insurer that he would not abide by that ruling and immediately instituted this suit to recover compensation in a lump sum, or, in the alternative, for $15 a week for 389 weeks. One of the grounds alleged as entitling plaintiff to a lump sum was that the insurer had, without justifiable cause, failed to pay the weekly allowances made by the accident board as they matured, a ground provided by the statute, on which ground the trial court refused to submit to the jury. On this point the court of civil appeals held that plaintiff could not repudiate the ruling of the board and at the same time treat it as effective and binding upon defendant, and seek to hold it liable for a lump sum settlement by reason of its failure to comply with the mandates of the board, so that the only basis for a verdict for a lump sum was that submitted by the trial court that a manifest hardship and injury would result if plaintiff were not allowed such relief. Judgment was rendered in the trial court for $22 per week for 265 weeks; this decision was arrived at by increasing the weekly compensation and decreasing the number of weeks in accordance with a provision of the statute. Defendant appealed. This judgment was modified by the court of civil appeals to provide that the trial court should have the power to review the judgment and diminish, increase or terminate the liability of the defendant, and to give the defendant the right at any time to redeem its entire liability by payment of a lump sum, such lump sum settlement to be approved by the trial court, it being held that the trial court had, by implication, this power of review and approval of an award which had been brought under its jurisdiction. As modified, the judgment was affirmed. United States Fidelity & Guaranty Co. v. Davis, — Tex. Civ. App. —, 212 S. W. 239 (1919).

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ten days after such order was entered. Plaintiff in error sued out a writ of certiorari from the circuit court of Peoria county, and upon a hearing that court quashed the writ for the same reason assigned by the Industrial Commission and certified that the cause is one proper to be reviewed by this court.

2. Need of Extraordinary care.

Appellee accidentally swallowed pins while trimming windows. Compensation was allowed for $1,410, payable in instalments of $5 a week, which was commuted to the lump sum of $1,247.25 in addition to $590 already accrued and $50 allowed for medical and hospital services. On appeal, it was argued that the commutation was erroneous because it was contrary to the provisions of the statute and because there was no evidence to support the finding upon which commutation was based. The commutation was based upon the testimony of a physician that petitioner was in bed in a helpless condition, and had required the constant attention of nurses; that there was a pin near the base of her brain, and that, in his opinion, an operation was necessary to save her life; that she was in need of constant care and attention, and, unless she received same, her life could not be saved. The court held that it was too plain for argument that this testimony was at least some evidence to support the finding under the statutory provision that commutation was a departure from the normal method of payment, and was to be allowed only when it clearly appeared that some unusual circumstances warranted such departure, the court saying that if the situation of claimant shown by such testimony was not an unusual circumstance within the statute it would have been hard to conceive circumstances that would call for commutation. As the finding of fact of the lower court was conclusive, if there was any evidence to support it, the finding upon this question could not be disturbed. The contention that the commutation was in violation of the terms of the statute was based upon a provision that "commutation shall not be allowed for the purpose of enabling the injured employee * * * to satisfy a debt, or to make payment to physicians, lawyers, or any other persons." The court pointed out that the act provided for commutation if it was for the best interest of the employee or would avoid undue expense or undue hardship; and it appeared that some unusual circumstance warranted such departure from the usual course and that such circumstances were present in this case where the life of applicant was at stake, and, at least in all probability, it could be saved only by a surgical operation, by the attendance of a physician, by nursing, and by medicines, all of which would require the expenditure of money, which the patient did not possess and could not raise. The court held that, under these circumstances, commutation should not have been defeated by the provision against allowing commutation to enable the employee to satisfy a debt or make payment to physicians or any other persons, as such provision if literally enforced would prevent commutation in any case, and that the intent of that provision evidently was not to prevent commutation to enable such payments to be made if unusual circumstances called for them. If, however, the court said, the provision in question was so plain as not to admit of a construction which would harmonize it with the other provisions of the section, then it was void,

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The only question involved in this case is whether or not a petition for review of an original award for compensation payable in installments can be maintained under paragraph (h) of section 19 of the Compensation act where such petition for review is filed within eighteen months of the original award and after an order for com-

as, when a saving clause, if good, would render a statute of no effect, the saving clause was void. The court therefore held that, either upon a liberal construction of the provision in question or by treating it as inoperative, the petitioner was entitled to prevail, and the judgment allowing commutation was affirmed. Jensen v. F. W. Woolworth Co., — N. J. L. —, 106 Atl. 808 (1919).

B. Conditions justifying partial commutation.

Plaintiff, a carpenter, fell from a scaffold and sustained an injury termed by counsel as a broken back. The parties made a compensation agreement for $10 per week, which was paid for nearly 2 years, when plaintiff petitioned the industrial accident board for a lump sum settlement. The statute relating to lump sum payments, section 22, part 2, provided: "Whenever any weekly payment has been continued for not less than six months, the liability therefor may be redeemed by the payment of a lump sum by agreement of the parties, subject to the approval of the industrial accident board, and said board may at any time direct in any case, if special circumstances be found which, in its judgment, require the same, that the deferred payments be commuted on the present worth thereof at 5 per cent per annum to one or more lump sum payments." The board found that plaintiff was permanently incapacitated for work as a carpenter; that as a result of respondents' failure to furnish necessary and reasonable hospital and medical services during the first 3 weeks following his injury, plaintiff had been obliged himself to furnish such services, and had incurred about $1,000 indebtedness thereby, one-half of which should have been furnished by respondents; and that the circumstances were such that plaintiff should receive sufficient compensation in a lump sum to pay debts contracted because of the accident and to make it possible for applicant to educate himself to follow some new vocation. The board therefore ordered that the petition for a lump sum settlement be denied, but that respondents be authorized and directed to make an advance payment of $1,750, which, commuted to its present worth, would amount to $1,617.06, the latter amount to be paid forthwith. Upon certiorari, respondents contended that the order was wrong; first, because the power of the board to order lump sum advance payments was confined to cases in which consent of the employer was given; second, because if its power was not so confined it did not extend beyond cases giving specific indemnities; third, because, even if the board was given power to grant lump sum advancements in any case if special circumstances required same, the present award should be reversed. As to the first two contentions the court said there was little necessity for construing the section of the statute as above quoted, because, in unmistakable terms, it provides for a lump sum agreement by the parties with the consent of the board, and also provides that the board may, at any time, in any case, if its discretion is moved by special circumstances, provide for a commutation of deferred payments

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mutation to a lump sum has been entered by the Industrial Commission and not rejected by either party within ten days.

Because of the recognized inability of the medical profession to forecast with certainty the results of an injury causing partial disability, as well as their inability many times to determine whether

without the consent of the employer. Under the third objection it was argued that if the section in question were given full effect, it would suspend other sections which provide for termination of liability for weekly payments upon death of the injured employee; or in case of death of one dependent that his proportion should be paid to the other dependents, and, if all dependents died, that compensation should cease; and that any weekly payment might be reviewed by the board and ended, diminished or increased. The court sustained the validity of the section in question, saying that the legislature evidently considered that in most cases the interests of the injured employee or his dependents would best be conserved by weekly payments, but that to that rule it created the exception that lump sum advancements might be made where special circumstances exist which make it probable that the interests of the employee would be best served by such form of payment and that there was no inconsistency between the provisions. The court further held that the showing was ample to authorize the board to order the lump sum payment and the order was sustained with costs to plaintiff. McMullen v. Gavette Const. Co., 207 Mich. 586, 175 N. W. 120 (1919).

C. Propriety of disregarding probability of death.

While plaintiff in error was undermining a loose rock, it fell upon him, causing fracture of the right radius, laceration of the right forearm and hand, fracture of the second and third lumbar vertebrae, causing a marked deformity by protrusion of the lower back at the site of the fracture, also causing permanent cystitis resulting in total permanent disability. The industrial commission ordered the employer, a self-insurer, to pay him at the rate of $8 per week for life, or until such time as compensation should cease or the order be modified. Thereafter the employee filed a petition for payment in gross, which was denied on the ground that the extent of the disability could not be determined because of the impossibility of determining how long claimant would live, and on the further ground that a lump sum settlement was not for the best interests of the parties. Plaintiff in error then filed in the district court his complaint to have the commission's order vacated, and prayed for judgment granting payment in gross of a sum of not less than $8,500, or payment of not less than $40 per week. The court confirmed the commission's order, basing its decision solely on the theory that the provision of the statute, section 57, chapter 179, Session Laws 1915, which provided for lump sum payments, did not apply to cases of total disability, this also being the view of the commission. The court found that, under the rule of liberal interpretation applicable to the statute as a remedial act, the section in question authorized the ordering of payment in gross for permanent total disability, and that the commission might make a reasonable estimate of the number of future payments when an award was for payments for life, and held that, as this ground for refusing the lump sum settlement was an erroneous theory of

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or not the disability is temporary or permanent or to determine the exact extent of the injury, the law-making power of the State has fixed a period of eighteen months within which such results may be determined with reasonable certainty. A review of the award or agreement within that period enables the Industrial Commission to

the law, plaintiff was prejudiced by the error, although the commission also denied his application on the further ground that a lump sum settlement would not be for the best interest of the parties. As plaintiff in error was entitled to have his case heard in the district court in the light of the correct interpretation of the law, the judgment was reversed and remanded for further proceedings. Karoly v. Industrial Commission of Colorado, — Colo. —, 176 Pac. 284 (1918).

III. Permanent partial disability.

A. Necessity of agreement of parties.

Appellee, while engaged in his duties of walking and inspecting the gas pipe line of his employer, fell down a steep embankment and sustained injuries of a serious and permanent nature to his liver, abdomen, bowels and stomach, causing and resulting in hernia, and brought suit therefor under the compensation act against the employer and its insurer. A verdict was rendered by the jury for damages up to the time of the trial for $355.50, and further damages of $10.50 a week for 87 weeks. The court entered judgment in the sum of $1,260 and the insurer appealed. It was held that, under the provisions of the compensation act, future payments could be redeemed by payment of a lump sum only by agreement of the parties thereto, and that the judgment should have been for the aggregate weekly payments to date of trial, and, for the remaining amount which the jury found due, judgment should have been for such amount, payable weekly. The court said that this error would not call for reversal, but merely for reformation of the judgment, but other errors made reversal necessary. American Indemnity Co. v. Hubbard, — Tex. Civ. App. —, 196 S. W. 1011 (1917).

B. Discretion to grant or deny commutation.

Appellant received an injury in the course of his employment resulting in a hernia, for which he filed a claim for compensation with the industrial insurance commission; the claim was disallowed. He appealed to the superior court, and, after a trial upon the merits, the court found that appellant, while engaged in extrahazardous employment, suffered a rupture "known and classified in surgery as a permanent partial disability, which caused a permanent partial disability," and judgment was entered ordering the commission to fix the compensation according to law, which judgment was not appealed from. The commission having failed to comply with the judgment, an application was made to the superior court for an order to compel it to fix appellant's compensation in a lump sum, and appellant's affidavit in support thereof set forth that appellant offered to furnish the commission with proof of the extent of his injury, which it refused to receive, informing him that, under its rules, no payment will be made for permanent disability in case of hernia, but that an operation was required in such cases. The compensation act provides that "for any permanent partial disability resulting from an injury, the workman shall re-

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determine from the evidence, with some degree of certainty, the true extent of the injury. Defendant in error contends that section 9 of the Compensation act is to be interpreted so that if the parties under the act have the award commuted to a lump sum where such award is payable in installments, and neither party rejects the lump sum

ceive compensation in a lump sum in an amount equal to the extent of the injury," and after specifying certain disabilities by name as constituting permanent partial disability, concluded with the definition, "or any other injury known in surgery to be permanent partial disability." From an order by the superior court denying appellant's application for an order to compel the commission to proceed to fix the amount of compensation in a lump sum, as required by the statute, this appeal was prosecuted. The court held that the commission erred in assuming that the judgment of the superior court merely determined that appellant's injury constituted hernia; that what that decision determined was that the hernia was a permanent partial disability for which, under the statute, he was entitled to a lump sum; and that the only course open to the commission was to proceed to fix the amount of the award in a lump sum against the accident fund. The judgment denying appellant's application was reversed and the cause remanded with instructions to the superior court to enter an order directing the commission forthwith to proceed to fix compensation in a lump sum as for a permanent partial disability in accordance with the statute. Kline v. Industrial Ins. Commission, — Wash. —, 172 Pac. 343 (1918).

Plaintiff, an employee in a coal mine, sustained a femoral rupture while exerting all his strength to lift a rock which had fallen on a fellow employee. The case was brought under the compensation act and the trial court awarded plaintiff a lump sum judgment computed on the basis of $5 and some cents per week for 8 years. Defendant contended that the court abused its discretion in awarding a lump sum judgment, and that, if plaintiff was entitled to compensation, it should have been awarded in periodical payments. The statute under which the judgment was rendered provided that "The judgment in the action, if in favor of the plaintiff, shall be for a lump sum equal to the amount of the payments then due and prospectively due under the act, * * * or, in the discretion of the trial judge, for periodical payments as in an award." Section 5930, Gen. Stat. 1915. The court held that, while it might be true that ordinarily a rupture like a femoral hernia could be successfully treated by a surgical operation which was not considered dangerous to life nor attended by much suffering, and that, if plaintiff would resort thereto, he might be completely restored to his former vigor in a few weeks or months, probably in much less time than 8 years, the court could not say that, because of that, the court abused its discretion in granting a lump sum judgment, and, as no abuse of discretion in failure to exercise a mere discretionary power was manifest, the supreme court could not substitute its judgment for that of the trial court on the very matter which the statute left to the trial court's determination. The judgment was affirmed. Raffaghelle v. Russell, 103 Kan. 849, 176 Pac. 640 (1918).

In Underhill v. Central Hospital for Insane, — Ind. App. —, 117 N. E. 870 (1917), it appeared that appellant

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award so made within the time provided by that section, (ten days,) such award of a lump sum is a final disposition of the claim, and that in such case it must be paid without regard to the question whether or not the injury has recurred, increased, diminished or ended.

Paragraph (h) of section 19 provides: "An agreement or award

was injured in the course of his employment at a hospital for the insane; that he received $28 a month and room, board and laundry, worth $2.50 a week; that his injury resulted in 75 per cent permanent impairment of one foot; that he was paid full salary and furnished with room, board and medical services for about 11 months; and that he was awarded $5.50 per week for 93¾ weeks and a credit for the sums already paid him was made, leaving a balance of $121.62, which was directed to be paid in a lump sum. He appealed from the award, claiming he should have been allowed compensation for 500 weeks as for a total disability. It was held that the board properly made the award under the partial disability clauses of the compensation act; that it was discretionary with it as to the amount of the award up to 200 weeks, and that this discretion was not abused in awarding for 93¾ weeks; that the finding of facts made by the board on conflicting evidence is conclusive on the appellate court; that the board was justified in deducting the payments made to appellant prior to the award; and that the board had power under the statute to require the award to be paid in a lump sum. The award was affirmed.

C. Survival of assigned judgment for lump sum.

An employee recovered a lump sum judgment under the compensation act for an infection of an unhealed wound in his foot from flood water he had to wade through on the employer's premises, the infection requiring amputation of the foot. An appeal was taken pending which a revivor was ordered by the supreme court in the name of the administratrix of his estate, to whom he had made an assignment of the judgment in trust for his four children. It was objected that the assignment was a nullity because forbidden by the statute. The court implied that it considered that an assignment of that nature was not necessarily in conflict with the spirit of the law, but found it unnecessary to decide the question and assumed the assignment to be invalid. It was argued against the revivor that the right to compensation and any judgment for compensation abate upon the death of the employee and do not survive to his heirs or representatives. The court pointed out that the case was not analogous to an award for the death of an employee where the compensation was allowed only to his dependents, and therefore his heirs, as such, or his executor or administrator, have nothing to do with it, as here the judgment was in favor of the workman; nor was it analogous to an award to an injured workman which provided for periodical payments, although subject to commutation, for in the present case plaintiff had obtained an absolute personal judgment requiring immediate payment of a fixed amount, which it was the duty of defendant to pay at once unless a stay should be procured pending an appeal, and defendant could gain no immunity by taking an appeal which is finally determined against him. To the further argument that, because the judgment was not assignable it did not survive the death of the plain-

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under this act, providing for compensation in installments, may at any time within eighteen months after such agreement or award be reviewed by the Industrial Board at the request of either the employer or the employee, on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended;

tiff, the court answered that while, as a rule, nonassignable causes of action did not survive, a judgment based upon such a cause of action did survive, and did so in this state notwithstanding pendency of an appeal, and that where a statute, for some special purpose such as the protection of a claimant against improvidence, forbade assignment, nonsurvivability did not necessarily result therefrom. The court held that even if the assignment was invalid the revivor was properly made in the name of the administratrix, and judgment for plaintiff was affirmed. Monson v. Battelle, 102 Kan. 208, 170 Pac. 801 (1918).

D. Consideration of probable wage increase.

Appellant, an employee, when about 18 years of age, was permanently disabled by injuries arising out of and in the course of his employment. After receiving weekly compensation for a time he applied to the industrial accident board for compensation by payment of a lump sum. The board considered the application, giving him the benefit of statute 1915, c. 236, because he was of such age and experience that, under natural conditions, his wages would be expected to have increased. Findings were made somewhat in detail as to his probable increase in earnings had he not been injured, and on that basis a lump sum was awarded. It did not appear that a specific award was made for a period of about 10 weeks, and the employee, being dissatisfied with the award, appealed. It was held that while the evidence might have supported a somewhat larger award, the whole question involved a consideration of the weight of the evidence, and the estimate of future earnings involved an examination of the employee and insight into his probable quickness of perception and general reliability, which were matters of fact for the board to determine. The circumstance that no specific item for the 10 weeks was included was held to show no error, as that period was doubtless taken into account in making the order as to payment of the lump sum. The decree was affirmed. In re Moran, 230 Mass. 500, 119 N. E. 956 (1918).

IV. Temporary disability.

A. Jurisdiction to consider recurrence after lump sum award.

An employee of plaintiff in error sustained an injury to his knee as a result of slipping on some paste in the basement of the building where he was employed, for which he was paid $6 per week for 9 weeks. About 16 months thereafter the employee, not having recovered, entered into negotiations, and a settlement was made under which he was paid $150 in cash, which settlement was confirmed by the industrial commission as an award under the compensation act. Less than 18 months thereafter he filed a petition for review on the ground that the injury had recurred and increased, producing derangement of the hip and other injuries. After due notice to plaintiff in error, the commission found that the injury had recurred and increased, and entered an award in his favor. A writ of certiorari was sued out of the circuit court, and

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and on such review, compensation payments may be re-established, increased, diminished or ended." We think the clear meaning of said paragraph is that wherever the statute provides for the payment of an award by installments, any agreement or award subject to review under such statute may be reviewed within eighteen months from the

on hearing, that court confirmed the decision of the commission and certified the cause as one proper to be reviewed by the supreme court. Plaintiff in error contended that, as more than the statutory period had elapsed after its last payment before the settlement for $150 was made, the commission had no jurisdiction to approve that settlement as a lump sum award. It was held, however, that by making the settlement agreement both parties submitted to the jurisdiction of the commission on the merits and waived the effect of the time limitation, although the contract of settlement specifically stated that it was made after jurisdiction had been lost by the commission and was purely voluntary on the part of plaintiff in error, as the employer could not relieve himself from liability by contract with an employee. It was further held that the commission had jurisdiction to review the lump sum settlement within 18 months and modify its award on the ground of recurrence, the contention of plaintiff in error, that a review on the ground of recurrence was authorized only when payments were made in instalments, and not when made in a lump sum, being held to have been decided to the contrary in Peoria Ry. Co. v. Industrial Commission, 290 Ill. 177, 125 N. E. 1 [the case annotated]. As the circuit court exceeded its jurisdiction by rendering a judgment directing payment of the amount of the award and ordering execution to issue, the judgment was reversed and the cause remanded to the circuit court with directions to the court to merely enter an order confirming the decision of the commission. Tribune Co. v. Industrial Commission, 290 Ill. 402, 125 N. E. 351 (1919).

Plaintiffs in error were engaged in buying and selling horses, and an employee, while riding a horse for exhibition purposes, was crushed against a fence, both bones of his lower leg being broken and his shoulder injured. He made a lump sum settlement for $925, including medical and hospital services. Later he filed a petition with the industrial board, claiming that the settlement was made under a misapprehension of certain facts, and that his disability had recurred and increased. The commission found that the parties were operating under the compensation act; that following the period of temporary total disability the employee had suffered a permanent partial disability, and awarded him $3,500 in weekly payments of $12 and $200 additional for hospital and medical expenses, all former payments to be deducted from that amount. Plaintiffs in error contended that they had not elected to come within the compensation act, but the court found that the evidence justified the finding that they had so elected. It was held that notwithstanding the lump sum settlement, the board had authority to review its former proceeding in which it approved the settlement, and that as the proceeding was conducted entirely by the insurance company, the employee not then being before the board, no effort was made to determine the extent of his injuries, and the sum awarded was not computed in accordance with the act, and, from a consideration of the whole evidence, it clearly appearing that the employee

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date of the agreement or award on the ground aforesaid and on the filing of the petition as aforesaid, either before or after such award has been commuted to a lump sum agreement. Section 9 of the Compensation act, allowing lump sum settlements, contains no language that forecloses any right of the parties to have the award of the

accepted the settlement for what he considered a temporary total disability while the evidence showed a permanent partial disability, the finding of the board was fully justified. The judgment of the circuit court, setting aside the award of the board on the ground that the parties were not under the compensation act, was reversed, and the cause remanded, with directions to the circuit court to confirm the decision of the board. Ellsworth v. Industrial Commission, 290 Ill. 514, 125 N. E. 246 (1919).

B. Jurisdiction of court on trial de novo.

An employee of a gas company sustained certain injuries and claimed a right to participate in the insurance fund. The company was operating under the provisions of the compensation act whereby it had elected to pay compensation direct to its employees. It denied liability, and the employee filed his claim for compensation with the state board, which decided he was not entitled to participate in the fund for the reason that the injuries were not received in the course of his employment. Appeal was taken to the common pleas court, in which a verdict was had in the gross sum of $2,000 under a direction of the court that the jury might award a verdict in a lump sum, and this charge was one of the grounds relied upon for a reversal of the common pleas judgment and affirmance of the judgment of the court of appeals which reversed the common pleas. The state contended that the jury, hearing cases of this character on appeal, sits as an appellate board of awards, and can render no judgment or award different from that which would have been made by the industrial commission had it found the employee entitled to an award. The court held that this contention was sound under the provision of the statute that, if the jury determine the right in claimant's favor, it "shall fix his compensation within the limits under the rules prescribed in this act; and any final judgment so obtained shall be paid by the state liability board of awards out of the state insurance fund in the same manner as such awards are paid by such boards," and that therefore the direction permitting the jury to award a lump sum was erroneous. It was held, however, that as the award of $2,000 amounted to $8 per week for 250 weeks, which the jury was justified in awarding, the error was not prejudicial. The judgment of the common pleas court was accordingly modified to an award of $8 per week for 250 weeks, and as so modified was affirmed. Roma v. Industrial Commission of Ohio, 97 Ohio 247, 119 N. E. 461 (1918).

C. Discretion of commission.

In Gilmore v. Monarch Cement Co., — Kan. —, 173 Pac. 913 (1918), plaintiff was awarded a lump sum of $2,070 on the basis of $5 per week for 8 years, the time during which, it was estimated, he would be partially incapacitated, and it was claimed that making the award in a lump sum was an abuse of discretion. The court said, however, that, while cases might be imagined in which an award

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commission reviewed upon the grounds set forth in paragraph (h) of section 19 of the same act. Section 9 merely intended to give the parties the benefit of cash payments in lump sums instead of carrying the award as an obligation to be paid in continuous installments. The payment of such a lump sum settlement by the employer would

of a lump sum might constitute an abuse of discretion, nothing approaching such abuse appeared in this case. The judgment was affirmed.

D. "Ascertainable by objective examination."

In Goodwin v. Cudahy Packing Co., 104 Kan. 747, 180 Pac. 809 (1919), the district court, to which a claim for compensation had been taken upon failure of the parties to settle the matter by agreement or arbitration, rendered judgment for a lump sum under a statute, Laws 1917, c. 228, § 20, which provided that in no case should a lump sum judgment be rendered for an injury not ascertainable by objective examination. The evidence showed that the injury resulted from a knife cut just above the wrist; that it took eight stitches to close the wound; that plaintiff was unable to work for seven months, and that his arm still bothered him in lifting and grabbing. The court said that while this evidence was properly received for other purposes, it could not be considered to determine whether the judgment should be for a lump sum or for periodical payments, as that question could be determined by objective examination only. However, a physician testified that he examined the injured arm, and his testimony, after eliminating the history of the case and the physician's inferences and conclusions, showed that the examination disclosed a scar, and a tendon, the free movement of which was inhibited by the scar, so that the tendon did not draw the thumb down into the hand, and disclosed loss of motion and grab. It was held that these facts were ascertainable and were ascertained by inspection and manipulation alone, purely objective means, and were sufficient to sustain the lump sum judgment.

V. Commutation as penalty for default in instalments.

In Lombard v. Uhrich, 102 Kan. 780, 172 Pac. 32 (1918), judgment was rendered under the Workmen's Compensation Act for the payment of $4 per week during plaintiff's partial incapacity, and provided that if defendants continued to employ plaintiff at full wages they should be relieved from making the weekly payment, but that whenever plaintiff should quit defendant's employ the payments should begin. Plaintiff quit their employ and took employment elsewhere at equal or greater pay, and, upon the striking from the files of a petition by defendants for a new trial on the ground that plaintiff fraudulently entered into the agreement with the intention of quitting and seeking employment elsewhere as soon as the judgment became effective, plaintiff made application for an order to enforce the judgment. The court ordered that defendants pay the $4 per week for the period named in the original judgment, and that in default thereof that the whole amount of such payments in lump sum should become due and payable, and that plaintiff be entitled to an execution for the whole of such amount in a lump sum. On appeal by defendants it was held that the court did not err in making such order, and the judgment was affirmed.

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not estop the employee to file his petition, under paragraph (h) of section 19, for a recurring and increased injury as therein provided. (Wabash Railway Co. v. Industrial Com., 286 Ill. 194.) In the case just cited there was a lump sum agreement between the parties and this agreement was approved by the Industrial Commission, and it

VI. Amendment of act as affecting prior agreement of self-insurer.

In 1914 appellant was granted permission by the state industrial commission to carry its own risk upon its agreeing, among other things, to pay into the state insurance fund an amount equal to the present value of the future payments of compensation under any award made by the commission against them. At that time the statute authorized the commutation of awards, provided the nature of the injury made it possible to compute the present value of all future payments. No statutory method was provided for estimating the present value of awards of future payments to widows, and it had been held impossible under the statute to compute such an award because no method was provided by law for estimating the contingency of remarriage, and that, therefore, the commission had no power to commute such an award. In 1917 the statute was amended by providing a method of estimating future payments to widows and the commission was empowered to require the commutation of such awards. In 1918 the commission passed a resolution requiring all self-insurers to commute all death benefits under awards occurring during the latter half of 1917, the amounts to be determined by the method provided for by the amended statute. Such an award had been made against appellant, and it was ordered to pay the sum of $7,534.04. Upon its refusing to do so and taking an appeal, the commission canceled its privilege of self-insurance on the sole ground of its resistance to the commission's order, as shown by the appeal, and its alleged repudiation of the agreement of 1914. The court held that the terms of the agreement of 1914 and the extent of the obligations thereunder were fixed when it was made, and could not be enlarged without a new voluntary promise, however retroactive the amendment may have been upon the law of cases previously arising, and that, therefore, there was no contract by appellant to pay as ordered in this particular instance and no breach of contract on its part. Furthermore, appellant would have the right to an appeal to determine its liability under its contract, and the commission could not penalize it for appealing. As no other ground was shown for cancellation of appellant's right to self-insurance, the order of the commission was reversed. State Industrial Commission v. Yonkers R. Co., — N. Y. App. Div. —, 173 N. Y. Supp. 858 (1919).

VII. Legislative discretion as to conditions of commutation.

In New York Cent. R. Co. v. Bianc, 250 U. S. 596, 63 L. Ed. 1161, 40 Sup. Ct. 44 (1919), affirming Sweeting v. American Knife Co., 226 N. Y. 199, 123 N. E. 82, and consolidated cases which involved the validity of a statutory provision for compensation for facial or head disfigurement, an objection was raised to the award being made in a lump sum. The supreme court said that whether the compensation should be paid in a single sum or in instalments is a matter of detail for the state to determine.

An employee of respondent, a self-

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was held in that case that that was such an agreement as could be reviewed under paragraph (h) of section 19 although the lump sum agreed on had already been paid. Paragraph (h) is for the mutual advantage of both employer and employee, and the same rule applied in favor of the employee must be applied in favor of the employer.

insurer under the compensation act, received an injury resulting in his death, and an award of compensation was made directing that certain payments be made per week to the widow during widowhood and to the dependents during dependency. Thereafter the commission passed a resolution that every mutual insurance company and every self-insurer should, on or before a certain date, pay into the state fund as a special fund under the terms of section 27 of the compensation law, as amended in 1917, the present value of the future instalments of death benefits under every award for death between certain dates. Later the commission, by its cashier, sent to respondent a notice referring to the claim by number, that the sum of $5,674.35 was due and must be paid before a certain date. After receipt of this notice the respondent served notice of appeal. The appellate division considered the notice as a determination or decision, and reversed it. The attorney general appealed. The court held that the notice in question was neither an award nor a decision of the commission, and no appeal would lie therefrom, and the appeal was dismissed without costs. The court added for the future guidance of the commission that the award was in the nature of a judgment, finally and conclusively determining the rights of the parties under the act, and it could not be substantially changed, as proposed, without notice and opportunity for a hearing, and that, after such hearing, before a different method of payment could be fixed, the award previously made must be modified, and that could not be done by an omnibus resolution like the one adopted. The court expressly disclaimed any intimation as to the validity of the statute under which the action was taken. Sperduto v. New York Interborough Ry. Co., 226 N. Y. 73, 123 N. E. 207 (1919).

VIII. Award for total of sums past due as lump sum award.

In Shaffer v. D'Arcy Spring Co., 206 Mich. 483, 173 N. W. 201 (1919), plaintiff, while at work for defendant, received an injury to his left leg for which he claimed compensation. Compensation was awarded at $6 per week from the date of the injury to the date of the award, Dec. 9, 1914. Neither party appealed, and the award was paid. In April, 1915, plaintiff petitioned the board to review its former order and to increase and extend the payments because of his failure to recover from his injuries, which application was denied. In April, 1916, another petition, substantially the same, was filed, and an order was made for compensation at $6 per week from the last payment to Nov. 22, 1916, this to close the case. Both parties applied for and received writs of certiorari and the proceeding was remanded for further action. [See Shaffer v. D'Arcy Spring Co., 199 Mich. 537, 165 N. W. 825 (1917).] Subsequently a motion for rehearing was filed and denied, a new petition filed, and evidence taken before the board, and on Sept. 12, 1918, an order was entered for payment of $6 per week from the date of the last payment up to the date of the order, and for the same amount for the fu-

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The Industrial Commission erred in sustaining the motion to dismiss the petition for review and the circuit court erred in quashing the writ of certiorari. The judgment of the circuit court is reversed and the cause remanded, with directions to remand the cause to the Industrial Commission for a hearing on plaintiff in error's petition.

Reversed and remanded, with directions.

ture so long as plaintiff seemed to be totally disabled, and this order was brought up for review in the present appeal. It was contended by counsel for defendant that the award of Dec. 9, 1914, was an award for a lump sum payment instead of for weekly compensation. That award recited that plaintiff "is entitled to receive and recover from said respondents the sum of $6 per week for a period of 23 weeks from the 2d day of July, 1914, and that said applicant is entitled to receive and recover from said respondents on this date $138, being the amount of such compensation that has already become due under the provisions of law, being all of said compensation, the same being now due; also for medical bill the sum of $4.50." The court held that as, upon the former appeal, it had considered the similar order of Nov. 22, 1916, as an order for weekly payments, the order of Dec. 9, 1914, must also be so considered, and that it was within section 14, part 3, of the compensation act which provides that "any weekly payment under this act may be reviewed by the industrial accident board." The award was therefore affirmed.

R. L. S.

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BOLDT v. PENNSYLVANIA R. CO.

[Supreme Court of the United States, January 7, 1918.]

245 U. S. 441, 62 L. Ed. 385, 38 Sup. Ct. 139, aff'g 134 C. C. A. 175, 218 Fed. 367.

1. **Federal Employers' Liability Act—Negligence of fellow-servant—Liability of carrier.**

In cases within the purview of the Federal Employers' Liability Act, the carrier is not shielded by the fellow-servant rule, but must answer for the negligence of an employee as well as for that of an officer or agent.

CASE NOTE.

Assumption of risk of negligence of other employees, under Federal Employers' Liability Act.

I. Operation of trains, 463-476.
- A. Failure to signal approach, 463-466.
  1. Trackman struck by snow plow, 463.
  2. Section hand struck by train on unusual track, 463-464.
  3. Unlighted engine, 464-465.
  4. Signal too late, 465-466.
  5. Porter struck while transferring mail, 466.
- B. Starting, stopping, jerks, etc., 466-470.
  1. Application of air brakes by brakeman, 466-467.
  2. Jolt caused by angry engineer, 467-468.
  3. Acceleration while employee boarding car, 468.
  4. Sudden stop by engineer, 468-469.
  5. Starting before fireman could board engine, 469-470.
- C. Excessive speed, 470-472.
  1. While brakeman boarding car, 470-471.
  2. Engine speeding in heavy smoke, 471-472.
- D. Collision, 472-474.
  1. With runaway cars, 472.
  2. Broken coupling leaving caboose on main track, 472-473.
  3. Open switch, 473.
     a. High speed, 473.
     b. Failure to observe signal, 473-474.
- E. Backing engine without lookout, 474.
- F. Negligent order of dispatcher, 474-475.
- G. Emission of steam at station, 475-476.

II. Switching operations, 476-494.
- A. Running cars against standing cars, 476-481.
  1. Crossing under cars, 476.
  2. Checker crossing near cars to depot, 476-477.
  3. Brakeman thrown from car, 477-478.
  4. Air inspector run over, 478.
  5. Car inspector struck, 478-479.
  6. Repairman injured, 479-480.
     a. Failure of plaintiff to post warning, 479.
     b. Failure of coemployee to post warning, 479-480.
     c. Runaway cars, 480.
  7. Car cleaner hurt, 480-481.
- B. Sudden stop, 481-483.
  1. Failure to uncouple cars being switched, 481-482.
  2. Use of direct air in making flying switch, 482.
  3. Negligent signal by conductor, 482-483.
- C. Sudden starting, 483-487.
  1. Premature signal, 483.
  2. Starting without signal, 483-486.

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2. **Master and servant—Assumption of risk—Extraordinary risks or risks obvious or fully known and appreciated.**

At common law, a servant assumes extraordinary risks incident to his employment or risks caused by his master's negligence which are obvious or fully known and appreciated by him.

3. **Federal Employers' Liability Act—Action for death of yard conductor—Instruction on assumption of risk.**

In an action under the Federal Employers' Liability Act for the death of

a. Injuring workman near car, 483-484.
b. Engine striking ash pit cleaner, 484.
c. Starting before cars uncoupled, 484-485.
d. Starting against order, 485.
e. Starting tug, 485-486.
3. Negligent signal, 486-487.
D. Open switch, 487-488.
1. Car being repaired struck, 487.
2. Inspector's motor car taking switch, 487-488.
3. Failure to turn switch, 488.
E. Failure to keep lookout, 488-489.
F. Collision, 489.
G. Changing method without warning, 489-490.
H. Failure to stop on signal, 490.
I. Moving turntable without warning, 491-492.
1. Engine derailed, 491.
2. Fireman injured while adjusting lock, 491-492.
J. Failure to leave passage between cars, 492.
K. Fellow employee taking wrong place on engine, 492-493.
L. Shoving unattended car on track, 493.
M. Switching bad order car, 493-494.
III. Section work, etc., 494-509.
A. Negligent order of superior, 494-497.
1. On approach of train, 494-497.
a. To take other side of track, 494.
b. To remove jacks from rails, 494-495.
c. To move hand car from track, 495-496.
d. To board moving train, 496-497.
2. To move live wire, 497.
B. Negligent information as to time of train, 497-498.
C. Objects falling from train, 498-499.
1. Coal, 498.
2. Ties, 498-499.
D. Throwing or dropping rail too soon, 499-500.
E. Operation of hand or motor car, 500-503.
1. Speeding motor car, 500-501.
2. Sudden stop of hand car, 501-502.
3. Sudden push, 502.
4. Removal from track, 502-503.
F. Management of weed burner, 503.
G. Exposure to weather, 503-504.
H. Particles flying from pick, hammer, etc., 504-505.
1. Ice or cinder from pick, 504-505.
2. Head of spike from glancing blow, 505.
3. Sliver of steel from chisel, 505.
I. Failure to give warning, 505-507.
1. Of likely approach of train, 505-506.
2. On starting work after rest period, 506-507.
3. Of danger from gasoline, 507.
J. Removing snowsheds, 507-508.
K. Wrecking operations, 508.
L. Fall from bridge, 508-509.

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an experienced yard conductor who was killed while assisting in an effort to adjust a faulty coupler at the end of a string of cars and while violating instructions, when a second string of cars was permitted to move by gravity against the first one, held that the plaintiff's requested charge to the jury that the risk which, since the passage of such act, the employee assumes, "is the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of defendant's officers, agents, or employees," did not accurately state any applicable rule of law, and was properly refused.

IV. Inspection and repair, 509-513.
- A. Rolling stock, 509-511.
  1. Loss of bearing from riveting, 509.
  2. Fall over surplus clinker hook, 509-510.
  3. Boring hole in car without warning, 510.
  4. Inspection of load of piles, 510-511.
- B. Electrical appliances, 511-512.
  1. Failure to turn off current, 511.
  2. Turning on current without warning, 511-512.
- C. Releasing hoists during repairs, 512-513.
- D. Fall of bridge during repairs, 513.

V. Loading, 513-514.
- A. Order to jump after coaling engine, 513-514.
- B. Removal of truck from express car door, 514.

Cross-references. Risks assumed under Federal Employers' Liability Act, see 8 N. C. C. A. 834-871; instructions as to assumption of risk in actions under Federal Employers' Liability Act, see 7 N. C. C. A. 685-700; assumption of risk of injury through defective or inadequate tools, appliances or equipment, under Federal Employers' Liability Act, see 19 N. C. C. A. 559-585.

I. Operation of trains.

A. Failure to signal approach.

1. Trackman struck by snow plow.

The plaintiff, who had been in the employ of the track department of the defendant for about 15 months was directed on the day of the accident to clean away the snow from a certain switch. About three-quarters of an hour after he began work, he was struck and injured by a train consisting of a rotary snow plow, tender and caboose, backing down hill. No whistle was blown and at least one of the train operatives saw the plaintiff when the train was a third of a mile away. The plaintiff's cap partially covered his ears and may have impaired his hearing. A train had passed the scene of the accident about half an hour before, and the plaintiff testified that he looked for the approach of other trains, though he did not expect any, from 3 to 5 minutes before he was hurt. The defendant was charged with negligence in failing to keep a lookout on the train and give warning of its approach. From a judgment for the plaintiff, the defendant appealed, contending that the plaintiff assumed the risk. The court affirmed the judgment holding that while the plaintiff assumed the risk of being run down by trains of the defendant operated in the usual way, he did not as a matter of law assume the risks incident to the operation of the defendant's trains without the use of whistle or bell. Morata v. Oregon-Washington R. & Nav. Co., 87 Ore. 219, 170 Pac. 291 (1918).

2. Section hand struck by train on unusual track.

The deceased, a section hand, arrived at the tool house where the men of his crew assembled before going to

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4. Federal Employers' Liability Act—Action for death of yard conductor—Instruction on assumption of risks.

In an action under the Federal Employers' Laibility Act for the death of an experienced yard conductor who was killed while assisting in an effort to adjust a faulty coupler at the end of a string of cars and while violating instructions, when a second string of cars was permitted to move by gravity against the first one, held that a charge to the jury that the deceased assumed the ordinary risks of his employment was more favorable than plaintiff could properly demand.

work, a few minutes before 7 o'clock on the morning of the accident. He then started to walk slowly along a passing track to a point near by where work had been stopped the day previous and was to be resumed that morning. Before reaching the point where the passing track joined the main track, deceased crossed over diagonally to the main track. While walking thereon, he was struck and killed by a work train. It appeared to be the usual custom for trains arriving at this time to run in upon the passing track and wait for the passing of a passenger train due a few minutes after 7 o'clock every morning. Instead of doing as usual, the work train approached on the main track from the rear of the deceased at from 20 to 35 miles an hour, and without a whistle other than the usual crossing whistle, until it was within 100 to 150 feet of him, and too late to avert the disaster. It appeared that the deceased was negligent in not keeping a better lookout for trains, but that the engineer was also negligent in not warning the deceased of his danger after he had been perceived. From a verdict and judgment for the plaintiff, the defendant appealed. The court affirmed the judgment, saying: "The general rule is that an employee of a railroad company assumes all the risks ordinarily incident to his employment, including those arising from the ordinary operation of trains upon the road. * * * The unusual speed of the train, considered by itself, would probably be among the risks assumed by deceased. The change from the customary track to the main track, standing alone, might also be among the contingencies concerning which he should be held to have assumed the risk, but add to these the negligent failure to give timely warning when his presence and apparent unconsciousness of danger were perceived, and we have a case which we think the court was justified in submitting to a jury." Stool v. Southern Pac. Co., — Ore. —, 172 Pac. 101 (1918).

3. Unlighted engine.

The deceased, a signal maintainer, was struck and killed by a fast passenger train while in the act of entering a tunnel of the defendant railroad upon a tricycle in the course of his duties in inspecting, repairing, and maintaining electric signals. The engine did not have a headlight showing at the time of the accident, though it was early in the evening and the day had been dark and rainy. The negligence alleged on the part of the defendant was the failure to show a headlight on the engine so as to warn the deceased of its approach. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, said: "Of course the doctrine of assumed risk does not apply if the defendant was guilty of negligence in not maintaining a headlight, for the servant never assumes the risk of the master's negligence unless he knows of the negligent act and appreciates the danger, or the negligent act and consequent danger are so obvious that a person of ordinary prudence in his situation would have observed the one

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5. Federal Employers' Liability Act—Assumption of risk—Applicability of doctrine.

The doctrine of assumption of risk applies in actions under the Federal Employers' Liability Act except where, as provided in section 4 of the act, there has been a violation by the carrier of a statute enacted for the safety of employees.

Action under the Federal Employers' Liability Act for the death

and appreciated the other. * * * Here there was not the slightest opportunity to observe the absence of a headlight and appreciate the danger. On the contrary, the danger itself was created and concealed by the negligent act of the defendant." Louisville & N. R. R. Co. v. Mullins' Adm'x, 181 Ky. 148, 203 S. W. 1058 (1918).

The deceased and his foreman were returning from work on a gas motor tricycle. The deceased was directed to sit on the front end of the machine in order to hold the wheels more firmly upon the track. He faced slightly southeast, while the machine was proceeding in a westerly direction. A passenger train, approaching from the east without signals, headlight, or a lookout, struck the tricycle and killed the deceased. It appeared that the foreman and the deceased were not seen by the train operatives until within a car's length of them. From a judgment upon a directed verdict, the plaintiff appealed. The court reversed the judgment and remanded the case for a new trial. The retrial resulted in a verdict and judgment for the plaintiff. The defendant appealed, contending that it was error on the part of the trial court to refuse its request to go to the jury upon the question whether the deceased had assumed the risk. The court, in affirming the judgment upon condition that the plaintiff accept a remittitur from $8,999.75 to $6,617.50, pointed out that the deceased assumed the risk of danger arising from the negligence of his fellow-servants; but servants operating a train were not fellow-servants of the deceased, since he was an employee working upon the tracks, and as a matter of law he did not assume the risk of their negligence. Grow v. Oregon Short Line R. Co., 47 Utah 26, 150 Pac. 970 (1915).

4. Signal too late.

Plaintiff's decedent, employed by defendant as a track walker, was killed while at work, and his administratrix sued under the Federal Employers' Liability Act to recover damages. It appeared that while decedent was walking along an eastbound passenger track, inspecting rails, a passenger train approaching from the rear blew a warning whistle, and that immediately decedent stepped over into the eastbound freight track, just in time to be struck by the engine of a freight train. Plaintiff alleged and offered evidence tending to show that it was the custom of defendant's engineers, when they saw persons walking on the track in apparent unconsciousness of the approach of a train to give a warning signal, consisting of several short blasts of the whistle; that decedent was unaware of the approach of the passenger train until the warning signal was blown, and that the passenger train was so close to decedent, when the signal was blown, that decedent was "compelled to act almost automatically" in leaving the passenger track, and without time to observe whether he was stepping into a place of safety or one of equal peril. The court, while making absolute defendant's rule to show cause for reasons not here relevant, held that the evidence warranted the jury in finding against the defendant on the

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of a yard conductor. Judgment of the Circuit Court of Appeals (134 C. C. A. 175, 218 Fed. 367), affirming a judgment on verdict for the defendant, affirmed.

For plaintiff in error—Henry W. Brush, Rufus S. Day, Frank Gibbons, and Charles W. Dills.

above contention, and held further, that the "doctrine of assumption of risk had no application" in the case, since decedent did not assume any risk arising out of the negligence of a fellow-servant (the failure to give timely warning of the passenger train's approach), the circumstances of the negligent act themselves precluding any knowledge of the peril thereby caused, in time to act in avoidance thereof. Santomassimo v. New York, S. & W. R. Co., — N. J. L. —, 105 Atl. 14 (1918).

5. Porter struck while transferring mail.

The plaintiff's decedent, a station porter, was engaged at the time of the accident in transferring the mail from one passenger train to another. A third engine backed into the crowded yard between the two trains, and through a dense cloud of steam, without the ringing of any bell or the giving of any other signal, and without having a trainman on the rear of the tender as required by the rules. As a result, the plaintiff's decedent, not knowing of the presence of the engine in that vicinity, was struck and killed. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the deceased did not assume the risk of the defendant's negligence, as he had no opportunity to know of it. As the court pointed out, an employee under the federal decisions assumes only those risks and dangers which are so obvious that a person of ordinary prudence would have observed and appreciated them. Hudson v. Seaboard Air Line R. Co., 176 N. C. 488, 97 S. E. 388 (1918).

B. Starting, stopping, jerks, etc.

1. Application of air brakes by brakeman.

Plaintiff's decedent was an engineer upon a northbound freight train of the defendant company. His train being scheduled to meet a certain southbound freight train upon a single track, he was given orders to take the siding at a certain point to make way for the southbound train. When the siding was reached, it was found that there were cars already on the siding, but the decedent's train pushed these ahead, and the cars already on the siding and the train hauled by decedent's engine more than filled the siding. The passage of the southbound train was accomplished by stopping the train after he had cleared the north end of the switch, and then pushing the cars on the north end of the siding over onto the main track. It appeared, however, that still another southbound train was expected, and to clear the main track for this train it became necessary to pull decedent's train and the cars which had preceded it upon the siding back upon the siding far enough to clear the switch; while decedent was backing his train for the accomplishment of this purpose, the rear brakeman of his train suddenly applied the brakes, and the sudden shock caused the decedent to strike his head against the cab, thereby causing his death. The conductor in charge of the decedent's train testified that he had intended

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For defendant in error—Frederic D. McKenney and J. S. Flannery.

The following are the pleadings in the action:

Complaint.

The plaintiff complains of the defendant, and for her cause of action states and alleges, upon information and belief:

not to cross the southern point of the switch, but it appeared that the act of the brakeman in stopping the train so suddenly was contrary to orders, and caused the situation wholly unexpected to the decedent. At the trial of plaintiff's action to recover damages for the death of the decedent, the jury was instructed that the decedent assumed the risk incident to his employment, and that, if the application of the air brakes was made upon a reasonable belief that it was necessary to apply them in order to avoid injury to property, they should find for the defendant unless they found that the emergency was brought about by the defendant's servants in the negligent operation of the train before the brakes were applied. The application of the Federal Employers' Liability Act to the case was admitted. In affirming the judgment for the plaintiff the supreme court said: "As an abstract proposition the qualification [contained in the instruction above set out] was correct, and the jury might have found that the conductor did not manage the train with due care, and so made the application [of the brakes] necessary. Whatever might have been our opinion had we been in the jury's place, we do not feel warranted in saying that they had no evidence to go upon, or that the instructions were wrong." Louisville & N. R. Co. v. Stewart, 241 U. S. 261, 60 L. Ed. 989, 36 Sup. Ct. 586 (1916).

2. Jolt caused by angry engineer.

The plaintiff's decedent, a rear brakeman on a night freight train, had been directed previous to the accident to take a seal press and go to the forward end of the train over the moving cars in order to seal a car that was to be left at the next station. In doing so, he either slipped on a banana peeling, falling between the cars and being killed, or was thrown from the top of the car by a sudden and violent jolt, caused by a violent application of the brakes by the engineer, which was shown to have occurred at about the place where the body of the deceased was later found. After a verdict for the plaintiff, the case was transferred on the defendant's exceptions. The court, in overruling the exceptions, said: "Under the federal statute, the negligence of a fellow-servant is not a defense, but assumption of risk is. The result is held to be that the doctrine of assumption of risk applies to acts of fellow-servants in the same way as it does to acts of the master. * * * From this it is argued that because * * * [the deceased] knew that the engineer was likely to handle the train roughly that night [because of trouble with the engineer when the train was being made up], therefore the risk of injury from such cause was assumed. But this knowledge came to * * * [the deceased] just as the train was starting on its trip, when there was no reasonable opportunity to quit the service. It related to the probability of want of care occurring in the future, and not to the result of acts already done. Under these circumstances it cannot be held as matter of law that * * * [the deceased] voluntarily encountered

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First: That your plaintiff is a citizen of the United States, and a resident of the city of Buffalo, county of Erie and state of New York, of which said city, county and state, Edward J. Boldt, your plaintiff's intestate, had been for many years a citizen and resident at the time of his death as hereinafter alleged, and that upon the 26th day of September, 1912, your plaintiff was duly appointed by the Surrogate's Court of said county of Erie, state of New York, administratrix of the estate of said Edward J. Boldt, deceased, and that she has duly qualified and is now acting as such administratrix.

Second: That at all the times hereinafter mentioned this defendant was

a known danger which had been created by his fellow-servant." Castonia v. Maine Cent. R. R., 78 N. H. 348, 100 Atl. 601 (1917).

3. Acceleration while employee boarding car.

The plaintiff, an electrical engineer, was employed to instruct the motormen of the defendant railroad how to operate its electric motors. On the evening of the accident, he was ordered to leave the motor that he had been riding that day at a certain point and take a train back to his headquarters. A superior instructed him that a certain train would slow down for him at that point. The train in question on arriving at that point did not stop, but did slow down to about 12 miles an hour. The plaintiff grabbed the round of a ladder, and landed safely with his knees in the stirrup. At that moment, however, the engine gave a sudden jerk forward, throwing him out of the stirrup and under the train, with the result that his right arm and left leg were cut off. A verdict for $30,000 in favor of the plaintiff was set aside and the defendant was awarded a new trial. On appeal from such judgment, the court reinstated the verdict and entered judgment for the plaintiff, holding that, while the plaintiff assumed all the ordinary risks of his employment, including the risk of mounting and riding moving trains, he did not assume extraordinary risks and hazards, such as the sudden and violent starting of the train, so as to break his hold and throw him under the train. As the court pointed out, unless such extraordinary risks are so apparent as to be appreciated by the employee, the negligence of the defendant in creating such additional risk would render it liable under the Federal Employers' Liability Act for any resulting injury. Dumphy v. Norfolk & W. Ry. Co., — W. Va. —, 95 S. E. 863 (1918).

4. Sudden stop by engineer.

The plaintiff's decedent was thrown against a railing of the caboose on the platform of which, in the discharge of his duties, he was riding when the train was brought to a sudden and violent stop by the engineer. There was evidence showing that the deceased was afflicted with a kidney disease when he entered the defendant's employment, and though the same injury would not have been fatal to a healthy man, there was evidence to the effect that it was the real cause of the death of the deceased. From a judgment for the plaintiff, the defendant appealed, contending that the evidence established assumption of risk by the deceased. The court, in affirming the judgment, held that the evidence was not sufficient to hold that the deceased, as a matter of law, assumed the risk. As the court pointed out, the deceased assumed all the "ordinary" risks of the employment which would be defined as risks, the hazard of which was appreciated by the employee and which remained after the employer exercised reasonable care for the safety of his employees. "The ques-

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and is a foreign corporation duly organized and doing business under the laws of the state of Pennsylvania, and had and has managing officials and maintains a managing office in said Western District of New York, to wit: in the city of Buffalo, N. Y., and operated and now operates lines of railroad running from the city of Buffalo, New York, south, to various points in the state of Pennsylvania and beyond, and in particular operated and does operate a certain line of railroad running from the city of Buffalo, New York, to and through the cities of Olean, New York, Emporium, Renovo, Williamsport and Harrisburg, in the state of Pennsylvania, which particular cities, among others,

tion whether a risk is ordinary," said the court, "depending upon that of reasonable care, and being, therefore, one of fact, is generally for the jury, though the court will declare the risk to be an ordinary one whenever it is of opinion that there is no sufficient evidence to warrant the opposite conclusion." Louisville & N. R. Co. v. Wright, — Ala. —, 80 So. 93 (1918).

The plaintiff, a switchman, while in the act of climbing onto a caboose in the discharge of his duties, was thrown from his position by a sudden application of the air to the brakes by the engineer in charge of the train. His leg caught under the wheel of the caboose and was so badly mangled as to necessitate amputation above the knee. The plaintiff testified that men were jerked loose from their positions on cars every day in the yards, and that he knew many similar occurrences took place. From a verdict for $22,750, upon which judgment was entered for $15,000, the defendant appealed. The court, in reversing the judgment, held that the plaintiff assumed the risk of the condition which caused his injury, and as to his contention that the defense of assumption of risk was no longer open to the employer, the court pointed out that while the defense was eliminated by the Federal Employers' Liability Act in cases of interstate commerce, where the violation by the carrier of the statute enacted for the safety of employees contributed to the injury, in all other cases it was a complete bar. Southern Pac. Co. v. Miller, — Tex. Civ. App. — 207 S. W. 554 (1919).

5. Starting before fireman could board engine.

The engineer of the freight train upon which the plaintiff worked as fireman started the train while the plaintiff was in a restaurant eating lunch. The engineer had left the room a few moments before and had started his engine, thinking that the plaintiff would catch the side of the car and then come into the cab from the ground or over the cars, in accordance with a custom which had prevailed for 14 years, when the engine was stopped a short distance from the station at a railroad crossing. The plaintiff, however, while going over the tops of the cars towards the engine after it had started, stumbled and fell between the cars and sustained the injuries in suit. There was a general verdict for the plaintiff, but from a judgment for the defendant upon the findings of fact, the plaintiff appealed. The court affirmed the judgment, holding that under the Federal Employers' Liability Act, the plaintiff assumed the risk. As the court said: "The plaintiff says the time was nighttime. It was a night train, and no one was better aware of the darkness than the fireman. The plaintiff says there was smoke. The record does not so show, but, if there were smoke, it was a normal incident to the operation of a freight engine. The whole situation created by the engineer's negligence lay before the open eyes of this experienced trainman the moment he stepped out of the lunchroom. He voluntarily chose his course, and voluntarily assumed

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were served by the train known as No. 94 hereinafter mentioned. That said railroad consisted and consists of the necessary switches, railroad tracks, sidetracks, yards, cars, locomotives, ways, works, machinery and appliances, and employed and employs in the operation of its trains, conductors, engineers, trainmen, brakemen, yard conductors, train dispatchers, superintendents, station masters, yard masters and assistants, switch tenders, switchmen, signal men, telegraph operators, and others, and is and at all times hereinafter mentioned was engaged in carrying for hire passengers and freight between the city of Buffalo, in the state of New York, and Emporium, Renovo, Williams-

the risk attending his choice.'' Briggs v. Union Pac. R. Co., — Kan. —, 175 Pac. 105 (1918).

C. Excessive speed.

1. While brakeman boarding car.

Plaintiff was employed as a brakeman on an interstate freight train operated by the defendant. While plaintiff was in the course of this employment, the train was stopped with the engine standing about 460 yards from a telegraph station and about 1 mile from the next stop. The engineer of the train directed plaintiff to walk up ahead of the train to the telegraph station to secure information whether the train could safely proceed to the next stop in view of the possible approach of another train having superior track right. Plaintiff went forward as directed, and upon being advised by the operator that his train could safely proceed, signaled the engineer accordingly. Plaintiff immediately descended to the platform in front of the telegraph station and awaited the approach of his train with the intention of climbing aboard the engine as it passed. He could not accurately judge the speed of the train, but assuming that it was going slowly enough for him to attempt to mount, he caught hold of the grab iron and put one foot on the step of the locomotive as it came opposite him. The train, however, was going at a speed estimated at 12 miles an hour, and the speed of the train combined with the weight of the plaintiff caused his foot to slip so that he loosened his hold, fell beneath the wheels of the tender and lost his arm. At the trial of plaintiff's action to recover damages for this injury, brought under the Federal Employers' Liability Act, it appeared that plaintiff had been employed as brakeman on this line for about 6 weeks, and before such employment had made two round trips over the road for the purpose of becoming acquainted with his duties. During this time he had frequently been called upon, under orders of the engineer, to leave the train and go forward to signal towers for orders or information, and then mount the train as it came by. The negligence charged in this action was that of the engineer in operating the train past this telegraph station at a speed so great as to make it dangerous for plaintiff to attempt to mount it. The defendant not only denied this negligence, but alleged that if the speed of the train was as great as it was charged, plaintiff must have assumed the risk of attempting to board the engine as it passed. The trial court submitted the case to the jury under proper instructions as to contributory negligence, but refused a certain instruction requested by defendant relative to the issue of assumption of risk, and gave no instruction whatever on this issue. On appeal to the state appellate court, that tribunal, while recognizing the state rule of practice, requiring a trial judge in case an instruction requested to be given was defective in form to give in lieu thereof an instruction appropriately stating the law of the case, on such issue, reached the conclusion that there was no question of assumption of risk for

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port and Harrisburg, in the state of Pennsylvania, and other cities and places, and is and was engaged in commerce between the different states, and that the particular acts of negligence hereinafter charged were committed, permitted or suffered to be committed while said defendant was so engaging in the act of commerce, and as a part of the act of such commerce, between the different states, as aforesaid.

Third: That at all of the times hereinafter mentioned, this defendant, for the purpose of assisting in the making up of its freight trains, maintained and now maintains at its yards in the city of Buffalo, in the neighborhood of

the jury, and therefore affirmed the judgment, regardless of such issue. The case then came on before the Supreme Court of United States by writ of error. Defendant there contended that, conceding the train was operated at a negligent rate of speed in view of plaintiff's purpose to board it, yet he assumed the risk of injury involved in the attempt, and that in any event it was error on the part of the trial court to fail to instruct the jury on such issue. In disposing of this appeal, the court held: (1) Under the facts of the case, it could not be said as a matter of law that a speed of 12 miles per hour was so great as to be necessarily an obviously extraordinary hazard to an experienced brakeman attempting to mount a passing engine; (2) that it was not the duty of the plaintiff to exercise care to discover the extraordinary danger due to the negligence of the engineer, and that plaintiff had the right to assume that defendant and its employees had exercised due care with respect to his safety until he noticed to the contrary, unless the want of care arising from such negligence was so obvious that an ordinarily careful person under the circumstances would have observed and appreciated it; (3) and therefore it was not error on the part of the court to refuse to instruct the jury to return a verdict in favor of defendant; (4) that the facts of the case nevertheless made it an issue for the jury whether plaintiff should be deemed to have assumed the risk of injury in attempting to board the train passing at the given speed; (5) that in view of the admitted rule of practice, to give a correct instruction where one incorrectly stated was requested on a given issue, it followed that the judgment could be reversed within instructions on a retrial to give a proper instruction relative to the issue of assumption of risk. Chesapeake & O. R. Co. v. DeAtley, 241 U. S. 310, 60 L. Ed. 1016, 36 Sup. Ct. 564 (1916).

2. **Engine speeding in heavy smoke.**

The plaintiff's decedent, a car repairer, was proceeding in accordance with orders to a point in a certain railroad yard of the defendant to repair a car. He was at the time carrying a sack of bolts on his shoulder, and, in avoiding an approaching engine, was struck and killed by an engine going in the opposite direction. The engine in question was proceeding under a heavy smoke screen and at a rapid rate of speed. The trial court instructed the jury that the deceased assumed the usual and ordinary risks of his employment, but did not assume the risk of negligence upon the part of a fellow-servant. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the question of assumption of risk was properly left to the jury, but that the trial court erred in giving its instruction as to assumption of risk, since the deceased did assume the risk of negligence upon the part of his fellow employees, if the danger was so obvious that an ordinarily prudent person would have observed and appreciated it. No exception having been taken to the charge, however, the judgment was

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Babcock street in said city, and running easterly or southeasterly therefrom, what is known as a "gravity yard," the same being an artificial hill with two sides of about equal length and the apex in the middle thereof. That the length over all of said gravity yard from grade to grade was about 1,000 feet, and the height of said apex was about 15 feet above the surrounding levels. That the plan of operation of said gravity yard called for the pushing of the cars up the grade at the westerly end thereof by a locomotive until the same reached the top thereof, whereupon they were cut off by a switchman, who switched them onto whichever one of the several tracks centered upon the top

not reversed. Central R. Co. of New Jersey v. Sharkey, — C. C. A. —, 259 Fed. 144 (1919).

D. Collision.

1. With runaway cars.

Plaintiff's decedent, a conductor on an interstate freight train of the defendant, was killed in a wreck. He had placed a caboose and tank car in front of the engine of the train, and was pushing them and pulling 36 freight cars, when 21 heavily loaded freight cars, which had in some way become detached at a high point on the track, rolled down the grade, striking his train, and so killing the decedent. Under the instructions of the court, the jury found that the death was due to the negligence of the defendant, that decedent had contributed to his death by his own negligence, but that the decedent did not assume the risk of being killed by the collision between his train and the runaway cars. Damages were therefore awarded in the sum of $20,000 for the widow and the dependent children of decedent. On appeal from this judgment defendant complained of the following charge: "If the jury find from the evidence that the wreck which caused the death of the plaintiff's intestate was solely and proximately caused by the negligence of defendant's servants in not properly applying brakes on cars standing on its main line on a grade, the jury are instructed that the risk of this negligence was not assumed by the deceased in allowing the caboose in which he was riding to be pushed by the engine, even if the deceased would have escaped injury if the caboose had been behind the engine instead of in front of it." In affirming the judgment for plaintiff the court said, respecting the above charge: "In this we find no error. The doctrine of assumption of risk is that an employee assumes the risk of accidents and injuries incident to the business properly operated. He does not assume the risk caused by the negligence of the company in not furnishing proper appliances or in any other respect. In this case the jury have found that the death of the intestate was due to the negligence of the defendant in the particulars above set forth. If the plaintiff in any respect contributed thereto, by putting the caboose and tank car in front of the engine, this was not assumption of risk, but was contributory negligence; and though it is not clearly apparent that this action contributed to the collision with the runaway cars, the jury have so found, and neither party has appealed on that ground, and the jury have apportioned the damages under the federal statute. Such contributory negligence was the act of the intestate, and not a risk of the business which he assumed." Horton v. Seaboard Air Line R. Co., 175 N. C. 472, 16 N. C. C. A. 724, 95 S. E. 883 (1918).

2. Broken coupling leaving caboose on main track.

The plaintiff's decedent, a rear end brakeman, was killed in a rear end collision while sitting in the caboose

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of said hill contained the train for which they were destined, down which track they proceeded by gravity to couple upon the rest of the train at the base of the hill.

Fourth: That upon the 11th day of October, 1911, your plaintiff's intestate was, and for some years then past had been in the employ of this defendant as a yard conductor, and that his duties consisted, among other things, in assisting, under the direction of the yardmaster and his assistant, in the making up of freight trains in and about the gravity yard aforesaid. That on said day at about 8 p. m. he had been engaged upon a certain track of said

of his train. The train was in the act of pulling in upon a sidetrack to allow a passenger train going in the opposite direction to pass. The couplings of the train, however, had broken, and the rear part had been left standing upon the main track. An engine and tender which were following a short distance behind entered the block upon which the train was standing, and though by the rules of the company the engineer should have run the engine "under full control," and have been able to stop within the distance which the track was seen to be clear, such was not done, and the collision resulted. The accident occurred in the early morning, and though the engine following had just rounded the curve, which hid the train ahead from the full view of the engineer, there was nevertheless sufficient light, and sufficient signal lights on the rear of the train to have enabled the engineer to have stopped before colliding with the train ahead had he, in accordance with railroad rules, had his engine under full control. From a verdict and judgment for $15,000 in favor of the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the accident was caused, at least in part, by the negligence of the engineer of the train following, and that while the defense of assumption of risk was permissible under the Federal Employers' Liability Act, nevertheless such a defense did not apply to extraordinary risks created by the negligence of a fellow-servant. Fuller v. Oregon-Washington R. & Nav. Co., — Ore. —, 181 Pac. 338 (1919).

3. Open switch.

a. High speed.

The plaintiff's decedent, a locomotive engineer, was killed in a collision with a train standing on a sidetrack. The accident was the result of negligence on the part of the tower man in leaving a switch open at that point, and concurrent negligence on the part of the deceased in operating his train at such a high rate of speed that he was unable to stop in time to avert the collision. The trial court refused to submit the question of assumption of risk to the jury, and entered judgment for $6,000 upon a verdict of $10,000. The court reversed the judgment, but upon the question of assumption of risk said: "We find that * * * [the deceased] had no knowledge of the negligence of the company in operating the switch, and for that reason the company cannot avail itself of the defense of assumption of risk. When he violated the rules of his employer in the operation of his train he assumed all the ordinary risks arising from his negligent operation of his train, but he did not assume the extraordinary risks caused by the active negligence of his employer of which he had no knowledge." Pennsylvania Co. v. Wasson, Adm'x, 3 Ohio Reports 458 (1914).

b. Failure to observe signal.

The deceased, a fireman on one of the defendant's passenger trains, was killed in a collision with a freight train which was left standing on a sidetrack by the freight train crew with the switch open. The negligence

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gravity yard known as Track No. 4, opposite Milton street in said city, under the direction of the assistant yardmaster of said defendant, in assisting in making up a certain fast freight train known as Train No. 94, which consisted mainly of cars billed to Emporium, Renovo, Williamsport and Harrisburg, and other places in the state of Pennsylvania, and made up by the pushing of said cars up the westerly or northwesterly side of the hill by a locomotive and allowing the same to come down by gravity on the other side and couple onto the locomotive and following cars of their train in the manner hereinbefore described. That said train, consisting of 30 to 40 cars, had been

alleged was that the crew of the freight train left the switch open and that the engineer of the passenger train failed to observe the danger signals shown at the open switch. The jury returned a verdict for the plaintiff, but made a special finding that, according to the railroad regulations in force at the time of the accident, the fireman as well as the engineer was under a duty to watch signals and switches. The defendant appealed from judgment entered on the verdict, contending that the deceased, by reason of his failure to observe the red light and inform the engineer thereof, assumed the risk of any injury that was caused by the train running into the open switch. The court affirmed the judgment, holding that while the deceased was negligent in not observing the light and informing the engineer, the proximate cause of the injury was the negligence of the freight train crew in leaving open the switch, and since under the Federal Employers' Liability Act contributory negligence can only reduce the amount of the recovery, any assumption of risk because of contributory negligence could not entirely defeat a recovery. Hackney v. Missouri, K. & T. R. Co., 96 Kan. 30, 149 Pac. 421 (1915).

E. Backing engine without lookout.

The plaintiff's decedent, a section hand, was at the time of the accident riding on a "speeder" inspecting the track. As the day was cold and stormy, he wore a cap with flaps fastened over his ears and tied under his chin. On rounding a curve, he was struck and killed by an engine running backward without any lookout stationed on the rear of the tender to ascertain if the track was clear or to give signals to the engineer. The fireman did not see the deceased until he was within two car lengths of him, and though the emergency brakes were applied immediately, the engine could not be brought to a stop except within about 300 feet. On appeal from a verdict and judgment of $3,700 for the plaintiff, the defendant contended that the deceased assumed the risk, since under the rules of the company, section men had no notice of trains either regular or irregular, and the deceased, having worked on the section for 5 years, knew that trains passed the point of the accident at all hours of the day and at irregular intervals. The court, in affirming the judgment to the extent of $1,800, held that, while the deceased assumed the risk of injury from all trains properly operated, he did not assume the risk of engines being run over the road reversed, without any proper lookout or warning being given, to avoid running him down. Anest v. Columbia & P. S. R. Co., 89 Wash. 609, 154 Pac. 1100 (1916).

F. Negligent order of dispatcher.

The plaintiff's decedent, a freight conductor, was killed in a rear end collision with another train. The deceased was, at the time of the accident, sitting in the caboose of his train, while the engineer and crew were clearing out a switch to make a coupling with a stalled engine, which the train dispatcher had ordered them to pick up. A blizzard was raging

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fully completed, was lying at the base of the hill, the rear half of the train with the caboose attached thereto being upon Track No. 2, near to Track No. 4 aforesaid, the front of said train with the locomotive attached thereto lying on said Track No. 4, and various of defendant's employees, preparatory to taking said train out upon its run, being engaged in looking over its couplings, air brakes and other equipment to be assured that the same were in proper condition therefor. That the last six cars of said train lying upon Track No. 4 were detached from said train about 160 feet, having most recently been switched thereon. That said assistant yardmaster and your plain-

at the time, and the crew of the freight train following was unable to see the block signals warning them that the train running ahead had been stopped. The collision occurred as a result. The order of the train dispatcher requiring the train of the deceased to pick up the stalled engine when he knew a blizzard was raging and that another train was following close behind was alleged as negligence. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, pointed out that risks arising from the employer's negligence were extraordinary, not ordinary risks, and that any defense on the part of the master as to assumption of such risks arising from negligence had to be specially pleaded. Phillips v. Union Pac. R. Co., 100 Neb. 157, 158 N. W. 966 (1916).

The deceased, a brakeman, was killed in a rear end collision while his train was standing on the main track under orders of the train dispatcher, and an attempt was being made to open a nearby switch and attach a stalled engine to the train. An extremely severe blizzard was raging, and the engineer operating the train causing the collision did not see the block signals warning him of a train ahead. The crew, of which the deceased was a member, knew of the approach of the second train, but the deceased neglected to put down torpedoes, throw out fuses, and protect his train from a rear end collision, though directed to do so by his engineer. From a verdict for the plaintiff in the sum of $25,000, upon which a judgment of $15,000 was entered, the defendant appealed. The court, in affirming the judgment on condition that the plaintiff remit an additional $1,500, held that, in view of the fact that the dispatcher negligently held the deceased's train to give assistance to the stalled engine under the circumstances then existing, the jury were justified in holding that the deceased was guilty of only contributory negligence in failing to properly flag the train, and that he did not, by assumption of risk, bar his right to recover. Hadley v. Union Pac. R. Co., 99 Neb. 349, 156 N. W. 765 (1916).

G. Emission of steam at station.

The plaintiff, a switchman, was struck by a passing engine as he stepped away from another engine to avoid being scalded by the steam which the engineer turned on just as he was passing. The plaintiff approached the locomotive from the north, the direction in which the train was going, and the engineer could have seen him before turning on the steam. A rule of the railroad prohibited such acts of the engineer as caused the injury at stations, though the rule was occasionally violated—a fact known to the plaintiff. The accident happened while the train was standing at a station taking on express matter and passengers. From a judgment refusing to take off a compulsory nonsuit, the plaintiff appealed. The court, in reversing the judgment and granting a new trial, held that the mere fact that there was an occasional violation of the rule forbidding the opening of cylinder cocks at station platforms did not

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tiff's intestate were standing on the ground at the rear of said train at the right thereof; said assistant yardmaster signaled to said engineer to back up and couple onto said last six cars, which, being done, it was discovered that said coupling did not ["make"]. That upon the said coupling failing the second time, said assistant yardmaster signaled said engineer to draw off said train a space of about 20 to 30 feet, which, being done, said assistant yardmaster thereupon went into the space between said detached cars and the train for the purpose of examining the drawhead upon the first detached car and pulling out the coupler thereof. That said drawhead being a very heavy one,

charge the plaintiff with assumption of risk. The court further said: "The evidence does not show that the plaintiff had reason to believe the train would start before he could pass the locomotive or that the cylinder cocks would be opened and emit steam when it did start. Express matter was being put on the train as he approached the engine, and he testified that he did not anticipate any danger in passing the engine." Haas v. Erie R. Co., 254 Pa. 235, 98 Atl. 867 (1916).

II. Switching operations.

A. Running cars against standing cars.

1. Crossing under cars.

Plaintiff, a hostler, in going home from work on the evening of the accident, started across the yards and switching tracks of the defendant. On his way he encountered a train of coal cars connected together. After looking up and down the track, he started across underneath the drawhead connecting two of the cars. While under the drawhead and putting his leg out to cross the rail to get out, an engine struck the train with sufficient force to move the train and drive a wheel over his leg. The plaintiff testified that before he went under the train he heard the switch engine 175 feet away. From a judgment for the defendant upon a nonsuit, the plaintiff appealed. The court, in affirming the judgment, said: "Before the plaintiff went under the cars he examined the situation, weighed the chances, and deliberately decided to take the risk. He admits there were other and safe ways to his home, and that he could have easily gone around either end of the train, and candidly said that if he had done so he would not have lost his leg. * * * This case comes under the federal law, which recognizes assumption of risk, and if there was ever a case in which plaintiff assumed the risk of his reckless conduct, it is this." Hinson v. Atlanta & C. A. L. R. Co., 172 N. C. 646, 90 S. E. 772 (1916).

2. Checker crossing near cars to depot.

The plaintiff's decedent, a car checker, while on his way to the depot to turn in his report of cars checked, necessarily had to cross over the defendant's tracks. Upon one track was a string of freight cars with the brakes set on at least three of them. As he crossed the tracks about three or four feet from the end of the standing cars, they were struck with great violence by another group of eight or ten cars that had been kicked down upon the same track. As a result, he was struck and so severely injured that death resulted. There was nothing to warn the deceased that such a movement was to take place, and his companion testified that the smoke of the switch engine could be seen more than 1,000 feet away, and that the smoke indicated that the engine was standing still. The companion of the deceased also testified that he heard no sound of the taking up of slack between the standing freight cars, such as would ordinarily be heard when they were struck with another

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said assistant yardmaster was unable to handle the same, or to pull out the said coupling alone, and your plaintiff's intestate in the performance of his duty followed him and assisted him. That while they were in that position no other person was sufficiently near to apprise them of possible danger, nor was any person or employee posted to look out therefor. That while your plaintiff's intestate and such assistant yardmaster were so occupied with the drawhead of said car, the said engine which had theretofore been pushing cars over the hill in the making up of said train, and which was then at the westerly or northwesterly end of said gravity yard, came over the hill pushing car for the purpose of coupling onto them. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the question of assumption of risk was properly submitted to the jury. Great Northern R. Co. v. Mustell, 138 C. C. A. 305, 222 Fed. 879 (1915).

3. **Brakeman thrown from car.**

Plaintiff, employed as a brakeman by the defendant, brought an action to recover damages for personal injuries, alleging that he had been hurt while on one freight car by the impact of other cars upon the one on which he was standing; such other cars having been negligently caused and permitted to run down grade at a fast rate of speed, upon the same track upon which plaintiff's car was standing, and without any person thereon to hold or control them. It was not denied that the case was governed by the provisions of the Federal Employers' Liability Act. Plaintiff was working at the bottom of the grade, and it was his duty to mount these several cars as they were sent down the incline and set the brakes at the proper time and stop them at the required place. He knew that other cars would be sent down upon the several tracks from time to time, and that there was a possibility of such cars striking a car upon which he was to work. At the time of the accident he stood at about the middle on the top of one of these cars and had no means of support. The work was being carried on at night, and the darkness was such that he could not see an approaching car until it was within a few feet of the car on which he was standing. He testified that while he was so standing upon a car, certain other cars were sent down the incline and struck it with such force that he was thrown between the cars and under the wheels, with the result that he received permanent and disabling injuries. It was likewise shown that cars which struck that car on which plaintiff was standing had been sent down the incline without a man being placed in charge thereof. In appealing from a judgment for the plaintiff, it was contended, among other things, that plaintiff had assumed the risk of injuries from an accident of this sort as a part of his employment. Affirming the judgment, the court said, with respect to this contention, "It is true that one suing under the Federal Employers' Liability Act is held to assume the risk of his employment, but that does not include risks incident to the negligence of defendant's agents, employees, or officers [citing cases]. As applied to this case, the risk of falling off a car properly managed or handled was a risk of plaintiff's employment; but the risk of being thrown off his car by the negligent act of his employer or any one for whom that employer was responsible was not such risk." Erie R. Co. v. Linnekogel, 160 C. C. A. 399, 248 Fed. 389 (1917).

The plaintiff's decedent, a brakeman, was thrown from the car upon which he was riding, under the train, and killed, when the string of cars which he was attempting to bring to

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several cars ahead of it, and the employees of said defendant, although well knowing that said train No. 94 was already made up, and that certain other employees were of necessity engaged in examining and testing its couplings, air brakes and other equipment, preparatory to starting, and that therefore the switching of further cars upon said Track No. 4 was dangerous, nevertheless negligently caused said cars to be switched to said Track No. 4 where your plaintiff's intestate then was. That so carelessly and negligently were said cars handled by the employees of defendant as they were run in upon said Track No. 4, and so slightly was the speed of same reduced by said em-

a stop collided with another car which had the brakes set. The deceased did not know that the car was at the position where the collision occurred, and had been told by a fellow-servant, whose duty it was to look out for obstructions, that it was 100 feet distant from where it actually stood. The deceased was on the rear end of a car stationed over 200 feet from the front end of the moving cars and had no opportunity to see that a collision was about to occur. From a judgment for the defendant, the plaintiff appealed. The court, in reversing the judgment and remanding the case, said: "Charge 51 * * * instructed the jury that plaintiff's intestate assumed all the ordinary risk incident to the manner in which his fellow-servants discharged their duties in the switching operation, which would comprehend a risk of a negligent discharge of duty by a fellow-servant. We are of the opinion this charge should not have been given." Porter v. Louisville & N. R. Co. — Ala. —, 78 So. 375 (1918).

4. Air inspector run over.

The plaintiff, an air inspector, whose duties were to couple up the air appliances as cars were being put in a train, and to test the air on the completed train, was trying to turn the angle cock of the air brake equipment when another string of cars were without warning "kicked in" against the car upon which he was working. He was thrown down as a result, and his arm so severely injured by being run over by the cars that amputation was necessary. From a verdict and judgment for the plaintiff in the sum of $12,000, the defendant appealed, The court, in affirming the judgment to the extent of $8,000, held that the facts did not place the case of the plaintiff within that exception to the Federal Employers' Liability Act which abolished the defense of assumption of risk where a statute enacted for the benefit of employees was violated by the employer. The court, however, further said: "But the facts of this case do not sustain the doctrine of assumption of risk. A servant never assumes the risk of the master's negligence. He assumes the usual and ordinary risk of the employment, but to these cannot be added the negligence of the master. A failure to warn was the neglect of the master." Young v. Lusk, 268 Mo. 625, 187 S. W. 849 (1916).

5. Car inspector struck.

The plaintiff, an assistant car repairer, was at the time of the accident inspecting the buffer of a mail car which had been detached from the rest of the passenger train and moved from 4 to 6 feet from the rest of the cars standing on the track. While so engaged, he was struck and severely injured by the foremost car of the rest of the train, which, with other cars, was set in motion as the result of a switch engine, working at the other end of the train, bumping against the standing cars with unusual violence. From a verdict and judgment for the plaintiff in the sum of $7,200, the defendant appealed.

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ployees, that they were caused to crash violently into said detached cars of the train upon which your plaintiff's intestate was working, causing them to move forward so rapidly that they closed up the gap of 20 to 30 feet between said detached cars and the rest of the train, running over your plaintiff's intestate and instantly killing him. That your plaintiff's intestate had no knowledge of the proximity of said cars, nor were any lights used thereon or any alarm or warning given.

And your plaintiff further says that, although the necessity therefor has at all times been clearly apparent, said defendant has at all times neglected to

The court, in affirming the judgment, held that the injury arose from an extraordinary risk which was not assumed by the plaintiff, since an employee assumed only the ordinary risks and dangers of his employment, and not the extraordinary and unusual risks thereof. Koepke v. Chicago, R. I. & P. R. R. Co., 200 Ill. App. 247 (1916).

6. Repairman injured.

a. Failure of plaintiff to post warning.

The plaintiff's decedent, an inspector and repairer of cars and engines, was at the time of the accident engaged in removing an old air hose from an engine and substituting a new one. He had about completed the work, when the cut of cars next to the tender on which he was placing the new hose was struck by cars pushed in by an engine on the same track. The deceased had violated the rules of the company requiring him to do no repair work without placing a blue flag in the proper position to warn other trainmen from backing cars in upon him. The deceased had informed no one around the yards of his intention to do the repair work in question. As a result of the cars coming together, the deceased was pinned between the drawheads of one of the cars and the tender, causing the injury which resulted in his death. From a judgment for the defendant on a demurrer to the evidence, the plaintiff brought error. The court, in affirming the judgment, held that the proximate cause of the plaintiff's death was his failure to post the blue flag signal, and having failed to notify any one of his intention to do the repair work or adopt the rule of the company designed for his protection, he must be held to have assumed the risk. Shumaker's Adm'x v. Atlantic Coast Line R. Co., — Va. —, 99 S. E. 739 (1919).

b. Failure of coemployee to post warning.

The plaintiff, a car inspector, had gone under a certain car to adjust the brake. While so engaged the car started forward. The plaintiff made a "lunge," seized a grabiron under the rear of the car, and managed to get out by the time the train came to a stop, but was injured. The plaintiff worked with another car inspector, and it appeared that he relied upon the latter to place the blue flag on the engine which was required by the rules of the company to keep cars stationary while being inspected. From a judgment for the plaintiff, the defendant brought error, contending that the plaintiff assumed the risk of injury, as the result of his reliance on his coemployee to place the flag that would protect him and the failure of the latter to do so. The court, in affirming the judgment, held that the plaintiff did not assume the risk. "The accident would not have happened at all," said the court, "but for the negligence of a fellow-servant; and as to employers, while engaged in interstate commerce, the servant so engaged does not agree, as between himself and the carrier, to assume the risk of the negligence of his fellow-servant." San Pedro, L. A. & S. L.

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promulgate a rule to the effect that whenever employees have occasion in the performance of their duties, as aforesaid, to go between sections of detached or standing trains for any purpose, however temporary, in any yard, or at any station where switching or the making up of trains is going on, a lookout should be posted to warn against impending danger of cars being switched against them when such employees are unable to see such cars.

And your plaintiff further alleges that said defendant was negligent in inviting or commanding your plaintiff's intestate to go between said cars into a position of danger; that said defendant was negligent in inviting or com-

R. Co. v. Brown, — C. C. A. —, 258 Fed. 806 (1919).

c. Runaway cars.

The plaintiff's decedent was engaged, at the time of the accident, in repairing a defective coupling on one of the defendant's cars. While so engaged he was caught by a moving car belonging to the defendant and fatally injured. The car being repaired was standing on a slight incline, and the cars causing the injury were standing about 15 or 20 feet up the grade. By force of gravity, the cars moved down upon him, as the result of the failure of some brakeman to set the hand brakes upon the cars. The trial court told the jury that if they found that the cars which caught the deceased were moved by the force of gravity, the deceased did not assume the risk incident to the cars being left without the hand brakes set. On appeal by the defendant from a judgment for the plaintiff, the instruction was alleged to be erroneous. The court, in affirming the judgment, said: "There certainly was no error in this instruction, as the deceased only assumed those risks that were known by him or were plainly obvious, and there is no evidence in the record that the deceased heard or saw the car moving upon him, or knew the hand brakes had not been set. In the absence of knowledge, he could rely upon the presumption that the employees of defendant had performed their duty in setting the hand brakes on the cars." Illinois Cent. R. Co. v. Stewart, 138 C. C. A. 444, 223 Fed. 30 (1915).

7. Car cleaner hurt.

The plaintiff's decedent, a car cleaner was at the time of his accident, wiping off the outside of a baggage car which was separated only 3 or 4 feet from another car. The cars were on a slight grade descending towards the west, and it was the practice in setting cars in upon the cleaning tracks to release them at the east end with a slight push and allow them to go to the other end of the track of their own momentum. There had previously been a rule in force requiring a blue flag by day and a blue light by night to be displayed whenever cars were being cleaned, and under such conditions they were not allowed to be disturbed. It appeared, however, that there was doubt as to the necessity for this rule, and it had been abrogated some time before the accident. A car was released at the other end of the track, and in striking the car upon which the deceased was working, moved it sufficiently to crush and kill the deceased, who was working between the diaphragm of it and the adjoining car. It was not explained as to how the deceased came to be between the buffers or diaphragms, as it was not necessary for him to occupy such a position unless he was cleaning the vestibule doors, and it was a disputed question whether such was a part of his duty. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, said: "In the case at bar the extent of the risk depended largely upon whether or not it was

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manding your plaintiff's intestate to go between said cars without posting a lookout to warn against impending danger as aforesaid; that said defendant was negligent in failing to promulgate and enforce a rule to the effect that when employees have occasion to go between cars in the manner hereinbefore set forth, a lookout should be posted to warn against the danger of other cars being switched against the cars or train they are working upon; that said defendant was negligent in causing said cars to be switched from said gravity yard upon said Track No. 4 knowing that said train No. 94 was already made up and that certain employees of said defendant were getting said train ready

necessary for the deceased to stand between the buffers in the performance of his duty, and as to that the evidence was conflicting. The burden of proof as to the assumption of risk is upon the defendant, and where there is any doubt as to the facts, or inferences to be drawn from them, the question is for the jury. * * * The deceased may have gotten between the buffers accidentally, or by a slip or fall; and it is not clear that he knew the car behind him belonged to an eastbound train or was liable to be disturbed. We are not convinced that the court below erred in declining to pass upon the question of assumption of risk as one of law." Falyk v. Pennsylvania R. Co., 256 Pa. 397, 100 Atl. 961 (1917).

B. Sudden stop.

1. Failure to uncouple cars being switched.

Plaintiff, employed by the defendant as brakeman, while working on the top of a moving box car in the defendant's yards, was injured by falling from the car. He sued the defendant for negligence, alleging that the engine foreman, a coemployee, negligently directed the engineer to stop and suddenly check the cars in such a manner that he lost his balance and fell. He alleged that it was the duty of the engine foreman to uncouple the cars from the switch engine as soon as they were shoved upon the switch tracks, thereby permitting the cars to run down grade and be stopped by plaintiff, and that the failure of the foreman to discharge this duty and the sudden stopping of the cars amounted to negligence, and was the proximate cause of his injury. The defendant answered by general denial, and alleged assumption of risk and contributory negligence on the part of the plaintiff. Appeal was taken from a verdict and judgment for the plaintiff. The action was one concededly belonging under the Federal Employers' Liability Act, but it did not appear that during the trial either defendant or plaintiff had referred in terms to that act, or that defendant had claimed any benefit therefrom. On the appeal, however, defendant contended that the proof brought the case clearly within the provisions of the federal act, and that under the terms of this act plaintiff assumed the risk of the injury complained of. Affirming the judgment for plaintiff, the court held that in accepting employment as switchman, plaintiff assumed the risks of the ordinary and usual dangers incident to such employment, which were known or which could have been known to him by the exercise of ordinary care; that he did not assume the risk of negligence on the part of the defendant unless and until he became aware of such negligence, except where the negligence was so apparent and the danger so obvious that an ordinarily prudent person should observe the one and appreciate the other. Respecting the contention of the defendant that the jury had been erroneously instructed in that they were charged that plaintiff did not assume the risk created by the defendant's negligence, without a qualification limiting this to risks

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to take out upon its run, and must of necessity be engaged in looking said train over, in order to see that its couplings, air brakes and other equipment were in proper condition therefor, and that, therefore, further switching of cars upon said Track No. 4 was dangerous; that said defendant was negligent in operating the said cars switched as aforesaid upon said Track No. 4 without lights or warning and at an unnecessary rate of speed, causing them to crash with such violence upon the succeeding cars as to cause them to run over your plaintiff's intestate, such speed being in excess of that required to make a coupling with said cars.

created by the defendant's negligence and unknown to the plaintiff, the court held that, in the circumstances, the defendant was not prejudiced by the omission, since the negligent act complained of was concededly an unusual method of switching, and occurred in such a brief space of time that in the nature of things plaintiff could not have been aware of the negligence previous to the injury so as to assume the risk thereof. Chicago, R. I. & P. Ry. Co. v. Ward, — Okla. —, 173 Pac. 212 (1918).

2. Use of direct air in making flying switch.

The plaintiff, a switchman, was thrown from his position on a box car while assisting in making a "flying switch," due to the sudden and unusual stopping of the train which arose from the application of direct air to the brakes by the engineer instead of the use of the "Johnson bar" provided to stop the engine more slowly. From a judgment for the plaintiff, the defendant appealed, alleging as error that the trial court refused to hold as a matter of law that the plaintiff assumed the risk. The court, in affirming the judgment, held that the plaintiff did not assume the risk. As the court pointed out, an employee assumed risk of injury from the negligence of a fellow-servant only when he knew of such negligence or had a reasonable opportunity to have known of it, and as the injury to the plaintiff occurred from the instant act of negligence on the part of the engineer in stopping the train without any previous warning, no opportunity existed by which he could have known of such negligence, and thereby have assumed the resulting risk. Jones v. Norfolk Southern R. Co., 176 N. C. 260, 97 S. E. 48 (1918).

3. Negligent signal by conductor.

The plaintiff's intestate, a brakeman, was directed by his conductor to uncouple two cars for the purpose of performing a certain switching operation. He was at the time on the top of one of the cars to which there was no side ladder. Consequently he went down the ladder at the end of the car between the two which were to be uncoupled. The custom was, in operations like this, to stand at the end of the car and pull the pin. While the deceased was in such a position, the conductor, without any signal from the deceased, suddenly gave a signal to the engineer to stop. As a result, the deceased was jerked from his position and his death ensued. From a judgment for the plaintiff, the defendant appealed, contending that as the deceased should have swung around the side of the car, stood in the side stirrup, and from there lifted the pin by the use of the pin lifter, he assumed the risk incident to uncoupling the cars from his position between them. The court, in affirming the judgment, held that the deceased as a matter of law did not assume the risk of the negligent stop signal given by the conductor, nor the risk of an improper switching operation, nor any risk resulting from his failure to swing around the end of the car and, while standing in the side

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Fifth: That said accident was caused wholly by the fault and negligence of said defendant as hereinbefore alleged, and without any default on the part of your plaintiff's intestate.

Sixth: That your plaintiff's intestate was the son of your plaintiff and was a strong, able-bodied man of the age of 33 years, unmarried, earning about the sum of $125 per month, and the sole support of your plaintiff.

Wherefore, your plaintiff demands judgment for the sum of thirty thousand dollars ($30,000) and the costs of this action.

stirrup, uncouple the cars from that position by the use of the pin lifter. Thompson v. Minneapolis & St. L. R. Co., 133 Minn. 203, 158 N. W. 42 (1916).

C. Sudden starting.

1. Premature signal.

The plaintiff's decedent, a brakeman, was engaged at the time of his death in cutting out certain cars from his train and assisting in switching them back upon a sidetrack. The deceased was between two cars, cutting the line, when the conductor signaled the engineer to back up. The foot of the deceased was somehow caught between the point of the sidetrack and the main track, with the result that he was knocked down and run over. The conductor testified that he did not see the brakeman, and that it was not his duty to locate him before giving the signal. It appeared, however, from the testimony of the engineer, that shortly before the signal was given to back the train, the engineer had seen light from two different lanterns; and that since the deceased and his conductor were at that time not far apart, and as the deceased was not seen by the conductor at the time the signal was given, the latter must have known that the deceased was between the cars, and the giving of any signal to back under such conditions was negligence. From a judgment for the plaintiff, the defendant brought error. The court, in affirming the judgment, held that the evidence warranted the jury in finding that the giving of the signal in question at the time it was given was negligence on the part of the conductor, and that the question of assumption of risk was properly submitted to the jury. As the court said: "Nor did the deceased assume the risk of such signal being carelessly given. We may well accept the statement that each employee, in switching operations, was to look out for himself, and yet a brakeman could not be said to have assumed the risk arising from the negligent conduct of the conductor. The brakeman was not chargeable with notice that his fellow-employee would violate a rule or a custom. He had reason to believe that the conductor would not move the train while he was between the cars. * * * We conclude no error was committed in submitting both the questions of defendant's negligence and the deceased's assumption of risk to the jury." Illinois Cent. R. Co. v. Norris, 158 C. C. A. 214, 245 Fed. 926 (1917).

2. Starting without signal.

a. Injuring workman near car.

The plaintiff's decedent, foreman of a section gang, after putting his men to work at cleaning away the snow and ice around two switches, left and went to another portion of the yard, evidently to do similar work himself. He placed himself at work on a switch about 200 feet in front of a string of cars about a quarter of a mile long and started to work. While so engaged, an engine was attached to the front of the cars, and, being suddenly moved, struck and killed him. No

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Answer.

The defendant above named, answering the complaint herein by Frank Rumsey, its attorney, admits that it is a foreign corporation organized and doing business under the laws of the state of Pennsylvania and maintains an office for the transaction of business in the city of Buffalo, N. Y., and operates lines of railroad running from the city of Buffalo, N. Y., south to various points in the state of Pennsylvania and beyond, one of which lines extends from the city of Buffalo to and through the cities of Olean, New York, Em-

warning was given of the approach of the train, and no brakeman was stationed on the end of the front car, as was required by a published rule of the defendant when cars were being "pushed." A judgment for the plaintiff was reversed by the supreme court, but on appeal by the plaintiff it was reversed and that of the trial court affirmed. The court pointed out that while it was the duty of the deceased to look out for himself as well as for his employees, the negligence of the defendant's employees in failing to comply with the published rule requiring a lookout to be posted on cars being "pushed" was not one of the dangers he was required to look out for, and therefore not one of the risks he assumed. Willever v. Delaware, L. & W. R. Co., 89 N. J. L. 697, 99 Atl. 321 (1916), rev'g 87 N. J. L. 348, 94 Atl. 595 (1915).

b. Engine striking ash pit cleaner.

The plaintiff's decedent, while in the employ of the defendant railroad at one of its ash pits, was run over and killed by a locomotive engine. An engine had been run over the pit and had been stopped just beyond while the deceased and others cleaned out the pit. In response to a signal given by another employee, the deceased was coming out of the pit, when the engine suddenly backed without warning and caused the injury in question. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, said: "The doctrine of assumption of risk has no application to such risks as arise solely and directly out of the negligent acts of fellow-servants. And if it did so apply, as a general rule, it would have no pertinence in the case of accidents the right of recovery for injuries arising out of which is regulated by the federal statute; for to so hold would be to nullify the declaration of congress that every common carrier by railroad engaged in interstate commerce shall be liable in damages to the personal representative of any employee who shall lose his life while employed in such commerce, when his death results 'from the negligence of any of the officers, agents or employees of such carrier.'" Grybowski v. Erie R. Co., 88 N. J. L. 1, 95 Atl. 764 (1915), aff'd 89 N. J. L. 361, 98 Atl. 1085 (1916).

c. Starting before cars uncoupled.

The plaintiff's decedent, a freight conductor, was at the time of the accident performing the duties of a brakeman in making a "flying switch." The purpose was to transfer five cars that were in front of the engine to a position immediately in the rear of a box car. The deceased, to make the "flying switch," assumed a position on the side of the car, where he stood upon an iron foot rest at the bottom of the car and held on with his hands to an iron handle attached to the side of the car. While in this position, he was obliged to reach around the side of the box car and grasp the lever which would pull the coupling pin. The engineer slackened the speed of his engine in order that the deceased might pull the pin, and should not have advanced thereafter until a signal to do so was given.

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porium, Renovo, Williamsport and Harrisburg, in the state of Pennsylvania, and that it maintains yards and switch tracks for the conduct of its business as a common carrier for hire in the various places above mentioned.

The defendant further admits that the plaintiff's intestate had for some years prior to October 11, 1911, been in the employ of the defendant as a yard conductor, and that on the 11th day of October, 1911, while the said plaintiff's intestate was employed by the defendant he came to his death by being run over by a freight car or cars in the freight yards of the defendant in the city of Buffalo, N. Y.

It appeared, however, that while the deceased was in a reclining position and attempting to pull the pin, the engineer suddenly started the engine forward, with the result that he fell to the ground and received such injuries as to cause his death a few hours later. From a judgment dismissing the complaint, the plaintiff appealed. The court reversed the judgment and remanded the case for a new trial, holding that the case should have been submitted to the jury. As the court said: "If it shall be determined that the engineer's negligence was the proximate cause of * * * [the deceased's] death, then, under the facts and circumstances disclosed by the record, he did not assume the risk within the contemplation of the federal statute governing the case." Reul v. Wisconsin, N. W. R. Co., 166 Wis. 128, 163 N. W. 189 (1917).

d. Starting against order.

The plaintiff, conductor of a switch engine, was run against and injured by an engine which he had ordered not to be moved until a certain other train had come into the yards. The plaintiff's crew operated the engine about the yard under his directions, breaking up trains as they came in and making up trains to be taken out. The plaintiff naturally supposed that the train would not be moved contrary to his orders, and the crew which moved the engine in violation of orders, thereby causing the injuries in suit, gave no warning of their intention to do so. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the plaintiff's injuries were caused by the negligence of his fellow-servants, and that while the Federal Employers' Liability Act did not eliminate the defense of assumption of risk except where the employer violated some statute enacted for the safety of employees, it nevertheless did not involve such employees as the plaintiff in any general assumption of risk for the negligence of his fellow-servants, for otherwise, the provision of the Federal Employers' Liability Act that the employee may recover by showing that one of the co-operating causes of his injury was the negligent act or omission of a coemployee would be inoperative. Southern Ry. Co. v. Fisher, — Ala. —, 74 So. 580 (1917).

e. Starting tug.

The plaintiff, a deck hand, was employed on a tug used to transport floats loaded with freight cars from one point in New York harbor to another. While in the act of securing a line to a bitt on the tug which was approaching and making it fast to a dock, a fellow-servant negligently started the tug without waiting for the customary signal from the plaintiff, and without giving him any warning, with the result that his hand was caught between the line and the bitt and severely injured. From a judgment for the plaintiff, the defendant brought error. The court, in affirming the judgment, held that the question of assumption of risk was properly left to the jury, and that the trial court properly refused to direct a verdict for the defendant. As the court said: "There are only two kinds of

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The defendant further answering said complaint, denies knowledge or information sufficient to form a belief as to each and every allegation in said complaint contained, except the allegations thereof hereinbefore specifically admitted.

Second.

This defendant further answering said complaint, and as a separate and distinct defense thereto, alleges, upon information and belief, that the said Edward J. Boldt, plaintiff's intestate, at the time of his death, had been in

risks which we can conceive might have been assumed by the plaintiff in entering or continuing in the service of the defendant. The first are the risks incident to the ordinary perils of navigation, assumed by all who follow that occupation. They relate to the habits of tackle and appliances, the motion and behavior of craft under conditions which maintain upon tidewater and on streams, and under the varying conditions of atmosphere and climate. Injuries from such perils are not caused by the negligence of any one. They are rather the result of what is termed pure accident, for injury from which the law affords no relief. The other risks assumed by the plaintiff were those which existed at common law, except the risk of injury resulting from the negligence of a fellow-servant, from the assumption of which the plaintiff in this case was saved by the statute under which he brought his action. As the plaintiff declared upon but one act of negligence, and that was the negligence of a fellow-servant, the risk of which he did not assume, the question resolved itself into the simple proposition: Was the plaintiff's injury occasioned by the particular negligence charged, or was it the result of pure accident? The solution of such a question properly rested with the jury." Erie R. Co. v. Jacobus, 137 C. C. A. 151, 221 Fed. 335 (1915).

3. Negligent signal.

Plaintiff's decedent was a brakeman upon a train, engaged in interstate commerce, operated over the lines of the defendant railroad company. At the time of the accident, which caused the death of the decedent, the train was engaged in switching cars, the main train was on the main track facing south, and the rear brakeman was stationed to the rear of the train. Decedent was head brakeman and had instructions to cut out a car and set it on a sidetrack. It was a part of his duty to cut the air line of the train for the separation of the several cars. While decedent was so engaged he, in some manner, was pushed in front between the rails at his place. While he was so held the conductor gave a signal for the movement of the train, with the result that the cars were backed over the decedent, so injuring him that he subsequently died. The conductor testified at the trial of plaintiff's action to recover damages that he did not know, at the time he gave the signal, where decedent was; that he did not see him or his lantern, and that it was not his duty to find out decedent's exact position before giving the signal. On cross-examination, however, the conductor admitted that it was the duty of the conductor and brakeman to look out for each other as much as possible. While reversing a judgment for the plaintiff, upon grounds not material here, the court held as to the charge of negligence that the jury were amply justified in finding the conductor guilty of negligence in giving the signal without first using due care to ascertain decedent's position. As to the allegation of assumption of risk raised by defendant, the court held that while each employee was sup-

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the employ of the defendant as a yard conductor for a considerable period of time, and he well understood the nature of the work which he was required to perform, and well understood such dangers as were involved in such employment, and that by entering and continuing in the service of the defendant in said capacity he assumed all risks incident to said employment and involved therein, including risks of an accident such as that set forth in the complaint.

Third.

The defendant further answering said complaint, and as a separate and

posed to look out for himself, it could not be said that decedent was chargeable with notice that a fellow employee would violate the custom of looking out for the other trainmen as far as possible. It was not error, the court therefore concluded, to submit to the jury also the question of decedent's assumption of risk. Illinois Cent. R. Co. v. Norris, 158 C. C. A. 214, 245 Fed. 926 (1917).

D. Open switch.

1. Car being repaired struck.

The deceased, a car repairer, was engaged at the time of his death in repairing a car placed on a sidetrack, outside, however, of the derail switch, which would have protected him against injury from other cars suddenly shunted in upon him. The deceased was so engaged, knowing that the defendant's rules directed him to do no work upon cars not protected by derailing devices. The switch to the track upon which the car was situated where he was working had negligently been left open by a fellow employee, and while under the car, engaged in inserting a bolt, cars being "kicked back" upon the main track went through the open switch, struck the car upon which he was working, and killed him. From a verdict and judgment of $12,000, the defendant appealed. The court, in affirming the judgment, said: "What were the risks ordinarily incident to * * * [the deceased] working outside the derail? It may be that of cars backed in there for repairs, etc., but we do not see how it could be successfully maintained that he assumed the risks of the switch being left open and a string of cars to be hurled in there, when they were not even intended for that track, by the engineer and those handling the switch engine. If assumed risk be based upon the idea of knowledge of the danger assumed, then deceased did not assume the risk from which his death resulted." San Antonio & A. P. Ry. Co. v. Littleton, — Tex. Civ. App. —, 180 S. W. 1194 (1915).

2. Inspector's motor car taking switch.

The plaintiff, a roadmaster, while making his usual trip over the road of the defendant upon the motor car furnished him, ran into an open switch, with the result that his car was derailed, and he was severely injured. The defendant contended that the plaintiff assumed the risk, since the switch target showing that the switch was open could have been seen several hundred yards distant. It was also alleged that the plaintiff knew that a custom existed on the part of the railroad men to leave the switch open when they ran on a sidetrack and intended to return to the main track in a few minutes; and further, that if he did not actually know of such custom, he should have known of it in the exercise of ordinary care. The plaintiff testified that he knew nothing of the custom of trainmen to leave the switch open under certain circumstances, and as his attention was directed to an inspection of the track immediately in front of him, he did not notice the switch target showing that the switch was open, but pre-

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distinct defense thereto, alleges, upon information and belief, that the accident which caused the death of the said Edward J. Boldt was caused through the negligence and carelessness of the said Edward J. Boldt and not by reason of negligence on the part of the defendant, its agents or employees.

Fourth.

The defendant further answering said complaint, and as a separate and distinct defense thereto, alleges that for many years and during all the times therein mentioned it did have and still has a branch or department of its

sumed it was closed in accordance with the rules of the road. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the plaintiff did not as a matter of law assume the risk. As the court pointed out, the risks arising from the negligence of the employer were not assumed by the employee, until he actually knew of them, and the question of ordinary care upon the part of the employee to discover such risks was immaterial. Kansas City, M. & O. Ry. Co. of Texas v. Finke, — Tex. Civ. App. —, 190 S. W. 1143 (1917).

3. Failure to turn switch.

The night switching crew of which the plaintiff was a member were engaged at the time of the accident in removing repaired empty cars from the car repair tracks and leaving others to be repaired. On a certain track were a number of cars that had been repaired, back of which were three unrepaired cars, and still back of these other repaired cars. To remove all of the cars that had been repaired, the switching crew attached the engine to the first repaired cars and the three unrepaired cars and hauled them upon the track, with the intention of backing up and "kicking" the three unrepaired cars onto an empty track. The foreman, whose duty it was to turn the switch, failed to do so. The string of cars went back upon the same track from which they came and ran against the remaining empty cars on that track. The plaintiff was at the time riding upon the side of a flat car in a leaning posture, in the act of uncoupling, to complete the intended kick in response to the foreman's signal. The impact of the cars threw him from the car. He fell with his back across the rail of an adjoining track, and was so injured as to induce tuberculosis of the spine. From a judgment for the plaintiff, the defendant appealed, contending that the plaintiff assumed the risk of being thrown from the car because of the insecure position which he had assumed. The court, in reversing judgment and remanding the case, held that the question of assumption of risk was properly left to the jury, and that the act of the plaintiff in riding in the position assumed was not an assumption of risk of an obviously defective appliance not attributable to negligence independently of some federal statute, which was all of the assumption of risk as at common law left unmitigated by the Employers' Liability Act, but was at most only contributory negligence which could reduce the amount of the damages but not constitute a bar to recovery. Bolch v. Chicago, M. & St. P. R. Co., 90 Wash. 47, 155 Pac. 422 (1916).

E. Failure to keep lookout.

The deceased, a passenger engineer, was accustomed to ride on his engine with the engine dispatcher when the latter ran it from the station which was his destination to the roundhouse. After arriving at the roundhouse, and cleaning up, it was his habit to cross over the tracks at a point where employees were accustomed to cross in leaving the yards and go to the house

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railroad service known as the Relief Department, for the establishment and management of a fund known as the Relief Fund for the payment of definite sums to employees of the defendant who became members thereof, and who under the regulations thereof shall be entitled thereto when disabled by accident or sickness, and in the event of their death to relatives or other beneficiaries specified in the application for membership; that said Relief Department of the defendant, through the officers of the latter having the control and management of said department, have adopted and promulgated rules and regulations which embody the obligations of the defendant to its employees who be-

of his brother for dinner. On the day in question, he had gone with the engine dispatcher to the roundhouse, where the latter had left him in the act of cleaning up and preparing to make up his time and work reports. The dispatcher then prepared another engine for its run, ran it to the water tank for water, and then backed it at the rate of four or five miles an hour for a distance of about 800 feet to the coal shed where he stopped to get a box of tools. The boy who handed the box up to him said there was a man under the tank. Examination disclosed that the deceased had been dragged from a point about 350 feet east of the water tank. He was twisted around the brake beam of the tender under the trucks nearest the engine, and died before any description of how the accident occurred could be given. The dispatcher had the bell of his engine ringing at the time, but, being alone, could keep a lookout on but one side of the engine. The accident occurred at that point where employees were accustomed to cross over in leaving the yards. Nearly an hour had elapsed between the time when the dispatcher left the deceased in his engine and when the accident occurred. From judgment on a directed verdict for the defendant, the plaintiff appealed. The court, in reversing the judgment and remanding the case for a new trial, said: "Upon the question of assumption of risk little need be said. It is true that assumption of risk still remains a defense under the federal act, but, as has been said by this court, that does not include risk of unexpected negligent acts of coemployees. * * * Under the evidence in this case there was room for the conclusion that the failure of * * * [the dispatcher] to keep a lookout on the south side was such a negligent act." Ewig v. Chicago, M. & St. P. R. Co., 167 Wis. 597, 167 N. W. 442, 449 (1918).

F. Collision.

The plaintiff's decedent was killed in a collision between his engine and certain moving freight cars while engaged in certain switching operations. There was evidence to the effect that the collision occurred because of a signal negligently given by the conductor. A judgment for the plaintiff in the sum of $25,000 was reversed and the cause remanded to the court of civil appeals with directions to enter judgment for the railroad company, from which the plaintiff brought error. The court, in reversing the judgments of both the district court and the court of civil appeals and remanding the cause to the district court for further proceedings, held that as it was a question for the jury whether the conductor's negligence was the proximate cause of the death it could not be held as a conclusion of law that the deceased assumed the risk. Pope v. Kansas City, M. & O. Ry. Co., — Tex. —, 207 S. W. 514 (1918).

G. Changing method without warning.

The plaintiff, a switchman, was notified by his foreman that a contemplated switching movement would be made by "shoving" the cars instead of "kicking" them. The plain-

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come members thereof, and to their legal representatives, and the obligations of such members and their legal representatives to the defendant, which control and regulate the legal relation of each to the other.

The defendant further alleges that the plaintiff's intestate, while in the defendant's employ and prior to the accident in question, made application to the defendant for membership in the said Relief Department, which application was in writing and signed by the said plaintiff's intestate; that in and by said application the said plaintiff's intestate did consent and agree to be bound by the regulations of the said Relief Department as contained in the

tiff, while on top of the cars and after the switching movement had begun, noticed that he could not see his foreman so as to receive signals. In such cases, the rules of the defendant required him to assume a position where he could see such signals. While walking back over the cars to assume the position required, the foreman suddenly changed his mind as to the method of performing the switching operation, signaled the engineer to "kick" the cars in, pulled the coupling to separate the cars, and as they pulled apart the plaintiff fell between them and was injured. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the evidence presented no exception to the rule that the servant did not assume the risk of the master's negligence, nor was he required to anticipate such negligence, sufficient to authorize a peremptory instruction in favor of the defendant as requested. Kansas City, M. & O. Ry. Co. v. Estes, — Tex. Civ. App. —, 203 S. W. 1155 (1918).

H. Failure to stop on signal.

The plaintiff's decedent, a brakeman, after going between cars to adjust a knuckle to make a coupling, was caught between the drawheads and received injuries from which he died immediately. The deceased alighted from the car which was attached to the train while it was moving backwards and ran ahead on the outside of the track for 15 or 20 yards, when he gave the engineer a stop signal three times, before going in on the track to adjust the knuckle. The defendant, on appeal from a judgment for $12,000, contended that as the deceased voluntarily placed himself in front of the train he assumed the risk of the resulting injury. The court, in affirming the judgment, held that the question of assumption of risk was properly submitted to the jury, and that there was evidence to support their finding, since there would have been no danger to assume but for the negligence of the engineer in failing to obey the stop signal, as it was his duty to do, and as the deceased supposed was being done. The court also said: "'Assumed risk' and 'contributory negligence' are sometimes loosely treated as synonymous. This, perhaps, for the reason that the same act may constitute both assumed risk and contributory negligence. * * * But there is a well-recognized distinction between assumed risk and contributory negligence. Contributory negligence implies fault or a breach of duty on the part of the injured party, either by doing or failing to do something that a reasonably prudent man would not have done, or would not have failed to do, to avoid being injured under the same or similar circumstances. On the other hand, there is a certain amount of danger incident to the many employments, which ordinary prudence cannot always avoid. Where these are known to the employee, they are assumed by him as an implied part of his contract of employment." Gulf, C. & S. F. Ry. Co. v. Cooper, — Tex. Civ. App. —, 191 S. W. 579 (1917).

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book of regulations of the said Department thereafter adopted, and by the provisions of any agreement or agreements made by the defendant with any other corporation or corporations establishing any administration of their respective Relief Departments in accordance with said book of regulations. That by the terms of said application the plaintiff's intestate further agreed with the defendant that the acceptance of benefits from the said Relief Fund for an injury or death shall operate as a release of all claims for damages against the defendant arising from such injury or death which could be made by or through the plaintiff's intestate or by or through his legal repre-

I. Moving turntable without warning.

1. Engine derailed.

The plaintiff, a fireman, was engaged at the time of the accident as hostler in a certain engine house of the defendant railroad. The plaintiff had taken an engine from the roundhouse to the coaling station over the turntable, and was backing it upon the turntable when he noticed that the same had been moved and that the rails were not in alignment. He consequently jumped from the engine and sustained the injuries in suit. The turntable had been moved during the intervening 10 or 15 minutes of the plaintiff's absence by a fellow employee and no warning whatever was given him that such had been done. It was not claimed that the plaintiff had any way of knowing that the tracks were not in alignment except by observation, and such appeared to be impossible because of the curve in the track in approaching the turntable. From a verdict and judgment in favor of the plaintiff in the sum of $4,791.75, the defendant appealed. The court, in overruling the defendant's motion for a new trial, said: "Nor can it be said that he assumed the risk. Assumption of risk implies prior knowledge of conditions from which accidents result. If held to apply here it would be difficult to conceive of a case in which recovery might be had. The accident was not the result of faulty appliances or defective machinery, but was caused by the heedless, almost unaccountable, carelessness of a fellow employee, who might have awaited for the plaintiff's return, or with the least possible amount of exertion given him due and timely warning of the change in the position of the table." Clement v. Maine Cent. R. Co., — Me. —, 102 Atl. 559 (1917).

2. Fireman injured while adjusting lock.

The plaintiff, a fireman, had been requested just previous to the injury by either the hostler of the roundhouse or his helper to lock the turntable, upon which the plaintiff's engine was to be run, turned around, and then given over to him for the next trip. Neither the engineer nor the plaintiff were allowed to take the engine from the roundhouse, use the turntable or operate the engine in any manner until it was placed on the track outside of the roundhouse where they were to receive it. Pursuant to the request, plaintiff went to the lock, a thing he had never done before during his 7 years of employment, and, finding it difficult to make the connection, he got his hand in such a position that when the table was moved for some cause, his little finger was caught and injured so that it had to be amputated. The wound became infected and two other amputations were rendered necessary. It appeared that one of the hostler's helpers in charge of the machinery which turned the table was notified by the plaintiff not to move it, as he was going to lock it, but that notwithstanding this request, the air which controlled the table was applied without warning, and the table moved with the result mentioned above. From a verdict for

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sentatives, and further agreeing that he or his said legal representatives would execute such further instrument as may be necessary formally to evidence such acquittance.

The defendant further alleges that the said application of the plaintiff's intestate for membership in the said Relief Department was duly approved, and that the said plaintiff's intestate thereupon became, and up to the time of his death was, a member of the said Relief Department of the defendant, and that he, his beneficiaries and legal representatives are bound by the agreements

$3,000, upon which the trial court entered a judgment for $1,750, the defendant appealed. The court reversed the judgment and remanded the case for a new trial, but held that the plaintiff did not assume the risk arising out of the negligence of his fellow employee in moving the table without warning. Byram v. Illinois Cent. R. Co., 172 Iowa 631, Ann. Cas. 1918 A 1067, 154 N. W. 1006 (1915).

J. Failure to leave passage between cars.

The plaintiff, a switch tender, was compelled, in the course of his duties in receiving trains and engines into the yard, to go to a small shanty containing a telephone which had been erected on the side of the tracks. There he telephoned orders to the other end of the yard relative to the distribution of the various trains. An order was posted on the outside of the shanty directing that no cars be stopped in front of it, in order that the plaintiff might not have to cross over the same in going to and from the yards to the shanty. This order had not been obeyed for a period shortly before the accident, and the plaintiff had complained to his superiors respecting it and had received assurances that it would be obeyed in the future. On the day of the accident, however, a string of cars had been left in front of the shanty and the plaintiff, after going between them, was struck by an engine as he emerged on the opposite side. From a judgment for the plaintiff, the defendant brought error. The court, in affirming the judgment, held that the question of assumption of risk was properly left to the jury. "While the defendant in error," said the court, "may be said to have known that it was wrong for other employees to violate the rule in failing to keep a passageway between the cars, thus to afford him a way to go to and from the points he was obliged to reach in the performance of his duties, we cannot say, as a matter of law, that he appreciated the danger, nor can we say that he was obliged to stop in the performance of his duties, particularly since he had received some promises to remedy the conditions as they existed. It is not the obviousness of a physical situation or condition which makes out a case of assumed risk; it is the obviousness of danger which the physical condition or situation produces." Lehigh Valley R. Co. v. Scanlon, — C. C. A. —, 259 Fed. 137 (1919).

K. Fellow employee taking wrong place on engine.

The plaintiff, a switchman, was thrown under his engine and severely injured in attempting to board it while in motion. It was the custom for the several members of the switching crew to take designated places upon the footboard of their engine and to board it while in motion. A fellow employee who had boarded the engine just previous to the accident had not taken his regular place, but rather had assumed the position assigned to the plaintiff. The latter, upon seeing the situation, and thinking that his coemployee was not going to move, attempted to board the

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contained in said application and by the regulations controlling the operation of said department.

Defendant further alleges that Caroline Boldt, the mother of the deceased, as the beneficiary named in the said application of the plaintiff's intestate for membership in the said Relief Department, has applied for, accepted and received from the said Relief Fund for and on account of the death of the plaintiff's intestate, as alleged in the complaint, and on account of which the plaintiff seeks to recover of the defendant in this action, the amount of two hundred and fifty dollars ($250); that the said Caroline Boldt on or about the

engine at the place reserved for the latter. The same instant the plaintiff placed his foot upon the running board, the fellow employee moved over to the place he should have assumed previously, with the result that the foot of the plaintiff hit his heels and he fell under the locomotive. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the question as to whether the plaintiff assumed the risk was properly submitted to the jury. El Paso & S. W. R. Co. v. Lovick, — Tex. Civ. App. —, 210 S. W. 283 (1919).

L. Shoving unattended car on track.

The plaintiff, a car inspector, was walking along the side of a drag of cars, inspecting them, when a car on an adjoining track was "kicked" in without any light thereon, or any person in control of same. The car was running at a speed variously estimated at from 8 to 17 miles an hour. The place was not well lighted and was at a distance of from 500 to 700 feet from a yard light. At the time the car approached, the plaintiff was at work with his back towards the car, his attention directed to his work, and did not observe the car. He was struck on the shoulder, knocked down, his left leg cut off about 9½ inches above the knee, his shoulder injured, the end of his finger cut off, and otherwise injured. From a verdict and judgment for $8,000, the defendant appealed. The court, in affirming the judgment, held that under the evidence there was testimony tending to show such facts as would exempt appellee from having assumed the risk, and that it became a question of fact to be determined by the jury. As the court said: "We feel that we can safely say that a servant does not assume the risks of the negligent acts of the master that are unusual or extraordinary and not known to the servant. There was evidence in this case tending to show that it was not usual or customary to kick a car in on track 16 without a brakeman thereon to control it and without a light, when the inspector was engaged in the work of inspecting the drag train." Lincoln v. Pryor, 199 Ill. App. 228 (1916).

M. Switching bad order car.

The plaintiff's decedent, a switchman, was at the time of the accident riding upon the pilot of the engine, as it pushed a crippled car back upon the bad order tracks. A timber underneath the car in question had been split. This timber tended to secure the drawbar and its attachments to the car. When the car came in contact with the car ahead as it was being placed, the engine pushed the drawbar back under the car due to its weakened condition, with the result that the ends of the car and the engine came together, crushing the intestate. Various inspectors chalked on the ends of the cars condemned as cripples the nature of the defects, and also nailed a tag on the car indicating what repairs were to be made. This had been done to the car in question, and the deceased might have discovered what was the matter with the car had he so desired. There was a

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30th day of October, 1911, for and in consideration of the payment of the above amount duly executed an instrument in writing, duly signed and sealed by her, whereby she acknowledged full satisfaction and discharge of all claims or demands on account of or arising from the death of the said plaintiff's intestate, and releasing the defendant of and from all liability on account of the transactions, acts and matters set forth in the complaint herein, which said release was executed before the commencement of this action.

The defendant further alleges that, pursuant to the agreements contained in the application of the plaintiff's intestate for membership in said Relief

verdict and judgment for $12,500, and the defendant moved to set aside the verdict and for a new trial. The court, in setting aside the verdict and dismissing the complaint, said: "The evidence shows that it was a part of the intestate's duty to assist in moving crippled cars, taking them out of trains, and placing them on tracks for repair. He was familiar with these duties, and the risks incident to the work. He knew this car was crippled. The markings of the inspector on the car advised him of the character of the defects. If he did not in fact read them, they were there to be read. It would seem that he assumed the hazards incident to the employment." Buschalewski v. New York Cent. R. Co., 105 N. Y. Misc. 541, 173 N. Y. Supp. 506 (1919).

III. Section work, etc.

A. Negligent order of superior.

1. On approach of train.

a. To take other side of track.

The plaintiff's decedent, a section hand, had been engaged just previous to the accident in "smoothing the track." This operation had been completed and the deceased and the other employees were proceeding up the track to unload a carload of ties when a train approached. The men were walking up the side of the track in single file, with the foreman in the lead, when the latter turned, with the train only 200 to 300 feet distant, and said, "On this side," and jumped to the other side of the track. The first two men succeeded in crossing, but the deceased, who was the third in line from the foreman, was caught by the engine and killed. For some reason, the deceased did not start across when the order was given, but hesitated for a perceptible interval, and when he did start across, the train was only one or two rails distant. The deceased, it appeared, was a green hand, and had worked only a few days upon the railroad in his entire lifetime. From a verdict and judgment for the plaintiff in the sum of $10,000, the defendant appealed. The court, in reversing the judgment and remanding the case for a new trial, held that the deceased assumed the risk of crossing the track, regardless of any possible order of the foreman to do so. As the court pointed out, the risk was so obvious that an ordinarily prudent person would have refused to encounter it, and though the deceased may have been a green hand in railroad work, any person of ordinary understanding knows that if he steps on the track in front of an approaching train he will be struck by it. Louisville & N. R. Co. v. Williams' Adm'r, 175 Ky. 679, 194 S. W. 920 (1917).

b. To remove jacks from rails.

The plaintiff's decedent, a section hand, was, at the time of the accident, engaged in the work of "spacing" ties. For this purpose, the track had been elevated about 3 inches by the use of "jacks," and flags had been placed some distance away to warn approaching trains to go more slowly. On the east side of the track about 2½ feet away from the rails

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Department, the acceptance of the said amount by the said Caroline Boldt operates as a release of all claims for damages against the defendant arising from the injury alleged in the complaint which could be made through the plaintiff's intestate, his beneficiaries or legal representatives.

Wherefore, the defendant demands judgment that the complaint herein be dismissed with costs.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

was an embankment. A passenger train, having approached without warning at a dangerous rate of speed, was not observed by the crew until about 300 feet away. The foreman then directed the deceased to remove the jack on the east side. This he was unsuccessful in doing, and the foreman, seeing the situation, suddenly ordered him to leave it alone and save himself, trusting that the engine would throw the "jack" out of place. The deceased became confused, and instead of standing back from the track upon the east side near the embankment, attempted to cross to the other side. He was struck, and died soon after. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the question of assumption of risk was properly left to the jury. As the court pointed out, the deceased attempted to release the "jack" upon the express order of the foreman, and as a result of negligence on the part of the defendant in the giving of such order and in the approach of the train without warning, he became confused, and thinking that he might be injured by attempting to stand on the east side near the embankment, where he might possibly have been injured by the flying jack, the deceased attempted to cross in front of the train to the other side of the track. "If decedent," said the court, "acted upon a reasonable apprehension of peril from remaining or going to the east side of the track, and acted as an ordinarily careful man under like circumstances would have acted, he could not be charged with having assumed the risk of attempting to cross the track in front of the engine." Cincinnati, N. O. & T. P. R. Co. v. Jones' Adm'r, 171 Ky. 11, 186 S. W. 897 (1916).

c. To remove hand car from track.

The plaintiff, a section hand, was at the time of the accident riding to work with his crew upon a lever car. The day was very foggy and misty. One of the defendant's passenger trains rounding a curve at a high rate of speed came suddenly upon them. The foreman ordered the plaintiff to assist him in removing the hand car from the track. This they were unable to do in time, and, though the plaintiff attempted to save himself when he saw a collision was inevitable, he was struck by the hand car as it was knocked from the track, breaking his leg and causing other injuries. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in reversing the judgment, said: "While it is true that a servant is bound to obey a command, when given as such, by one occupying the relation of vice principal to the master, if it pertains to the duties of the servant's employment, and does not involve a violation of the law, and if the act required is not one which is of itself so obviously dangerous that no person of ordinary prudence could be expected to perform it, still even the direct and immediate order of the master will not justify a servant in rashly exposing himself to a known and obvious danger; and if, in compliance with the

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At Buffalo, N. Y., defendant has a yard where freight trains are made up. Cars under control of a brakeman descend by gravity to desired positions on connecting tracks which lie southward of the "hump" or high point. A rule forbade employees from going between cars without first taking precautions not observed in the present case. Some evidence tended to show that under long-continued

command in such cases, the servant be injured, he cannot recover of the master therefor. * * * In order to charge an employee with the assumption of risk attributable to a defect due to the employer's negligence, it must appear not only that he knew * * * of the defect, * * * but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it. * * * Thus it is impossible to hold, * * * that the plaintiff did not know and appreciate the obvious danger incident to remaining upon the track in the face of an on-coming locomotive, whose gleaming headlight was staring him in the face. We are compelled to say that he assumed the risk which occasioned his injury." Southern Ry. Co. v. Simmons, — Ga. App. —, 100 S. E. 5 (1919).

d. To board moving train.

The deceased, a boy 16 years of age, had been employed by the defendant for 6 months previous to the accident as a section hand. On the day of the accident, the crew of which the deceased was a member had been taken to work on a gasoline hand car. In the evening, on making preparation for their return, it was discovered that the hand car was not working well. At that time, a freight train approached, and to avoid walking to town, the foreman told the crew to board the train "if it slowed up," according to the testimony of one witness, or "if it was safe," according to the testimony of another. In either event, there was testimony of an assurance or direction by the foreman to get on the train. The deceased, in attempting to board the train, sustained injuries that caused his death a few months later. From a judgment for the defendant on a directed verdict, the plaintiff appealed. The court reversed judgment and granted a new trial, holding that the question of assumption of risk was for the consideration of a jury. Schantz v. Northern Pac. Ry. Co., — N. D. —, 173 N. W. 556 (1919).

The plaintiff, a lineman engaged in the repair of the defendant's telegraph wires and lines, was injured while attempting to board a freight train in pursuance of an order of his superior. In going to and from places of work on the defendant's road, it was the custom for such employees as the plaintiff to ride upon its engines and cars, both freight and passenger. The plaintiff alleged that his injury arose from the negligence of his superior in giving him the order to mount the moving train. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that a servant injured while obeying a direct command of the master, does not assume the risk of danger unless it is so imminent that a reasonably prudent person would not assume it, and that whether the plaintiff understood and appreciated the danger of obeying the order in question was a question which was properly submitted to the jury. "Where the servant clothed by the master with the authority to direct

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practice, considered good railroading, cars (in "strings" or "cuts") were constantly sent down and purposely allowed to strike others with sufficient force to secure coupling, but not hard enough to injure the equipment, "regardless of the position the men are in, putting them under obligation to take care of themselves."

While between cars, contrary to instructions, and assisting in an

the work," said the court, "and the servant to whom the directions are given do not stand upon an equal footing, it cannot be said as a matter of law that the servant is precluded recovery upon the ground that he assumed the risk." Vandalia R. Co. v. Kendall, — Ind. App. —, 119 N. E. 816 (1918).

2. To move live wire.

The plaintiff, while a member of a wrecking crew engaged in clearing away the wreck of certain cars engaged in interstate commerce, took hold of the end of a live wire that had been torn down by the wrecking outfit. The plaintiff did not know, it appeared, that the wire was charged with electricity, and he was directed to remove it by express order of the foreman. From a judgment for the plaintiff, the defendant appealed, contending that the plaintiff assumed the risk. The court, in affirming the judgment, said: "When the evidence does not conclusively establish that the risk was known to the plaintiff, or was open and obvious to common observation, or that, in the performance of his duty at the time of the accident, he must, in the exercise of ordinary care, necessarily have discovered the danger, the issue of assumed risk is a question of fact to be determined by the jury. We think the evidence warranted the jury in finding against defendant's plea of assumed risk. The evidence also authorized the jury to find that * * * [the foreman] was negligent in ordering plaintiff to take hold of a wire which he knew to be charged with electricity, without warning plaintiff of the danger of handling the wire." Houston Belt & Terminal Ry. Co. v. Wolkarte, — Tex. Civ. App. —, 197 S. W. 1023 (1917).

B. Negligent information as to time of train.

The plaintiff, a section foreman, was proceeding at the time of the accident with his crew to a certain point on the defendant's railroad to repair a washout, which he heard had occurred. A telegraph operator had informed him that he had time to reach the point in question before the arrival of a belated train, and instead of sending a flagman ahead on approaching a sharp curve to see if the train was in sight, the hand car was merely stopped and started again soon afterward, when no sound of an approaching train was heard. On rounding the curve the train was seen approaching, and in hurriedly removing the hand car from the track the plaintiff severely strained himself and suffered permanent physical injuries. No negligence on the part of the coemployees of the plaintiff in removing the hand car from the track was alleged or proven, nor was any negligence shown in the running of the freight train with which the plaintiff so nearly collided. The trial court did not instruct the jury upon the question of assumption of risk, and this was alleged as error on appeal by the defendant from a judgment for the plaintiff. The court, in reversing the judgment, held that the plaintiff assumed the ordinary risks of his em-

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effort to adjust a faulty coupler, Edward J. Boldt, an experienced yard conductor, was killed. The coupler was at the south end of a "string" standing on an inclined switch. Another "string" moving down from the north hit the standing one violently and drove it against deceased and across a space of 20 feet.

Suing under the Federal Employers' Liability Act, plaintiff maintained that the deceased, as a matter of law, did not assume the risk. "The evidence clearly shows," said the court, "that the coal was piled high above the sides of the tender, and, by reason of the fact, was likely to fall or to be thrown from the tender and injure those working along the track. There can be no doubt that a clear case of negligence is made out by the evidence. * * * Since the decedent did not know that the particular tender was improperly loaded, and had no opportunity to observe and appreciate the danger therefrom, we conclude that no question of assumed risk was presented, and that the trial court did not err in so holding." Cincinnati, N. O. & T. P. Ry. Co. v. Claybourne's Adm'r, 169 Ky. 315, 183 S. W. 903 (1916).

ployment, among which was the danger of encountering trains upon that section of the track in his charge, and also the danger of injury resulting from the necessity for hurriedly removing his hand car from the tracks of the railroad upon the near approach of trains, and that whether the injury resulted solely in consequence of an ordinary risk of his employment, or was one which was obvious under the information imparted to him by the telegraph operator, or whether it resulted in part from a risk arising on account of the negligence of an employee of the defendant acting within the scope of his authority, which was not assumed by him, were questions of fact which should have been submitted to the jury under proper instructions. Atlantic Coast Line R. Co. v. Tomlinson, 21 Ga. App. 704, 94 S. E. 909 (1918).

C. Objects falling from train.

1. Coal.

The plaintiff's decedent, a section hand, while engaged with his crew in tamping a track at a certain point on the defendant's railroad, was directed by his foreman to assist in removing a hand car from the track to avoid a collision with an approaching passenger train. The car was removed, and the deceased, while waiting by the side of the track with the remainder of the crew for the train to pass was struck behind the ear with a piece of coal which fell from the tender, receiving serious injuries from which he finally died. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the deceased, as a matter of law, did not assume the risk. "The evidence clearly shows," said the court, "that the coal was piled high above the sides of the tender, and, by reason of the fact, was likely to fall or to be thrown from the tender and injure those working along the track. There can be no doubt that a clear case of negligence is made out by the evidence. * * * Since the decedent did not know that the particular tender was improperly loaded, and had no opportunity to observe and appreciate the danger therefrom, we conclude that no question of assumed risk was presented, and that the trial court did not err in so holding." Cincinnati, N. O. & T. P. Ry. Co. v. Claybourne's Adm'r, 169 Ky. 315, 183 S. W. 903 (1916).

2. Ties.

The plaintiff, a section hand, stood at the side of the track with the remainder of the crew, just previous to the accident, to allow a train to pass. The train in question contained one car loaded with crossties, and while the same was passing the plaintiff, certain of the ties fell from the car and injured him on the head and back. Negligence on the part of the defendant was alleged in the careless loading of the car, and in the running of the train at a dangerous rate of speed over an uneven portion of the track, thereby causing the load to loosen more easily. From a judgment on a peremptory instruction for the plain-

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tained that the brakeman in control negligently permitted the moving cars to strike with too great violence; also that the company negligently failed to promulgate and enforce adequate rules to safeguard deceased while occupied about his task; and some evidence tended to support both claims. The Circuit Court of Appeals affirmed a judgment upon verdict for defendant after the trial court had

tiff, the defendant appealed. The court reversed the judgment and remanded the case, but held that the plaintiff did not assume the risk from the falling ties. As the court pointed out, the plaintiff was in a place where he had a right to be and where his duty placed him, and a duty rested upon the defendant of seeing that the shipper loaded his shipment in such a manner that injury would not be caused to those lawfully along the track. Yazoo & M. V. R. Co. v. McCaskell, — Miss. —, 79 So. 217 (1918).

D. Throwing or dropping rail too soon.

The plaintiff, a section hand, during the two weeks preceding the accident had been engaged in taking out the old rails of the main track, replacing them with new steel, resetting the ties, and surfacing the roadbed. On the day of the accident, however, he was engaged in loading the old rails that had been removed on to a flat car. In loading, one end of a rail was thrown too soon, and falling, struck the plaintiff's heel, so causing the injuries in suit. Judgment for the plaintiff was affirmed on appeal to the appellate court, and the defendant brought error. The court, in affirming the judgment, held that while an employee assumes the ordinary risks of his employment, unless there be a violation of the federal law, risks arising out of the negligence of a fellow-servant, such as that here involved due to the throwing of the end of the rail too soon, were not assumed. Kusturin v. Chicago & A. R. Co., 287 Ill. 306, 122 N. E. 512 (1919), aff'g 209 Ill. App. 55 (1918).

The plaintiff was at the time of the accident in the employ of the defendant, cutting steel rails and repairing its tracks. Being called by the foreman to come to the point where four other men were working, to assist in dropping a rail in order to break it at the place where it had been cut, the plaintiff started to obey the order. Before he had any opportunity, however, to touch the rail or do anything with it, the four men holding it dropped it in such a manner that it fell on his foot and caused the injuries in suit. The plaintiff testified that the same number of men had handled similar rails the same day in a satisfactory manner, but that often as many as seven men were used for that purpose. From a judgment of nonsuit, which was affirmed by the supreme court, the plaintiff appealed. The court, in affirming the judgment, held that the plaintiff assumed the risk as a matter of law. The court, in pointing out the distinction between contributory negligence and assumed risk, said: "Contributory negligence involves the notion of some fault or breach of duty on the part of the employee. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risk may be present, notwithstanding the exercise of all reasonable care on his part." Cetola v. Lehigh Valley R. Co., 89 N. J. L. 691, 99 Atl. 310 (1916).

The plaintiff, a section hand, was

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denied motion for new trial based solely upon its refusal to give the charge specially requested by plaintiff and copied below. 218 Fed. 367, 134 C. C. A. 175.

To the general charge plaintiff made no objection whatever. In the first paragraph it declared:

engaged at the time of the accident in cleaning up the debris of a wreck. With several other employees he had lifted an iron rail, which was crooked and resembled the letter "S." The plaintiff was inexperienced in the work, and had told the foreman to warn him when any possible danger should arise, and how to avoid it. While lifting on the rail, one of the employees signaled that it be dropped. Not understanding the signal, the plaintiff held on to the rail when it was dropped, and was injured. The foreman was present but gave no signal, and his negligence did not concur in the signal being given. The jury were instructed that "plaintiff did not assume the risk of extrahazardous work, if any, unless he was warned and instructed in said work by the defendant company, and after so being warned continued to work at said hazardous work." From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, said: "If appellee was inexperienced in the work and asked that he be instructed in the work, that moving crooked rails was more dangerous than straight rails, that this was the first work of the kind he had ever done, and that he had not been warned, it was a question for the jury to determine under appropriate instructions, and the evidence, whether or not he was warned and whether or not under the circumstances the danger was patent and obvious." Missouri, K. & T. Ry. Co. v. Mooney, — Tex. Civ. App. —, 181 S. W. 543 (1916).

The plaintiff, a section hand, was engaged in replacing old ties with new in the track of the defendant railroad, both rails of which had been raised and were supported by track jacks. The plaintiff stood astride a rail with his left foot under it, and was in such a position when a passenger train suddenly approached, and the foreman gave orders for the immediate removal of the jacks. The employee on the other end of the rail suddenly and without warning thereupon operated the jack in such a manner as to quickly lower the rail upon the plaintiff's foot, causing three of his toes to be mashed. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the Federal Employers' Liability Act superseded all state laws and abolished the common-law rule exempting the employer from responsibility for the negligence of one servant towards another, and eliminated the defense of assumption of risk where the injury was caused by the negligent act of a fellow-servant. The court further said: "If the defense of assumption of risk were available in a case of this kind it would be difficult to imagine circumstances under which the rule imposing liability upon the employer for the negligence of a fellow-servant could be applied." Koukouris v. Union Pac. R. Co., 193 Mo. App. 495, 186 S. W. 545 (1916).

E. Operation of hand or motor car.

1. Speeding motor car.

The plaintiff, a section hand, was, at the time of the accident, returning

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"The foundation for the action is the Employers' Liability Act, which was passed by Congress in the year 1908, and which substantially provides that, if the employees of interstate railway carriers are injured while at work, on account of the negligence of the employer, or on account of the negligence of an officer or agent, or, indeed, even on account of the negligence of a fellow servant, that a recovery can be had."

Continuing, it explained nature of the accident, relationship, re-

from work on a motor car operated and in charge of his foreman. The car was being driven about 40 miles an hour, and, as a result of the excessive speed, it left the tracks and severely injured the plaintiff. His shoulder bone, wrist, and collar bone were broken, one eye was lost, one side of the face was crushed, and by the wasting of one arm and hand, he was totally incapacitated from labor. From a verdict for $25,000, upon which judgment was entered for $20,000, the defendant appealed, alleging that as the plaintiff did not protest against the rate of speed at which the car was going at the time of the accident, he assumed the risk. The court, in affirming the judgment, held that as the foreman had complete control over the plaintiff, and had the right to direct the speed of the car regardless of any protest that the plaintiff might make, the failure on the part of the plaintiff to protest against the speed of the car did not result in his assumption of the risk which caused the injury. "Under the Federal Employers' Liability Act," said the court, "the servant has a right to assume that his employer has furnished him a safe place to work and has provided him with safe appliances with which to work. He assumes all the normal risks incidental to his employment that are known to him, or which, by the exercise of ordinary diligence and prudence by a person of reasonable caution and intelligence, are ascertainable, and does not include those risks incidental or attributable to the negligence of the employer, until he becomes aware of such negligence and the risks arising therefrom; and in that event it must appear that he not only knew the negligence or defect arising therefrom, but that it endangered his safety; or else the danger must have been so obvious that a person of ordinary prudence in like circumstances would have realized it—all of which are questions of fact for the jury." Wichita Falls & N. W. Ry. Co. v. Davern, — Okla. —, 177 Pac. 909 (1919).

2. Sudden stop of hand car.

The plaintiff, a section foreman, was thrown from a hand car upon which he and five Mexican section hands were returning from work, as the result of one of them either placing his foot upon the brake or holding down upon the lever, so as to suddenly check the speed. The plaintiff testified that he knew cars were often checked in such a manner, but did not suspect that such was going to be done at this particular time. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, said: "Nor do we agree with appellant that, because appellee knew that in the operation of hand cars they are sometimes accidentally and unintentionally checked or slowed up, he assumed the risk. The effect of the jury's finding is that the hand car was checked by the negligence of one or more of the section hands, and the fact that appellee knew that cars may have been previously so stopped or checked is not ground for holding that he assumed the risk of the negligence of appel-

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sponsibilities, and obligations of parties, definition and effect of contributory negligence, etc.

Concerning assumption of risk, the court said:

"Evidence has been given by other witnesses that customarily cars are sent over this 'leader' into the yard of the defendant, and into the railroad yards of other railroad companies, ad libitum; that is, they are sent freely,

lant's servants on this occasion." Missouri, K. & T. Ry. Co. v. Robeson, — Tex. Civ. App. —, 178 S. W. 862 (1915).

3. Sudden push.

The plaintiff, a section foreman, was at the time of the accident standing upon a push car propelled by a hand car upon which several employees were working the "walking beam" which furnished the power. While proceeding in this manner towards a station for certain construction materials, one of the section men on the hand car gave the push car a sudden kick with his foot. As a result, the push car suddenly went forward, and the foreman, falling upon the track between the cars, was severely injured by the hand car running over him. From a verdict and judgment for the plaintiff in the sum of $10,000, the defendant appealed, contending that the plaintiff assumed the risk. The court, in affirming the judgment, said: "The contingency that one of the laborers would suddenly kick the car upon which the plaintiff was riding was not an obvious risk, nor such as could reasonably have been anticipated. The plaintiff, as defendant's servant, did not assume the extraordinary and unusual risks of the employment (26 Cyc. E. 1, p. 1177), and the complaint alleges, and the defense does not deny, that the injury resulted from an extraordinary or unusual act, one not to be reasonably anticipated." Arizona Eastern R. Co. v. Bryan, 18 Ariz. 106, 157 Pac. 376 (1916).

4. Removal from track.

The plaintiff, a section hand, while assisting in removing a hand car from the track, was badly injured by the foreman, who, working on the opposite side, negligently threw the weight of the car against plaintiff. The defendant defended the action upon the ground that, under the plaintiff's own theory of the case, he had assumed the risk complained of, and was therefore not entitled to recovery. From a judgment for the defendant, the plaintiff appealed. The court, in reversing the judgment and remanding the case, said: "But under the plaintiff's version of this case, his injury was caused, not through any risk assumed by him, but through the negligence of one of his fellow-servants; and although it may be true that the doctrine of fellow-servant and the doctrine of assumption of risk originally grew out of the same principle —that of an implied contract on the part of the employee to assume the risks incident to the negligence of his fellow-servant or to assume the risks incident to his employment and known to him—nevertheless at this time each of these doctrines are well established in the jurisprudence of this country, and both [each] is as distinct from the other now as if their origin were entirely different." The court in conclusion pointed out that the common-law rule exempting the employer from liability for the negligence of a fellow-servant had been abolished under the Federal Employers' Liability Act, though the defense of assumed risk was still preserved. Elliott v. Illinois

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one after another, to classify them and to make up trains when already classified; they are defined as 'live tracks,' a dangerous place to work, gentlemen, and workmen who take upon themselves occupations of that character assume the ordinary risks of the employment; they assume the risks that are incident to the particular avocation." "The decedent, as I have already stated, was bound to take care, and exercise diligence, and avoid any accidents from the movements of the cars in the yards and while at work. A railroad company, gentlemen, does not guarantee or insure the safety of its employees; it is merely obliged to use ordinary care to prevent unusual risks by the decedent,

Cent. R. Co., 111 Miss. 426, 71 So. 741 (1916).

F. Management of weed burner.

The deceased was, at the time of his death, employed in the operation of a weed burner. The machine consisted of a car on the front of which were situated gasoline tanks and on the rear of which were placed two wings weighing about 350 or 400 pounds capable of being raised and lowered over obstructions, and which constituted the "burner" part of the machine. The work train to which the weed burner was attached had been run upon a sidetrack to permit the passing of a passenger train. While standing there, the tanks of the weed burner had been filled with gasoline, and the deceased had made certain adjustments to the left wing, which was lowered. No one connected with the operation of the train seemed able to testify at the trial whether or not this wing had ever been raised after the deceased had completed his work and before the work train was again started in operation. The train, however, had proceeded only about 1,500 or 2,000 feet when the burner was derailed, and the gasoline thrown over the deceased, igniting, so as to cause his death shortly afterwards. It was conceded that the death resulted from negligence, at least in part, of the defendant. The court instructed the jury that the deceased assumed no risks arising from any negligence of the defendant. From a judgment for the plaintiff, the defendant appealed, assigning as error the instruction regarding assumption of risk. The court reversed the judgment and remanded the cause for new trial, citing with approval the statement in Chicago, R. I. & P. Ry. Co. v. Hughes, — Okla. —, 166 Pac. 411, as follows: "It is error to instruct a jury in an action for damages for personal injuries that a servant does not assume such risks as are created by the master's negligence. The true rule in this regard is that the servant assumes all the ordinary risks of his employment which are known to him, or which could have been known with the exercise of ordinary care to a person of reasonable prudence and diligence, under like circumstances; and with reference to risks not naturally incident to the occupation, but which may arise out of the failure of the master to exercise due care in the performance of some duty owing by him to the servant, the rule is that the servant does not assume such risks until he becomes aware of such negligence of the master and of the risks arising therefrom, unless the defect and risk are so apparent and obvious that an ordinarily careful person would observe the one and appreciate the other." Kansas City, M. & I. Ry. Co. v. Costa, — Okla. —, 170 Pac. 892 (1918).

G. Exposure to weather.

The plaintiff had been employed for several weeks in shoveling snow and fixing snow fences on the defendant's railroad. On the day of the accident, the plaintiff and others consented to go to some cuts a few miles away and clean away the snow, though a blizzard was then raging and

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which, under the circumstances, and the manner in which the work was ordinarily done, could not be reasonably anticipated." "You must be satisfied, gentlemen, in order to give her an award, that it is due to her because of the negligence of the defendant railroad company, and, if you also believe that it was due to the negligence of the decedent himself, who was engaged in a risky occupation, he, as I said before, assumed the ordinary risks of his employment, then you may apportion the damages."

At defendant's request and without objection, the jury were told:

the weather was very cold. No coach in which the crew could ride was furnished, though one was promised, and no fires were built along the way, though assurance had been given that such would be done. The plaintiff was compelled to ride both ways on the top of the tender of the engine, and the crew was kept at work all night instead of 3 hours as had been promised. As a result of such conditions, the plaintiff's feet became frozen and two toes on the left foot had to be amputated. From a verdict of $2,295 for the plaintiff, the defendant appealed, contending among other things that the plaintiff assumed the risk. The court affirmed the judgment, holding that the question of assumption of risk was properly left to the jury. As the court pointed out, a servant has the right to rely on the assurances of his master to protect him against unusual risks or dangers of his employment, and if the servant continued in the employment because of such assurance, and the same was not fulfilled, the servant could not be held to have assumed the risk. Koofos v. Great Northern Ry. Co., — N. D. —, 170 N. W. 859 (1918).

H. Particles flying from pick, hammer, etc.

1. Ice or cinder from pick.

The plaintiff, a section hand, was engaged at the time of the accident in lining up the track of a spur, several ties of which had been replaced a few days before as the result of a wreck. The plaintiff was nipping the ties by placing a lever under their ends so as to prize them up to the rail, and his companion, the section boss, would stick a pick into the tie near the rail and prize down on the handle so as to pull the rail to its proper place. The section boss in making a stroke with his pick into one of the ties, upon which there was ice and perhaps cinders, caused some of those substances to fly, and a small portion of it struck the plaintiff in one of his eyes, resulting in the loss of its sight. From a judgment for the defendant, the plaintiff appealed. The court, in affirming the judgment, held that the plaintiff assumed the risk of the condition resulting in the accident, as it was one ordinarily incident to the employment. "Particles of earth, cinders, or rocks will get upon the top of the ties, and over them, and to require all of this to be removed before the work of repairing the track should proceed would entail such a consumption of time as to make the repairing of railroad tracks not only expensive and impractical, but almost impossible of performance. Moreover, the record in this case makes it more probable than otherwise that the substance which flew into the plaintiff's eye was a piece of ice formed by the sleet accumulated on top of the ties. The railroad company was not responsible for the cold weather bringing about and producing such conditions." The court also pointed out that the fact that the plaintiff warned his companion of the possible consequences of sticking the pick into the tie, and then continued to work, showed that he knew of the

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"That the decedent assumed the obvious necessary risks of the employment in which he was engaged."

Plaintiff then asked a charge that:

"The risk the employee now assumes, since the passage of the Federal Employers' Liability Act, is the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of defendant's officers, agents, or employees."

danger, and thereby for another reason must be considered as assuming the risk. Jones v. Southern Ry. in Kentucky, 175 Ky. 455, 194 S. W. 558 (1917).

2. Head of spike from glancing blow.

The plaintiff and a coemployee were at the time of the accident tightening certain spikes holding the ties to the rails, which had become loosened and stood from a half inch to an inch above the ties. About 10 minutes before the accident in question occurred, the plaintiff's fellow workman so struck a spike that part of the head was knocked off and passed just under the plaintiff's chin. The plaintiff then cautioned his helper to strike the spikes a direct instead of a side or glancing blow. He explained how it should be done, and after watching for a few moments the performance of the work as directed, he returned to his own work about half a rail distant. A few moments later, the helper again struck a spike a glancing blow, with the result that the head flew off and struck the plaintiff in the eye, eventually causing the loss of sight therein. From a judgment for the plaintiff, the defendant appealed, assigning as error the refusal of the trial court to direct a verdict in its favor. The court reversed judgment and remanded the case, granting a new trial, holding that the injury was the result of the ordinary risks incident to the employment, which were assumed by the plaintiff. Ruping v. Oregon Short Line R. Co., — Utah —, 171 Pac. 145 (1918).

3. Sliver of steel from chisel.

The plaintiff, at the time of the accident, was holding a steel rail a few feet from where it was being cut in order to steady it. The foreman held a chisel on the rail at the place where it was desired to sever it, while another employee struck the chisel with a steel maul. After cutting for a time, a stroke of the hammer caused a sliver of metal to fly from the battered end of the chisel and strike the plaintiff in the eye, practically destroying his sight. The defendant, on appeal from a judgment for the plaintiff, contended that the plaintiff was engaged in handling a simple tool and assumed any risk of injury consequent upon its use. The court reversed the judgment and remanded the case, but said upon this question: "We have difficulty in understanding how the simple tool rule, invoked by defendant, can apply to the case. Plaintiff was not handling any of these instruments. He was performing a service apart from the operation of the tools, and his charge is that defendant, through his servants, so manipulated the tools that a small piece of metal was thrown into his eye." Haire v. Schaff (Mo. App.), 190 S. W. 56 (1916).

I. Failure to give warning.

1. Of likely approach of train.

The plaintiff's decedent had been removing snow from the railroad just previous to the accident. Work had been temporarily suspended, and the men were told by the foreman to go

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Denying the request the court said:

"Under the Employers' Liability Act the employee simply assumes the risk of his employment. Section 4 [Comp St. 1916, § 8660] reads, 'Such employee shall not be held to have assumed the risk of his employment in any case where a violation by such common carrier of any statute enacted for the safety of employees contributed to the injury, or death of such employee.' I decline to charge as requested, because this is not an action of the kind specified in section 4."

into a covered car a short distance down the track as it was raining and freezing at the time. To do so the men were compelled to walk down the track, and, not knowing that a fast passenger train was behind time, they were struck by the train and the plaintiff's intestate was killed. No warning had been given to them that the train was behind time. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, said: "We think the failure to warn the men that the passenger train was behind time and might be expected is sufficient to sustain the verdict, since the jury might have believed the evidence that the boss told the men to go to the covered car, and there was no way to go except along the track. This disposes of the question of assumption of risk. No doubt a railroad employee or any one else assumes the risk of walking on the track, but it does not follow that he assumes the risk of being struck by a train which he may well think had gone by." Armbrecht v. Delaware, L. & W. R. Co., 90 N. J. L. 529, 101 Atl. 203 (1917).

2. **On starting work after rest period.**

The plaintiff, on the day of the accident, was employed in unloading bridge timbers from a freight car. The timbers were about 10 feet long, laid lengthwise of the car, and weighed between 300 and 400 pounds. Two men worked on the outside of the car and received the timbers as they were rolled on to a skid by two men on the inside of the car. A few minutes before the accident the car had been switched to allow the passing of a train and then switched back to its original position. The plaintiff assisted in replacing the skid against the doorsill and then stood by its side with his right hand on the pile of timbers, and his head turned slightly away from the car. While in this position, a timber shot out from the car door without warning, struck the pile of timbers at the point where his hand was resting, and injured it. The plaintiff contended that after a period of rest it was usual to warn the party on the outside before work was resumed. As a result of the injury, a portion of the bone of the third finger was crushed at the middle joint and had to be removed. After healing, it had a sidewise flexion of about 10 per cent and a flexion towards the palm of about 25 per cent. The little finger was ankylosed in the middle joint, causing a flexion towards the palm of the hand. A loss in efficiency of from 10 to 20 per cent was claimed. From a verdict of $1,800, upon which a remittitur of $300 was entered, the defendant brought error, contending that the plaintiff assumed the obvious risk that some of the timbers might pass beyond control of the men, and that had he looked in the direction of the car, as would an ordinarily prudent person, the danger would have been obvious. The court affirmed the judgment, holding that under the Federal Employers' Liability Act an employee assumed the usual risks incident to his employment, and that whether the plaintiff should have known of the danger, and whether he

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This denial is the only error properly assigned here; and the circumstances afford no reason for departing from the general rule which limits our consideration to it.

Section 1, Employers' Liability Act, 35 Stat. 65 (Comp. St. 1916, § 8657), declares:

assumed the risk through a failure to conduct himself as a person of ordinary care would have done was a question properly submitted to the jury. Chapman v. Ann Arbor R. Co., 196 Mich. 671, 163 N. W. 107 (1917).

3. Of danger from gasoline.

The plaintiff had been placed in charge of the signal tower and water tank at a certain point on the defendant railroad. He was not notified, however, as to any of the dangers surrounding the operation of the gasoline engine which pumped the water into the tank and was entirely unfamiliar with such work. The accident happened on the first night after he took charge of the work alone, and the injury resulted from an explosion occurring from pouring gasoline near a fire. The plaintiff was terribly scarred and disfigured on his face, neck, and ears. From a verdict and judgment for $15,000, the defendant appealed. The court, in affirming the judgment, pointed out that neither the age, education or experience of the plaintiff were such that he would know and appreciate the properties of gasoline and dangers therefrom without a warning from the defendant, which was not given in the instant case. Upon the question of assumption of risk, the court said: "But a servant does not assume risks due to negligence of his employer and fellow-employees, unless they are obvious or fully known and appreciated by him. * * * And the question of assumption of risk is one of fact for the jury. * * * It was properly submitted to the jury in this case, and their action respecting it is not to be disturbed." Erie R. Co. v. Collins, — C. C. A. —, 259 Fed. 172 (1919).

J. Removing snowsheds.

The plaintiff's decedent was engaged with other workmen in removing certain snowsheds from the defendant's right of way. While two fellow employees were tearing off and removing certain beams from the top of the snowshed, the deceased with other employees had fastened a rope around an upright beam to lower it gradually and in the proper direction to the ground. The workmen upon the shed were directed to throw their timbers on the opposite side from where the deceased was working. One of them, however, attempted to pry his end loose while the other end was fastened, with the result that it fell on the opposite side, thereby frightening one of the men assisting the deceased, so that he did not do his duty and caused the post to fall in the wrong direction and upon the deceased, resulting in his death. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment and later denying a rehearing, held that the deceased did not assume the risk of injury arising from the negligence of his fellow employees. Ward v. Southern Pac. Co., — Cal. App. —, 183 Pac. 594 (1919).

The plaintiff, a carpenter, was engaged at the time of the accident in removing and repairing a snowshed, part of which covered the main track of the defendant railroad and part of which covered a sidetrack. While the plaintiff was removing part of the

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That carriers "shall be liable in damages to any person suffering injury while he is employed," etc., "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

In cases within the purview of the statute the carrier is no longer

roof over the sidetrack, as directed by his foreman, other employees in removing that portion of the shed over the main track removed certain supports which caused the part of the building upon which the plaintiff was working to collapse, thereby injuring the plaintiff. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, said: "There is evidence that plaintiff was engaged in the work assigned to him prior to and at the time that the foreman and other employees, by the act of removing the main beam, caused the shed to fall. It therefore became a question of fact for the jury to determine whether plaintiff had such knowledge of the danger as to charge him with assumption of the risk, and, the question having been determined in favor of plaintiff, the judgment cannot be disturbed." Southern Pac. Co. v. Gordon, — Tex. Civ. App. —, 193 S. W. 471 (1917).

K. Wrecking operations.

While a wrecking crew of the defendant was engaged in clearing away the debris of a wreck, the plaintiff with other section hands, under their own foreman, was engaged in relaying the rails and retamping the ties. The plaintiff, who never before that day had been working around such wrecking outfit, though he had some 2 months' experience as a section hand, was at the time of the accident about 20 feet from the wreckage facing towards the wrecking outfit. The cable from the derrick of the wrecking car was attached to the last pair of trucks of the cars still remaining to be removed and power applied to it. The man in charge of the cable perceived that something was apparently holding back the trucks more than their weight, and thereupon shut off the power. Immediately thereafter, a rail swung out and around from the wreckage and flew backward towards the plaintiff, striking him and causing serious injuries. The trial court left the question to the jury as to whether the plaintiff assumed the risk. A finding that the plaintiff did not assume the risk resulted, but the verdict for the plaintiff in the sum of $3,500 was set aside and judgment entered for the defendant, from which the plaintiff appealed. The court reversed the judgment and directed it to be entered for the plaintiff upon the verdict, holding that, as the work done by the plaintiff at the time of the accident was other than his usual work, was the first of its kind in his experience, and was under the direction of a vice-principal distinct from the one in charge of the wrecking crew, it was within the province of the jury to find, as they did, that there was no assumption of risk by him. McDougall v. Chicago & N. W. R. Co., 168 Wis. 426, 170 N. W. 266 (1919).

L. Fall from bridge.

The plaintiff, while pulling a spike, was thrown from a bridge as a result of the alleged negligent act of a fellow-servant. The plaintiff claimed that he did not assume the risk of negligence of such fellow-servant. From a judgment for $5,000 in favor of the plaintiff, the defendant appealed. The court, in reversing the judgment and remanding the case for

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shielded by the fellow-servant rule, but must answer for an employee's negligence as well as for that of an officer or agent.

In Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 503, 34 Sup. Ct. 635, 639 (58 L. Ed. 1062, 8 N. C. C. A. 834, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475), we said:

new trial, held that as it was not claimed that any violation of a federal statute enacted for the safety of employees contributed to the injury, the defense of assumed risk was not excluded, and that in the absence of an affirmative showing that the fellow-servant of the plaintiff was guilty of the negligence which was the proximate cause of the injury, the defendant was not liable. Carlson v. Chicago Great Western R. Co., 205 Ill. App. 156 (1917).

IV. Inspection and repair.

A. Rolling stock.

1. Loss of hearing from riveting.

The plaintiff, a boiler maker's helper, while assisting in placing a patch upon a water tank attached to the tender of a locomotive, was ordered by his superior to go inside the tank and hold a heavy piece of iron against the end of each rivet, while a coemployee applied an air hammer upon the rivet from the outside. The blows from the hammer made a great noise on the inside where the plaintiff was working. As a result of his too long continued work in the tank at the direction of his superior, the plaintiff lost his hearing. At the time of the injury he was 22 years old, and, it appeared, had very limited experience in the kind of work he was directed to do. From a judgment for the plaintiff, the defendant appealed, contending that the plaintiff assumed the risk. The court in affirming the judgment held that the question was properly submitted to the jury. As the court pointed out, a servant acting under the commands of his master does not assume the risk incident to the act commanded, though he knew there was some danger, unless a person of ordinary prudence would not consent to encounter it. Martinson v. Chicago, B. & Q. R. Co., 102 Neb. 238, 166 N. W. 624 (1918).

2. Fall over surplus clinker hook.

The plaintiff, a fireman, was at the time of the accident fixing the headlights of the engine for the next run. He had adjusted the headlight, and with the two small rear lights in his hands was in the act of going back over the top of the coal and water tank of the tender to place them in their proper position. He stumbled over a clinker hook, which was a long rod with a hook in the end of it used to pull clinkers out of the firebox, lying across the top of the coal. As a result, he fell across the coal board running across the rear end of the tender separating the place for the coal from the manhole of the water tank, and sustained the injuries in suit. The plaintiff testified that another clinker hook was in the cab at the time, and that the hook over which he fell was not in its proper place. From a verdict and judgment for $3,500, the defendant appealed. The court, in reversing the judgment, held that it was part of the duty of the plaintiff to remove the surplus clinker hook and make the engine safe for the trip, and that, as the risk causing the injury was one ordinarily incident to the employment, it was assumed by the plaintiff. The court also pointed out that the defense of

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"It seems to us that section 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action." Jacobs v. Southern R. R. Co., 241 U. S. 229, 235, 36 Sup. Ct. 588, 60 L. Ed. 970.

At common law the rule is well settled that a servant assumes

assumed risk was not withheld from the employer by the Federal Employers' Liability Act, except where the injury complained of was the result of a failure of the master to comply with some requirement of a federal statute. Louisville, H. & St. L. Ry. Co. v. Wright, 170 Ky. 230, 185 S. W. 861 (1916).

3. Boring hole in car without warning.

The plaintiff, a car carpenter apprentice, was at the time of the accident engaged in splicing two broken timbers of a car floor with other timbers. For this purpose, a hole was bored through both the broken beam and the splicing timber with a drill operated by an air motor. The holes on the inside of the car were then reamed out so that the bolts which fitted therein would set down in the floor so as to create an even surface. After the holes had been bored for the first sill, and while the other workmen were preparing to bore the holes for the second sill, the plaintiff went inside the car to do the work of "reaming." For this purpose he sat upon the floor, and while in such a position the other workman bored the hole for the second sill, the drill bit coming through the place where he was sitting and severely injuring him. There was evidence that the usual custom in doing the work in which the plaintiff was then engaged was to either kneel on the floor or stoop down, instead of sitting thereon. The jury found that the injuries were the result of the negligence of the plaintiff's fellow employees boring the remaining holes without previous warning to him, and from a verdict and judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, said: "Citation of authorities is unnecessary to support our further conclusion that plaintiff cannot be held to have assumed the risk of his injury if the same resulted from the negligence upon which the verdict and judgment were predicated, in the absence of prior knowledge by plaintiff of such negligence." Gulf, C. & S. F. Ry. Co. v. Hall, — Tex. Civ. App. —, 196 S. W. 613 (1917).

4. Inspection of load of piles.

The plaintiff, a brakeman, was injured when one of a carload of piles dropped from the car to the ground in such a manner that the rear end was driven through the caboose in which he was riding. The piles were pyramided upon the flat car with three stakes on each side, and a wire passed from the top of the load down around one stake socket, up across the load and down around the other socket, and back to the top, with the free ends untied and the double wire tightened by turning a bar passed underneath, and so making a loop around the bar, and twisting the loop as much as possible. Negligence was alleged in the failure of the conductor to conduct an adequate inspection and refuse the shipment because the stakes were not higher and their tops not wired together with several strands of wire tightened in proper manner. Until the shipments immediately preceding this consignment, the plaintiff had never seen piling loaded or shipped, and he had no reason to

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extraordinary risks incident to his employment or risks caused by the master's negligence which are obvious or fully known and appreciated by him. Shearman & Redfield on Negligence (6th Ed.) § 208; Bailey, Personal Injuries (2d Ed.) § 385. This general doctrine was clearly recognized in Gila Valley Ry. Co. v. Hall, 232 U. S. 94, 101, 34 Sup.

think that the conductor had accepted an unsafe tying. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the question of assumption of risk was properly submitted to the jury, and that the evidence was insufficient to direct a verdict for the defendant upon such ground. As the court pointed out, to make the defense of assumption of risk good in such a case, the plaintiff must either have known or have been charged with knowledge of the negligence of the conductor in accepting such a shipment—an element not present here because of unfamiliarity with the proper method of loading such shipments—and must in addition have appreciated the danger or be bound to appreciate it. Michigan Cent. R. Co. v. Schaffer, 136 C. C. A. 413, 220 Fed. 809 (1915).

B. Electrical appliances.

1. Failure to turn off current.

The deceased was repairing a part of the electrical apparatus on a bridge over the defendant railroad, a part of the appliances of which were not dead. On the day of the accident, the plaintiff had worked first on a bus breaker, which was not charged. After finishing this relatively safe work, the deceased was called to the work on the knife switches, where he had to stand on a raised plank, slightly inclined, to reach the part where he was to help. It was claimed that this plank was slippery from grease. It had been the practice to make these parts dead also when previous repair work had been done, but this had not been done in this particular instance. The deceased did not know that the current was on, and while at work thereon, a connection between the knife switch and the receiving jaw caused his instant death. From judgment on a verdict to the amount of $15,000, the defendant appealed. The court, in affirming the judgment, said: "The jury could find that it was negligence to not kill these breakers and other parts, and that deceased had not been told, and had no reason to suppose, that the receiving jaws were charged. On this ground, by their verdict, the jury could and did find negative contributory negligence, and also could properly find against the defense of assumption of risk, since it does not appear that deceased was aware that these jaws had not been killed as prudence required." Millette v. New York, W. & B. R. Co., 169 N. Y. App. Div. 126, 154 N. Y. Supp. 792 (1915).

2. Turning on current without warning.

The plaintiff, an electric lineman, was so burned by coming in contact with 11,000 volts of electricity that he lost both arms at the shoulder sockets, and suffered other serious injuries. The plaintiff had seen a fellow employee, upon the direction of a foreman, pull a knife switch, deenergizing a wire in connection with which he was working about an hour and a half before the accident. The act of negligence charged by the plaintiff, and necessarily found by the jury, was that at the direction of the same foreman, the fellow employee closed the switch again charging the

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Ct. 229, 58 L. Ed. 521; Jacobs v. Southern R. R. Co., supra; Chesapeake & Ohio Ry. v. De Atley, 241 U. S. 310, 313, 36 Sup. Ct. 564, 60 L. Ed. 1016; and Erie R. R. Co. v. Purucker, 244 U. S. 320, 324, 37 Sup. Ct. 629, 61 L. Ed. 1166, 19 N. C. C. A. 723.

The request in question did not accurately state any applicable rule

tap wire, without notifying the plaintiff, with the result that on coming in contact with the wire he sustained the injuries in suit. From a verdict and judgment for $85,000, the defendant appealed. The court, in affirming the judgment, upon condition that the plaintiff file a remittitur for $30,000, said: "The risk in this case was not such a danger as is normally and necessarily incident to the occupation, but it was one which arose out of the negligence of a fellow-servant, attributed to the master by the operation of the act. It therefore cannot be held that the plaintiff assumed it, unless it be shown that he knew the wire was charged, or unless the fact was so obvious that an ordinarily prudent person would have observed it, and so learned of the risk and danger; in other words, unless he had actual or constructive knowledge. In this case the plaintiff did not know that the wire was charged, for he had seen Berkery pull the switch for the very purpose of de-energizing the wire, so that plaintiff might safely work near it. The question is left whether the situation was such that an ordinarily prudent person should have known of the danger. * * * How plainly the closed switch could be seen is in doubt; but plaintiff, relying entirely on what he had seen, made no investigation, and did not even look at the switch. Under all these circumstances, I think it was a question of fact whether the defect and risk were so obvious that an ordinarily prudent person would have observed and appreciated it." Fried v. New York, N. H. & H. R. Co., 183 N. Y. App. Div. 115, 170 N. Y. Supp. 697 (1918).

C. Releasing hoist during repairs.

The plaintiff, a stationary engineer, was, at the time of the accident, engaged in repairing part of the machinery used in hoisting coal at one of the defendant's coaling stations. A portion of the machinery consisted of a cable which went through a pulley apparatus at the top, and around a drum below. There were two buckets which were drawn in rotation to the top and dumped. While a crew at the top were repairing the apparatus, the plaintiff, either in compliance with an order given by his foreman, as he claimed, or without such an order, as the defendant claimed, went underneath the drum to straighten out the cable, which was ordinarily wound around the drum, but which had become unwound so that about 6 feet of the strands hung from the bottom of the drum. While so engaged, some one loosened the bucket at the top, with the result that the plaintiff's fingers were caught between the drum and the cable and squeezed off. From a verdict and judgment for the plaintiff in the sum of $7,000, the defendant appealed. The court, in affirming the judgment, said: "We think there was evidence to justify the jury in finding that the accident happened through defendant's failure to exercise ordinary care, especially as it must have been obvious to the superintendent that his crew could not permit a bucket to drop without endangering the safety of the plaintiff. For defendant it is claimed, however, that plaintiff knew that the repairing gang was releasing the east bucket, which, when released, was likely to

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of law and was properly refused. Already the jury had been told that deceased assumed the ordinary risks of his employment—a statement more favorable than plaintiff could properly demand. The risk held to have been assumed in the Horton Case certainly arose from negligence of some officer, agent or employee; and if the negligence of

fall and injure him, and therefore he assumed the risk. We think this a misconception of the doctrine of assumed risk. It may be said that the plaintiff placed himself in a position where he was in danger of injury if defendant's servants were negligent, but this, employees, of necessity, constantly do. Such an act is not, however, an assumption of any risk except that of injury through the negligence of a fellow-servant—a defense not available under the Federal Employers' Liability Act. The doctrine of assumed risk is, in effect, substantially this: that where an employer has negligently created a dangerous condition, and his employee continues to work knowing of its existence, he will, in certain circumstances, be held to have assumed the risk caused by the dangerous condition thus created." Sells v. Grand Trunk Western Ry. Co., 206 Ill. App. 45 (1917).

D. Fall of bridge during repairs.

The plaintiff's decedent was at the time of the accident engaged in sawing logs that had become lodged in a certain bridge of the defendant railroad as the result of a freshet, in order that the same might be removed. The freshet had undermined the piers of the bridge, and the whole structure was in process of being repaired for immediate use. While the deceased was engaged as above described, and in making a cable fast to such logs as it was designed to have removed, the bridge fell from its support upon him, and his death resulted. The trial court instructed that if negligence on the part of the defendant contributed in any way to the injury, the deceased was not guilty of assumed risk. From a judgment for the plaintiff, the defendant brought error. The court reversed the judgment and remanded the case for a new trial, holding that the deceased assumed all risks which were open and obvious, even though injury resulted from negligence of the defendant, provided such negligence did not result from a violation of a safety statute. Columbia & P. S. R. Co. v. Sauter, 139 C. C. A. 150, 223 Fed. 604 (1915).

V. Loading.

A. Order to jump after coaling engine.

The plaintiff's decedent was engaged just prior to the accident in shoveling coal forward in the tender of the engine with his foreman and a fellow workman. After the engine had started, his foreman ordered him to jump off when there was only a clear space of about 14 feet between the engine and a train of cars moving in the opposite direction at a speed of about 20 miles an hour. Both the deceased and his fellow workman obeyed and both were struck by the train. The fellow workman survived, and testified that the accident happened because the impetus given him by the moving engine and the suction of the train impelled him too far. The jury disagreed, and the defendant's motions for nonsuit and directed verdict were denied, subject to exception. The court, in overruling the exceptions, said: "The order given called for quick action upon the part of the men, and did not afford them an opportunity to consider whether they

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all these should be excluded in actions under the Employers' Liability Act, it is difficult to see what practical application could ever be given in them to the established doctrine concerning assumption of risk.

The judgment below is affirmed.

could do so safely or not. The doctrine of assumption of risk has no application to such a situation.'' Topore v. Boston & M. R. R., 78 N. H. 311, 100 Atl. 153 (1916).

B. Removal of truck from express car door.

The plaintiff's decedent, an express messenger, was engaged previous to the accident in loading various articles of general merchandise from several trucks into a railway car. Among the articles placed in the car was a basket of bread, which was destined for a different run and had been put on the truck by mistake. It was taken into the car and left standing there until the other things had been loaded. The deceased then took hold of one of the handles of the basket, with the intention of dragging it back upon the truck. Expecting to find the truck where he had left it a few minutes before—about a foot from the side of the car—he stepped backwards without looking. The truck, however, had been moved by someone in the meantime, and consequently the deceased fell to the platform, receiving the injuries which caused his death. It appeared that another employee of the defendant had moved the truck, since he was seen standing at the head of the truck immediately after the fall. The plaintiff claimed that a custom prevailed that when a truck was before a car door, it was not subject to removal without the consent of the person in the car. From a verdict directed for the defendant, the plaintiff brought error. The court, in reversing judgment and granting a new trial, held that the case should have been submitted to the jury. ''Neither do we think,'' said the court, ''that it can be said that Chapman assumed the risk of the negligence of his fellow employees. The federal authorities seem to hold that in order to make the negligence of the fellow-servant one of the assumed risks under this act, the injured employee must actually know of the fact of the negligence of his fellow-servant, or that such negligence was so customary that he would be charged with knowledge thereof.'' Chapman v. United States Exp. Co., 192 Mich. 654, 159 N. W. 308 (1916).

O. L. C.

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CHACE TRUCKING CO. v. RICHMOND LIGHT & RAILROAD CO.

[Court of Appeals of New York, January 28, 1919.]

225 N. Y. 435, 122 N. E. 210, rev'g 173 N. Y. App. Div. 663, 160 N. Y. Supp. 326.

1. **Street railroads—Occupancy of city street—Condition of grant of right.**
A street railway company does not occupy a city street to the exclusion of other public uses to which the street is adapted, the grant to it being under the implied condition that it could not unreasonably interfere with such uses.

2. **Street railroads—Occupancy of city street—Interference with use of street by travelers.**
A street railway company, occupying a city street, may not interfere with the reasonable use of such street by travelers upon it even if their use of it involves temporary obstruction of the company's traffic or interference with its wires.

3. **Street railroads—Occupancy of city street—Use of street by traveler.**
A traveler's use of a city street, occupied by a street railway company, must be reasonable, and the traveler may not unduly interrupt the operations of the road nor negligently injure the company's structures.

CASE NOTE.

Liability for injury from overhead wires during passage of buildings, pile drivers and like objects being transported along highways.

I. Buildings being moved, 515-524.
A. Injury to employee of mover, 515-524.
1. Electric shock, 515-522.
2. Fall with rotten pole, 522-524.
B. Injury to house, 524.
II. Hay-stacking derricks being transported, 524-534.
A. Along highway, 524-529.
B. Over highway bridge, 529-531.
C. From lane into highway, 531-532.
D. From field into highway, 532-534.
III. Threshing outfit, 534-537.
A. Striking telephone wires, 534-536.
B. Striking guy wires, 536-537.
IV. Cement-mixing machine, 537-538.

Cross-references. Liability of electric companies to persons injured by electric wires in public highways, see 5 N. C. C. A. 926-946; liability of municipal corporation for injuries caused by electric wires of company operating under franchise, see 6 N. C. C. A. 611-623; height of electric wire from ground or distance from possible contact as affecting liability for death or injury, see 10 N. C. C. A. 494-514; application of doctrine of res ipsa loquitur in action for injuries caused by electricity and electric wires, see 5 N. C. C. A. 51-52; liability of electric company for personal injury caused by overcharged service wire, see 14 N. C. C. A. 253-280; liability for injuries to persons struck by protruding or overhanging objects while driving, see 11 N. C. C. A. 954-980.

I. Buildings being moved.

A. Injury to employee of mover.

1. Electric shock.

Plaintiff was assisting in moving a frame store building along a public road, across which defendant maintained its poles upon which were two telephone wires and a ground wire 19 feet above the road, and two uninsulated transmission wires carrying

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4. **Street railroads—Occupancy of city street—Use of street by travelers—Rule.**
Reasonable use of a city street, occupied by a street railway company, with concurrent rights, is the rule as between the company and travelers on the street.

5. **Street railroads—Occupancy of city street—Unreasonable use of street by traveler—Moving of pile driver.**
The moving of a pile driver in a city street, occupied by a street railway company, is not an unreasonable use of such street as against the company.

6. **Street railroads—Lifting trolley wires for passage of pile driver—"Volunteer."**
A street railway company which sends a wrecking gang to lift its trolley wires in a certain street in order that a pile driver which is being moved by a third person in such street may be taken under the wires is not a mere "volunteer" in so doing, but is performing its legal duty.

7. **Street railroads—Electrocution of horses attached to pile driver—Action for damages—Question for jury—Negligence.**
In an action against a street railway company for the killing by electrocution of certain of plaintiff's horses when the pile driver to which they were attached and which was being moved in a city street came in contact with defendant's trolley wires, which wires defendant had sent a wrecking gang to lift, in order that the pile driver might be taken thereunder in safety, held that there was a fair question of fact for the jury as to whether defendant's servants were not negligent in stating that they could and would lift the

33,000 volts each, 23 feet 2 inches above the road. The highest part of the building was 21 feet 3 inches high. While plaintiff was on the roof attempting to raise the telephone or ground wire, he came too near one of the power wires and received a shock causing injuries for which the present suit was brought. The court referred to the case of Wade v. Empire Dist. Electric Co., 98 Kan. 366, 158 Pac. 28, post, for the principles of law which, for the most part, were controlling, and said it was necessary in the present case only to review a number of alleged trial errors. Defendant complained that the court erred in not sustaining a motion for judgment on the findings on the ground that plaintiff recovered upon a theory that ordinary travel on a highway included the moving of houses which were higher than defendant's wires, and in that connection insisted that much irrelevant testimony was admitted about moving houses and other structures, and particularly as to moving them along that road prior to the erection of defendant's wires. In answer to special interrogatories submitted by defendant, the jury found that, during the 6 years the wires had been up, three houses and one store building which were high enough to be interfered with by the wires had been moved along at that point. The court said that defendant placed too narrow a construction upon plaintiff's theory of the use of the highway; that plaintiff's evidence was not confined to houses and store buildings, but embraced any and all kinds of structures customarily moved along public roads, such as buildings, derricks and other machinery high enough for the wires to interfere with; that the evidence thereto was not confined to the time since the wires were erected; and that the special findings covered but a part of the facts and circumstances relied upon by plaintiff to show that defendant should have anticipated the use of the highway for moving such structures. It was held that there was evidence justifying a finding that, before the wires were erected and thereafter, there continued to be such a common use of the highway in moving buildings, machines and other structures as would bring notice to defendant that its high-voltage wires were a menace to

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wires if danger became imminent and in inviting the plaintiff to drive on, when they subsequently claimed that such action on their part was impossible.

8. **Street railroads—Electrocution of horses attached to pile driver—Action for damages—Question for jury—Whether defendant's servants acted within scope of authority.**

In an action against a street railway company for the killing by electrocution of certain of plaintiff's horses when the pile driver to which they were attached and which was being moved in a city street came in contact with defendant's trolley wires, which wires defendant had sent a wrecking gang to lift in order that the pile driver might be taken thereunder in safety, held that the jury might find that, in stating to the plaintiff that they could and would lift the wires if danger became imminent, defendant's servants were acting within the scope of their authority.

9. **Street railroads—Electrocution of horses attached to pile driver—Action for damages—Question for jury—Contributory negligence.**

In an action against a street railway company for the killing by electrocution of certain of plaintiff's horses when the pile driver to which they were attached and which was being moved in a city street came in contact with defendant's trolley wires, which wires defendant had sent a wrecking gang to lift in order that the pile driver might be taken thereunder in safety, held that, under the circumstances, the question of plaintiff's contributory negligence was for the jury.

Chase, Collin and Cuddeback, JJ., dissenting.

human life unless precautions were taken to insulate them or place them in such position that they would not interfere with the lawful use of the highway. As to the use of highways for moving houses, the court said that where no public authority has undertaken to prescribe rules and regulations for the use of country roads for such purpose, it was aware of no reason why such use was not a lawful one. It was contended that it was error to exclude evidence that defendant had a rule that, upon notice to it, the company would render assistance to persons desiring to move such structures under its wires. The court said that, while there would have been no error in admitting the testimony, defendant could not, by adopting such rule, limit the right to use the highway for a lawful purpose. Defendant introduced evidence showing that it was impracticable to insulate wires which carried more than 6,000 volts, and the trial court was asked to take judicial notice of that fact and sustain a demurrer to the evidence. The court pointed out that failure to insulate was not the only negligence charged, and that if it was wholly impracticable to insulate the wires, there was all the more reason why defendant should have placed them higher or underground. Defendant offered to introduce a model to show the situation at the place of injury, and complained of its rejection, but it was held that all the matters which would have been shown thereby could be and were explained by the evidence, and, while its admission would not have been error, it could not be said there was an abuse of discretion in refusing to admit it. In stating the issues, the trial court instructed that the petition charged wanton negligence, and defendant alleged error in refusal to instruct that there was no evidence of wanton negligence and that "wanton means reckless, wicked, wilful." It was held there was no error in such refusal, as there was no question of punitive damages in the case, and the jury absolved plaintiff from contributory negligence under instructions that such negligence would bar recovery. The verdict of $15,000 was alleged to have been so excessive, because that sum if invested at 6 per cent would have greatly exceeded

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Action for death of horses by electrocution by trolley wires. Judgment of appellate division, reversing judgment for plaintiff and dismissing complaint, reversed and new trial ordered.

For appellant—Henry Waldman.

For respondent—Bertram G. Eadie.

The following are the pleadings in the action:

Amended Complaint.

The plaintiff, for his amended complaint, complaining of the defendant, respectfully shows to this court and alleges:

I. That the plaintiff is and was at all the times hereinafter mentioned a domestic corporation organized and existing under the laws of the state of New York.

II. That the defendant is and was at all the times hereinafter mentioned a domestic corporation duly organized and existing under the laws of the state of New York.

plaintiff's earnings before the injury, as to show prejudice and passion on the part of the jury. It was held, however, that the earning capacity was not the only consideration in determining the amount of the verdict, and that the sum in question was not excessive where it appeared that plaintiff was 22 years of age at the time of the injury; that the effect of the electric current was to render him unconscious for 10 days; that a piece of skull 4 inches long and 2 inches wide was removed, which necessitated 6 operations, a silver plate being inserted in its place; that there were burns and scars on his body; that one hand was partially paralyzed; and that the injuries left him, to a large extent, in a helpless condition physically. Judgment was affirmed. Logan v. Empire Dist. Electric Co., 99 Kan. 381, L. R. A. 1917 E 258, 161 Pac. 659 (1916).

Deceased was employed by a house mover, his principal duty being to drive a team, but when not so engaged he assisted in other ways, and was accustomed to handling electric wires strung on the streets, when it became necessary in moving buildings under them. In compliance with an ordinance, the house mover procured from the city clerk a permit to move the house upon which deceased was when killed. He also gave notice to defendant electric company and its employees arranged to move wires near the place from which the building was removed, and they remained in the neighborhood subject to call if further needed. After the house had been moved about 400 feet a street intersection was reached where defendant's wires were suspended about 18 or 20 feet from the ground. The wires were raised by the house mover or an employee, and the building passed part way under and then stopped. The mover did not call upon defendant's men to handle the wires but testified that he intended to handle them himself. He was detained in conversation, however, and deceased, being unoccupied, went up a ladder, evidently to handle the wires, and in ascending the sloping roof slipped or lost his balance and fell across or grabbed the wires and was killed instantly. This suit was brought by his widow and judgment for $5,000 was recovered. On appeal, defendant made three assignments of error: (1) That the court did not sustain de-

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III. That the plaintiff is in the trucking business and is a common carrier for hire, and that on or about the 19th day of February, 1909, plaintiff entered into an agreement with a corporation known as Raymond Concrete Pile Company, whereby, for a valuable consideration, plaintiff agreed to haul a certain large pile driver belonging to the said Raymond Concrete Pile Company from 166th street and Park avenue in the borough of Bronx, city, county and state of New York, to a pier at 150th street and the Harlem River, in said borough, and deposit the same upon a lighter which was situated in the Harlem River at the foot of said 150th street (which lighter was to carry said pile driver to a pier at Clifton, Staten Island, in the borough of Richmond, county of Richmond, and city of New York), and plaintiff from said pier at Clifton, Staten Island, was to haul said pile driver through various streets in the borough of Richmond, county of Richmond, city and state of New York, to the works of the New York and Richmond Gas Company, at Stapleton, Staten Island, in said borough.

IV. That the defendant owns and controls certain trolley wires hung on poles and running over a roadway known as Bay street in the borough of Richmond, county of Richmond and city of New York, through which wires said defendant transmitted electricity of heavy voltage and of sufficient power to operate and propel its trolley cars along said highway, known as Bay street, in said borough, and maintained said wires and operated said cars along said highway by permission of the municipal authorities of the city of New York and their predecessors.

V. That plaintiff and the said Raymond Concrete Pile Company notified

fendant's demurrer to plaintiff's evidence; (2) that the court did not instruct the jury to return a verdict for defendant; (3) that the court erred in instructing the jury that defendant owed deceased a positive duty to have its wires in a safe condition for interference therewith by deceased. It was urged in support of the assignments of error that deceased was a bare licensee, to whom defendant owed no duty to have its wires in a safe condition to handle; that deceased was guilty of contributory negligence, and that, even if it be conceded that defendant owed to decedent a duty other than as a bare licensee, it had discharged its full duty as shown by plaintiff's evidence. The court held that both deceased and defendant were licensees in the use they were making of the street, but that it could hardly be said that either was a licensee as to the other; that defendant had notice of the moving of the building, and, though it was not shown it had notice that the building would pass the point in question, there was evidence tending to show that the moving of buildings was of so frequent an occurrence that defendant must have taken notice of such use of the streets. There was evidence that the wires carried a voltage of 2,300, and that no insulation is efficient to save the life of a person coming in contact with such a wire, and also evidence that proper insulation would prevent injury. The trial court submitted, as a question of fact, whether, under all the evidence, defendant was negligent, and whether deceased was guilty of contributory negligence, and instructed that if, under all the facts of the case, persons were liable to come in contact with the wires, defendant was under obligation to have the wires insulated, and, on the other hand, if deceased knew of their dangerous character and purposely came in contact with them, he was guilty of contributory negligence. These instructions were held to be in accord with the principles of the law. In affirming the judgment the court said: "If, from all the circumstances, the defendant had reason to apprehend that the building would be moved under the wires where the accident occurred, it was its duty, knowing its wires to be highly charged with electricity, to have such wires at the street crossing insulated, or to take such other pre-

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the defendant, Richmond Light and Railroad Company, of their intention to have said pile driver hauled through various streets in the borough of Richmond, county of Richmond and city of New York, and that in hauling said pile driver along said highways it would be necessary for said defendant to raise certain trolley wires that were owned and controlled by it along the roadway designated by the plaintiff and said Raymond Concrete Pile Company; and that the defendant, Richmond Light and Railroad Company agreed with the plaintiff and said Raymond Concrete Pile Company to send a crew of experienced linemen and others skilled in the art of handling electricity along with the horses and wagon belonging to the plaintiff in order to protect plaintiff's chattels from coming in contact with the trolley wires of the defendant.

VI. That on the 23rd day of February, 1909, while plaintiff was engaged in the hauling of said pile driver along a certain street known as Bay street in the borough of Richmond, county of Richmond, city of New York, the defendant, Richmond Light and Railroad Company, sent a crew of men in its employ along with the plaintiff's agents and servants, and from time to time during the progress of the hauling of said pile driver said crew raised various trolley wires and gave instructions to plaintiff's agents and servants when to proceed and when to stop the progress of their teams, and that when plaintiff's truck carrying said pile driver, to which was attached six teams of horses, or twelve in all, arrived at Bay street adjacent to the corner of Vanderbilt avenue, at Clifton, Staten Island, situated in the borough of Richmond, county of Richmond and city of New York, the agents, servants and employees of the defendant instructed the plaintiffs' agents, servants and employees to

cautions as might be necessary to protect any one who might be liable to be upon such building from contact or injury from such wires." Winegarner v. Edison Light & Power Co., 83 Kan. 67, 28 L. R. A. (N. S.) 677, 109 Pac. 778 (1910).

Defendant operates a street railway and furnishes electricity to persons near its right of way. A line of wire was strung along and across certain streets, the expense of erecting the line being paid by the school district, which wished to use electricity, and thereafter paid defendant a stipulated price per month for use of the current. After the construction of the line defendant kept it in repair and assumed control over it. The wires were uninsulated, carried a current of 650 volts, were strung among 10 or 15 telephone wires, and did not differ much in appearance from the telephone wires. Six or seven years prior to plaintiff's injury, a house mover, while moving a house, came in contact with the wires at the place where plaintiff was injured and pressed defendant's wires against the telephone wires, burning some of them in two, and, upon notice, defendant's servants made the repairs necessitated thereby. Plaintiff was moving a house along the street, and as the house was higher than the wires he climbed on top and grasped defendant's wires to lift them, together with several of the telephone wires, when he received a shock which practically destroyed his hands. The wires were 22 to 25 feet high and properly strung, except for being with the telephone wires and being uninsulated. On the day before, defendant's servants had assisted plaintiff in moving the house under its trolley wire. In a suit for damages plaintiff recovered judgment for $6,500, from which this appeal was taken. One of the grounds of defense was that plaintiff was not entitled to recover because he had failed to procure a permit to move the house on the streets as required by ordinance. The court said the law was well settled that violation of an ordinance will not defeat recovery unless such violation is the proximate and efficient cause of the injury; that the city was the only one to complain of plaintiff's use of the street; that such use did not relieve defendant of the duty of not necessarily exposing him to the danger which the exercise of the highest degree of care on its

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stop the teams attached to said truck, and one of the members of said crew in the employ of the defendant Richmond Light and Railroad Company proceeded ahead of the truck and at or near the crossing of Vanderbilt avenue and Bay street then and there measured the distance from the ground to the trolley wires overhead, and notified the driver of the plaintiff's wagon to proceed, that he had ample room to drive his truck under said trolley wires, and as the truck and pile driver situated upon it came directly under said trolley wires, the top of said pile driver came in contact with the trolley wires of the defendant, and the electricity that was being transmitted through said trolley wires flashed through said pile driver and came in contact with the twelve horses belonging to plaintiff attached to said truck, which said twelve horses were thrown violently to the ground, and instantly killed three of said horses belonging to plaintiff and killing another shortly afterward; and that said shock of electricity injured four other animals attached to said truck and belonging to plaintiff so that plaintiff was unable to use them for a period of three months, from February 23, 1909, to May 24, 1909.

VII. That the value of said four animals that were killed as aforesaid was twelve hundred and fifty dollars.

VIII. That plaintiff was compelled to expend the sum of six hundred and eight dollars in the hiring of four horses for a period of 76 days, from February 24 to May 22, 1909, inclusive, at the rate of two dollars per day for each horse, to take the place of the four animals injured as aforesaid, and was further compelled to expend the sum of one hundred and twelve dollars

part could have avoided, and that, if plaintiff had possessed a permit, his injury would have been none the less certain or painful. Defendant further contended that, even if plaintiff had obtained a permit, his action in interfering with the wires amounted to a trespass, and should bar recovery. The court replied that moving houses along a public highway was a privilege that might rightfully be granted by the authorities so long as such use did not amount to a nuisance or destroy private property or impair the obligation of contracts; that while such use was uncommon and extraordinary, that fact would not relieve defendant of the duty of exercising towards plaintiff the degree of care required of users of electricity, and that plaintiff, in lifting the wires over the house, was not molesting defendant's property to the extent of damaging it or interfering with its service, and he was, at most, a mere technical trespasser, which would not prevent recovery. It was held that, even if defendant was not the owner of the wires, there was sufficient evidence to fasten the control and maintenance of them on it, and this required defendant to use such wires with the same degree of care as if it owned them; that it did certainly own and control the current of electricity which caused the injury. A statute pleaded by defendant making it a misdemeanor to "unlawfully and maliciously destroy, injure, or otherwise tamper with any * * * line or pole," etc., was held to be no defense, as the tampering contemplated is such as is unlawful and malicious, resulting in injury to the equipment, and merely raising the wires to prevent the house from striking them would seem to be an act to prevent an injury to the wires rather than to destroy them. The general law governing the duties of users of electricity was stated by the court to be to exercise "the highest degree of care practicable to protect those from danger who, through business or pleasure, may rightfully go into places that may bring them in contact with wires and other instrumentalities which convey and carry the energy." Defendant did not controvert this statement of the law but contended that, as its wires were 22 to 25 feet above the street, it could not reasonably anticipate that plaintiff would climb up and come in contact with them, and that, placed as they were,

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for veterinary services, medicines, etc., in endeavoring to cure said horses of the injuries received as aforesaid.

IX. That the damages aforesaid were occasioned through the negligence and carelessness of the defendant, its agents, servants or employees, and without any neglect on the part of the plaintiff whatsoever.

X. That by reason of aforesaid plaintiff suffered damage to the extent of nineteen hundred and seventy ($1,970) dollars as follows:

Value of animals destroyed (4)	$1,250.00
Hire of four horses for 76 days at two dollars per day each	608.00
Veterinary fees, medicines, etc.	112.00
	$1,970.00

Wherefore, plaintiff demands judgment against defendant for the sum of nineteen hundred and seventy dollars besides the costs and disbursements of this action.

Answer.

The defendant, by its attorneys, Kenney & Eadie, for amended answer to the amended complaint of the plaintiff herein, alleges and states as follows:

First. Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs of the plaintiff's amended complaint marked or numbered "I," "III," "VII" and "VIII."

it owed plaintiff no duty to insulate them or take any other precautions than the evidence showed it did take. The court pointed out that a great number of houses were moved along the streets of the city; that trouble with the wires at that point had been previously encountered by another house mover to defendant's knowledge, and that defendant's servants had assisted plaintiff in getting the house under its trolley wire on the day prior to the injury, so that it could not be declared as matter of law that the act of plaintiff was so exceptional and unheard of that a reasonably prudent person, exercising the highest degree of care, would not have anticipated that those engaged in the house moving business would come in contact with them, and that the wire in question, strung as it was, was highly dangerous when a contact was made with the telephone wires alongside of it. It was held plaintiff could not be held guilty of contributory negligence as matter of law, inasmuch as the evidence showed the wires of defendant were strung among similar-looking uninsulated telephone wires that were harmless in themselves, so it was not a case of one knowingly laying hands on an obviously uninsulated wire which he could be held, as matter of law, to know, or, by the exercise of reasonable prudence, would have suspected was charged with a dangerous current. Defendant's request to instruct that plaintiff was guilty of contributory negligence because he did not use rubber gloves in attempting to lift the wires was held to have properly been refused because, while such precaution on his part might have been the safest method, it was for the jury to decide whether the method he used was such as a reasonably prudent person would have adopted. Judgment was affirmed. Blackburn v. Southwest Missouri R. Co., 180 Mo. App. 548, 167 S. W. 457 (1914).

2. Fall with rotten pole.

In Collar v. Bingham Lake Rural Tel. Co., 132 Minn. 110, L. R. A. 1916 C 1249, 155 N. W. 1075 (1916), it appears that plaintiff, while moving a house along a village street, came to defendant's telephone wires which interfered with the passage of the house, and notified defendant's secretary to remove them. Upon being told that linemen would have to be procured

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Second. Upon information and belief, defendant denies the allegations contained in paragraphs of the plaintiff's amended complaint marked or numbered "V," "VI," "IX" and "X."

Wherefore defendant demands judgment dismissing the complaint herein with costs.

ANDREWS, J. Bay street, Stapleton, is a street 35 to 45 feet wide running north and south and is paved with asphalt. Through it the defendant has a double-track electric road. Power is conveyed to the cars through two overhead trolley wires which, although loaded with a dangerous current, are necessarily exposed, which are 15 feet from the pavement and each of which is 20 or 22 feet from the nearest curb.

On February 23, 1909, the plaintiff was moving by truck a heavy pile driver the top of which reached 16 feet or more from the pavement. Drawing this truck were fourteen horses. Two of them were hitched side by side to the pole, while the twelve others, two by two, were attached to the pole by a cable. Tied to the rear of the truck

from another town to do the work, plaintiff said he had worked as a lineman, and, if furnished the necessary tools, he would do the work. The tools were furnished and plaintiff climbed a pole and cut the wires, when the pole, being rotten underground without the knowledge of plaintiff or of defendant's secretary, fell, and plaintiff received severe injuries, for which this suit was brought. Plaintiff based his right of action upon a claim that he had been employed by defendant to remove the wires, and the relation of master and servant existed between them at the time of the accident. The court said that, if plaintiff was acting as servant of defendant, the evidence was probably sufficient to make a question for the jury; but if he was acting solely in the furtherance of his own business, and was a bare licensee, the evidence disclosed no facts upon which defendant could be held liable, and their relationship depended upon whether plaintiff, at the time of his injury, was performing an act which it was defendant's duty to perform in removing the wires to permit passage of the house. Upon the question of defendant's duty to remove the wires the court said that, while the village undoubtedly had the power to require defendant to raise or remove its wires to permit the passage of buildings, it had not, so far as the record disclosed, done so, and that any duty in that respect rested upon the general statutes, which gave defendant the right to erect and operate telephone lines in the highways, but provided that "such lines shall be so located as in no way to interfere with the safety and convenience of ordinary travel along or over the same." It was held that moving a house along a highway did not constitute "ordinary travel," and, although it was assumed that plaintiff was rightfully moving the building along the street, the statute requiring defendant to maintain its lines so as not "to interfere with the safety and convenience of ordinary travel" did not require it to remove its wires to permit passage of the building. In affirming the order of the trial court denying plaintiff a new trial after dismissal of his suit, the court said: "Defendant was prior in point of time, and had appropriated the street to the use of its telephone lines. Neither the village council nor the legislature had imposed any duty upon it to remove its

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was another team hitched to a wagon the wheels of which were locked. Obviously the truck was steered by the action of the two horses hitched to the pole. The twelve in addition would have little effect upon it, unless the cable was taut and they were pulling upon it.

The truck reached Bay street from the east. It was to turn toward the south. It was therefore necessary for it to reach the west side of the street, and to do so it had to pass beneath the trolley wires.

The defendant, with its wires and other structures, was rightfully in the street. But it was not there to the exclusion of those other public uses to which the street is adapted. The grant to it was under the implied condition that it could not unreasonably interfere with such uses. Lambert v. Westchester Elec. R. R. Co., 191 N. Y. 248, 83 N. E. 977; Opdyke v. R. R., 78 N. J. Law, 576, 76 Atl. 1032, 29 L. R. A. (N. S.) 71; McKim v. Philadelphia, 217 Pa. 243, 66 Atl.

wires for the purpose of permitting the moving of houses along the streets. It follows that plaintiff, in removing the wires, was not engaged in performing a service incumbent upon defendant to perform, and cannot be held to have been removing them in furtherance of defendant's business. The work which he was doing was solely in furtherance of his own business; and, although performed upon the property of defendant with the consent of defendant, did not make him the servant of defendant. He was a mere licensee, and the ruling of the trial court was correct.''

B. Injury to house.

In Pearson v. Tri-State Telephone & Telegraph Co., 111 Minn. 331, 126 N. W. 1091 (1910), plaintiff sued to recover damages for injury to his house by its coming in contact with defendant's telephone cable when he was moving the house across the street. Plaintiff recovered a verdict for $100, and defendant appealed from an order denying a new trial on the ground that there was no evidence in the record to sustain the verdict. It appeared that at plaintiff's request, and upon payment by him of $24, defendant undertook to raise the cable for the passage of the house, and did raise it, but not sufficiently high, so that it scraped the roof, destroying shingles, and in some degree wrecking the house. The court held that the request of defendant to raise the cable, the undertaking to do so, and receipt of the money constituted sufficient evidence to justify the conclusion that defendant agreed to raise the cable sufficiently to enable the house to pass without damage, and that there appeared to be no reason why it could not have been raised higher, and, as the house had been moved up to the street before the cable was raised, the proper height to raise it could have been determined at that time. The judgment was affirmed.

II. Hay-stacking derricks being transported.

A. Along highway.

While plaintiff was hauling a hay derrick 29 feet 4 inches high along a highway the extreme top of the derrick came in contact with defendant's high-power wires which were strung across the highway. The current passed down the derrick, knocked plaintiff down and rendered him un-

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340, 19 L. R. A. (N. S.) 506. It might be required temporarily to remove its tracks if the street was to be graded (Matter of Deering, 93 N. Y. 361); or if a sewer were to be built (Brooklyn Elec. R. R. Co. v. City of Brooklyn, 2 App. Div. 98, 37 N. Y. Supp. 560; New Orleans Gas L. Co. v. Drainage Comn., 197 U S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831); or other public purposes served (Chicago, B. & Q. Ry. Co. v. Drainage Com'rs, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; R. R. v. Wakefield, 103 Mass. 261). Nor might it interfere with the reasonable use of the highway by travelers upon it, even if such use involved temporary obstruction of its traffic or interference with its wires. Under some conditions, such a use might include the removal of a building. Western N. Y. & P. Traction Co. v. Stillman, 143 App. Div. 717, 128 N. Y. Supp. 363. Under others, it might not. Williams v. Ry. Co., 130 Ind. 71, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. Rep. 201. But in any event such use must be reason-

conscious, frightening the team and causing it to run away, dragging the derrick over him and injuring him severely. Plaintiff brought this suit for damages and recovered judgment. On the question of contributory negligence it appeared that plaintiff had driven other similar derricks under the same wires without injury, but it was shown that they were slightly lower than the one involved in the accident. The court said that it was for the jury to say, in view of all the circumstances, whether a reasonably prudent and careful man would have been justified in assuming that defendant had placed its wires at such a height, or had so insulated them, that they would not be a source of danger. On the question of defendant's negligence, plaintiff pleaded and offered in evidence a franchise under which it was alleged that defendant was operating and which required its wires to be 35 feet high, on poles not more than 100 feet apart, neither of which specifications was complied with at the point of injury. The trial court, however, practically instructed the jury that violation of the franchise would not be a ground of recovery, which eliminated the franchise from the case, and it was given to the jury as a common-law action of negligence. The evidence tended to show that derricks of the same character were in common use in the county, and the court held that it was the duty of defendant to have used care commensurate with the extremely dangerous character of the force it was engaged in transmitting, to so maintain its wires at crossings as to minimize their danger to citizens lawfully using the public roads, and that it was its duty to have used every reasonable precaution to keep its wires sufficiently high for the safe passage of structures like the one in question, which were common in that locality. The court said it would have been but a small item of expense to defendant to have placed its wires high enough to have eliminated all probability of danger to persons traveling on the highway. Judgment was affirmed. Greenwood v. Eastern Oregon Power Co., 67 Ore. 433, 136 Pac. 336 (1913).

Plaintiff brought an action to recover damages for the death of her husband from a shock received while attempting to move a derrick under defendant's power wires. On the first trial a demurrer was sustained to plaintiff's evidence, and, on appeal, that judgment was reversed (94 Kan.

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able, and the traveler might not unduly interrupt the operations of the road or negligently injure its structures. Reasonable use with concurrent rights is the rule.

We cannot say that the removal of this pile driver was an unreasonable use of Bay street. When they reached that street, therefore, what was the duty of the plaintiff's servants? They might not heedlessly destroy the defendant's wires. If without danger they might raise them and so pass beneath, they might do so. But these wires were exposed, and to the unskilled, dangerous. If contact were made injury might happen, not only to plaintiff's servants but to defendant's property. If so, doubtless it would be claimed that the plaintiff was negligent. Yet it had the right to pass. Under these circumstances, the defendant was notified of the situation. Equally recognizing the respective rights of the parties, the defendant at once sent a wrecking wagon and a gang of men so that the plaintiff might do in safety what it had a right to do. In this the defendant

462, 147 Pac. 63). The second trial, from which this appeal was taken, resulted in a verdict and judgment for $8,000. Deceased was, by occupation, a mover of houses, machinery, and articles of like character. The derrick he was moving was, when loaded on trucks, 21 feet high, and defendant's wires were strung at right angles across the road 20 feet from the ground. When the wires were reached the owner of the derrick, who had climbed it to lift over the telephone wires previously encountered, refused to lift the power wires, and another man assisting in the work also refused because of their dangerous nature. Deceased turned the team over to another to drive while he ascended the derrick to lift the wires. He directed the handling of the team while doing so, and had lifted one of the wires over the derrick, and was on his knees attempting to raise the other when he received the shock which killed him. Deceased had been engaged in moving houses, machinery and derricks for 10 years in the district where defendant had about 150 miles of wires crossing the highways. The petition contained an averment that deceased took hold of the wires preparatory to lifting them, when he slipped and fell, and thus came in contact with the wires that killed him. Defendant contended that a demurrer to the evidence should have been sustained because no testimony supported the averment. The court said the contention bordered on the technical, as it was conceded that deceased was handling the wires in some manner, and, as the witnesses were on the ground, none of them could tell the exact manner in which he came in contact with the wires, and the slight variance occasioned no possible prejudice to defendant because its claim of contributory negligence was not strengthened by the evidence showing the facts. Furthermore, upon request, the trial court would have allowed the petition to be amended to conform to the proof even after judgment. On the question of contributory negligence the court adhered to its opinion given on the former appeal that, upon the evidence, it could not be said that deceased was guilty of contributory negligence as a matter of law. In the opinion on that appeal it appears that the evidence showed that the wires in question carried 5,500 volts and were of about the same size and appearance as tele-

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was not a mere "volunteer." It was performing what in our judgment was its legal duty. This gang lifted the wires, signaled when they were ready, and the truck was thus enabled to cross to the west side of Bay street and turn to the south. The wrecking wagon followed it closely to protect the defendant's wires should the need again arise.

If the pile driver came in contact with the exposed wires, every one recognized that there was danger; but just so long as the truck was on the level or was going uphill the cable attached to the horses would be taut, and there would be no difficulty in steering it safely along the street near the curb.

This was at first the situation. There was a slight ascent, but when the top of the hill was reached a more difficult problem was presented. Ahead was a descent. The road was not straight, but on a curve. A tree stood at the side with branches reaching over the street. The pavement was smooth. It had been raining, and it was

phone wires; that other higher power wires of defendant crossing the road a short distance therefrom were carried at a greater height, so that they did not interfere with the derrick; that deceased was uneducated and without electrical training or experience, and that it was plausible that he did not know or believe they were dangerous, and whether they were carrying a heavy or dangerous current was not apparent to ordinary observation. Defendant on the second trial called two of its employees as witnesses, who testified to having, on previous occasions, helped deceased to move structures under wires, and that they had warned him of the danger of handling such wires, and it was urged that, therefore, the finding was contrary to the evidence. The court held that the jury, by their special answers, indicated that for some reason they discredited the testimony of those witnesses, and that, where the trial court was satisfied that the jury had disregarded evidence, it should consider that fact on the motion for a new trial. When a case came to the supreme court with the verdict approved by the trial court it would be presumed that the court which heard the testimony did not regard the finding of the jury as such evidence of passion and prejudice as to warrant a new trial. The wires which caused the death of decedent had originally been insulated, but the insulation had worn off, and defendant called a number of expert witnesses, who testified it was not good practice to insulate wires carrying a voltage as high as 5,500, and upon such testimony defendant contended that its construction was in good condition and that it complied with all requirements as to safety as determined by the expert witnesses. To this the court answered that "expert witnesses determine nothing. They testify to facts and to their opinions concerning conditions, and the jury determine what the facts are." Objections were made to instructions given and refused as to the duty to insulate the wires, on the ground that they assumed a fact which was disputed by the evidence. The court replied that it was only fair to consider the instruction in question in connection with other instructions which charged that it was the duty of defendant to keep its wires insulated so they would be harmless, "or

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therefore probably wet and, to some extent, slippery. The load was of great weight. It could only be held back and steered by the action of the horses attached to the pole. For this purpose the other twelve horses were practically useless. The truck had no brake. The wagon behind would act as a brake to some extent, and would serve to steady the truck in its descent; just how much it is difficult to say without experiment. Any one who has attempted to drive a heavy wagon down a hill with a pair of horses holding back against a load knows how the wagon inevitably moves from side to side. To keep a straight course is most difficult. With reason, therefore, the servants of the plaintiff hesitated.

However, they were rightfully in the street. This the defendant had recognized. With its wagon the defendant's servants were on the spot to prevent a collision. Once already they had done so. Just how efficient they would or could be we may assume the driver of the truck and his companions did not know. But in any event,

if not insulated, to keep them in a position and location out of reach of all common ordinary traffic and travel," and that, moreover, defendant was confronted with the law as declared in a former opinion (see Winegarner v. Edison Light & Power Co., I, A, 1, ante), to the effect that it is the duty of an electric company, having reason to apprehend the moving of structures higher than its wires, to have such wires at street crossings insulated, or to take such other precautions as might be necessary to protect anyone who might be likely to be upon such structures. To a contention that there was error in refusing to instruct that deceased was a trespasser when he drove the derrick against the wires, and that therefore defendant owed him no duty except not to injure him wantonly, the court answered that deceased was lawfully using a public highway when he was killed, and was in no sense a trespasser, nor was he a mere licensee of defendant. It was held that the court properly refused to instruct that defendant had the right to maintain its wires across the road because, as no contention was made to the contrary, such instruction was not needed. The jury found that deceased could have moved the derrick under the wire by lowering it and hauling it in a horizontal position, and defendant contended that it was entitled to judgment, and that the court should have found deceased guilty of contributory negligence as matter of law because he failed to adopt the safer method. The court said the fact that there was a safer method was a circumstance proper for the jury to consider in determining whether deceased exercised ordinary care and prudence. Defendant introduced testimony that no accident had occurred at the place in question before, and urged that such fact was strong evidence that its wires were not in an unsafe and dangerous condition. This, the court said, was a circumstance proper to be urged before the jury, but the fact itself had no place in an argument before a court which could not determine the facts. The judgment was affirmed. Wade v. Empire Dist. Elec. Co., 98 Kan. 366, 158 Pac. 28 (1916). On rehearing (reported in — Kan. —, 158 Pac. 1110 (1916)), defendant urged that the court misunderstood its point as to variance between the petition and proof; that defendant did not

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again the defendant was not a mere volunteer. It was so managing its property as to reconcile its rights with those of the plaintiff.

Knowing whether or not the situation was safe, seeing the plaintiff's hesitation, the defendant urged it on. The plaintiff's foreman, to some extent, at least, had explained his difficulty to the defendant's foreman. He said that the truck would be likely to turn into the wires; that one end or the other would strike them. In reply, the defendant's foreman assured him that he and his companions were there and that they would raise the wires if it was necessary. He said: "We are here, and we will protect you. What more do you want?"

It is familiar knowledge that an inference or invitation of assurance may be drawn from the raised gate at a railway crossing—an inference drawn equally whether the gate is required to be maintained or is maintained voluntarily. In principle the express assurance here given is not unlike that there drawn from circumstances.

rely upon variance, but upon the fact that deceased voluntarily took hold of the wires with his bare hands, as showing contributory negligence. The court answered that it fully agreed that the evidence showed voluntary contact, but that the question of contributory negligence, which really was the only question in the case, was for the jury to determine under all the circumstances.

B. Over highway bridge.

Plaintiff was injured by his hay derrick coming into contact or near contact with defendant's high-power wires while it was being transported over a bridge in a highway and causing the current to pass down a wire cable attached to the derrick. A peremptory nonsuit was granted by the trial court, and it was contended that this was error, as a peremptory nonsuit could not be granted without the consent of plaintiff. The circuit court of appeals held that a nonsuit could be granted under a rule that the federal courts will follow the state law in that respect, and the state statute provided for involuntary nonsuit on the motion of defendant. Such motion was held to admit the existence of every fact in favor of plaintiff which the evidence tended to prove, or which could be gathered from any reasonable view of the evidence, and, in sustaining the nonsuit, the trial court in effect held that plaintiff had presented no evidence tending to show that the proximate cause of the injury was the negligence of defendant. The evidence was held by the court to tend to show that the highest point of the derrick was 27 feet 6 inches; that derricks similar in construction and height were owned by farmers generally in the neighborhood, and were frequently moved along the highways, and were in common use prior to the construction of defendant's power line; that the bridge which plaintiff was approaching was higher than the roadway on either side, and was built before the power line was; that the lowest wire was nearer the ground at the point of the injury than at other points, being but about 27 feet 3 inches high, while at other points it was from 29½ to 31 feet; that the standard of construction for such a power line in that country was for the lowest transmission wire to be from 30 to 33 feet from the ground; that it was impossible to pass over

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Relying upon it as they had relied on the earlier assurance when they drove under the wires, the plaintiff's servants started down the hill. The result, which was reasonably to be expected, happened. The front end of the truck ran toward the middle of the street and come into collision with the trolley wire, which was not lifted by the defendant's servants as they had promised. Electricity passed through the truck, and some of the horses attached to it were killed. Under these circumstances, we think there is a fair question of fact for the jury as to whether the defendant's servants were not negligent in stating that they could and would lift the wire if danger became imminent, and in inviting the plaintiff to drive on, when as they now say that was an impossible thing for them to do. Whether there was danger or not was a matter in respect to which they assumed to have superior knowledge. Further, in giving the assurance that they did, it follows that at least the jury might find that they were acting within the scope of their authority. They were engaged in their mas-

the road and the bridge at the point of the accident with a derrick such as plaintiff's without passing under defendant's transmission line. It was not contended that defendant's wires, which carried a current of 23,000 volts, should have been insulated at the place where the injury occurred, but that they should have been carried at such height as would permit the safe passage over the highway and bridge of such a structure as plaintiff's and that the standard of such safety was well known to defendant. It was held that it was clearly the duty of defendant to raise and keep its high-power wires sufficiently high for the safe passage of such structures; that the evidence tended to show defendant had not performed such legal duty, and that the question of defendant's negligence should have been submitted to the jury. Defendant contended that plaintiff was guilty of contributory negligence, and supported the charge by evidence that it was the long end of the boom carrying the cable which came in contact with the wires, and that when the turn was made to go upon the bridge the boom swung out over the fence and under the wires of defendant. From this evidence it was argued that either in starting the team the derrick was jerked, or plaintiff pulled on the boom rope, and caused the long end of the boom to be raised and come in contact with the wires. The court said there was nothing in the record to support the inferences thus drawn from the evidence, but if there had been it would have been for the jury to draw them as inferences of fact, not for the court to draw them as inferences of law. Further, on the question of contributory negligence, the court referred to testimony of plaintiff that he had been informed that the wires were 30 feet high; that just prior to the accident he had moved the derrick under the wires without any difficulty at a point 300 yards from the place where the injury occurred, and that on several prior occasions he had moved the derrick under the wires at different points along that highway without interference or contact. Under these circumstances it was held the question of plaintiff's contributory negligence should have been submitted to the jury. Judgment was reversed, with

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ter's business. They were acting not for themselves but for it, and here, as when the wires were first raised, it might well have been their duty to notify the plaintiff's servants when they might proceed in safety. We think, also, that the question of the plaintiff's contributory negligence was, under these circumstances, for the jury.

The judgment of the Appellate Division should be reversed; but, as that court has disapproved the finding of the jury, a new trial should be ordered, with costs to abide the event.

CHASE, J., dissenting. After the plaintiff's truck with its load reached the west side of Bay street, there was nothing to prevent its being safely taken along that street under the defendant's cross-wires, if it was kept at or near the curb line. There was a greater clearance under the cross-wires at the side than in the center of the street. After reaching the west side of the street, the truck was

instructions to grant a new trial. Shank v. Great Shoshone & Twin Falls Water Power Co., 124 C. C. A. 35, 205 Fed. 833 (1913).

C. From lane into highway.

Defendant constructed a power line along a highway with the wires 27 feet 8¾ inches above the ground. About 4 years after it was constructed plaintiff, who was 18 years of age, with his father and others, started to haul a hay-stacking derrick out of a lane into the road. The boom was of the stationary type, reaching 30 feet 4 inches from the ground. On reaching the power line they estimated that the derrick would pass under the wires, but to make sure, they removed the rear wheels of the truck upon which it was supported to lower the boom. The horses were unhitched, and the truck was moved forward by hand. When the boom was near the wires plaintiff and his father went to the other side of the road to make sure whether the boom would clear the wires, and, both being of the opinion that it would, the derrick was moved forward by pulling on an iron cable attached to the boom. As the boom was passing under the first wire, and without actual contact therewith, the current arced and passed down the cable, inflicting injuries on plaintiff which necessitated amputation of his left arm and both legs below the knees. An action for damages was brought on the ground that defendant was negligent in stringing its wires so low as to interfere with the free passage of the derrick under them. Defendant denied negligence, and alleged that the injury was due to plaintiff's own negligence. On the first trial, a verdict and judgment for $25,000 was obtained, which was reversed on appeal (170 Cal. 115, 148 Pac. 788) on the ground that plaintiff had failed to prove negligence in the construction of defendant's line. On the second trial a verdict and judgment was recovered for the same amount, from which this appeal was taken. The court held the law governing the duty of electric companies in constructing power lines to be, as stated in its former opinion, "to exercise a high degree of care in placing the wires, so as not to interfere with traffic on the ordinary highway, and so as to avoid contact with and

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driven southerly 300 or 400 feet before it was at the height of ground. It was then stopped.

In considering the relative rights and obligations of the parties the conversation between the two foremen before the truck was again started is helpful. As given by the plaintiff's foreman, it was as follows:

"Q. And then you had a talk with the foreman? A. Then I had a talk with the foreman. I went outside and stood there while we were hooking up the horses. I merely asked him what did he think about it. 'Oh,' he said, 'he measured it—everything would be all right if we would keep to the right.'

"Q. And what did you say to that? A. I explained to him. I said, 'Now this is going to turn around either one end or the other and strike that wire just as sure as you live when you are going down that hill.' He said, 'No, it ain't. We are here. We will raise the wire up for you.' * * *

"Q. Mr. Hazlegreen, after the foreman told you that he was there and that he would raise the wires, did you say anything to him? A. Why, I said to him: 'Well, wait a minute; I have to think over that. In regards to what?'

"Q. Well, give me this conversation that you had with him, before you

injury to any person or object which may reasonably be expected to pass under the wires." The court, after reviewing the testimony, said that it showed that the movement of derricks exceeding the height at which the wires were strung at the point in question was not an infrequent or uncommon occurrence; that, while such derricks were not as common on the highways as ordinary vehicles, nevertheless, during the haying season, they were quite properly and frequently conveyed over the highways, a fact which it was the duty of defendant to have ascertained before stringing its wires so as to make provision for free passage of such derricks under them. Evidence that other telephone and high-power wires were strung along highways at the same or lower heights as defendant's was held to be of no consequence and to afford no protection to defendant in its invasion of the right of those who were entitled to a safe and unobstructed ordinary use of the highways. It was held that plaintiff was not guilty of contributory negligence, as it was not a case where one, having knowledge of the dangerous character of electricity, carelessly and recklessly placed himself in actual contact with it, but that the testimony showed that neither plaintiff nor those associated with him were aware of the propensity of high-power electricity to arc or leap over the intervening space to a conductor brought near but not in contact with it but that they believed no harm would result unless actual contact was made and took precaution by actual observation to ascertain whether such contact would not occur. Judgment was affirmed. Fairbairn v. American River Electric Co., — Cal. —, 175 Pac. 637 (1918). Rehearing denied.

D. From field into highway.

Defendant's power line ran along a right of way on the land of deceased and telephone wires were strung on the same poles beneath the power wires. Once prior to the accident involved in this suit, deceased, while moving his hay derrick under the wires, climbed the derrick and lifted the telephone wires over it. Later in again passing under the wires the derrick came in contact with the power line and broke it in two, the

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proceeded to go along with your truck. Was anything said at that particular time? A. Nothing, only, as everything is all right, go ahead.

"Q. Who said that? A. The foreman of the wrecking crew.

"Q. And then what did you do? A. Well, I had all my drivers standing there alongside of me.

"Q. Yes, and what did you do? A. We used a little judgment before we started, and we asked one another would we think it right for to start. So the wrecking crew people told us to go ahead: 'We are here, and we will protect you. What more do you want?'"

The second truck was then attached to the truck carrying the pile driver, and its wheels were chained so as to make it a drag on the loaded truck and prevent it from descending the slight grade by gravity. Plaintiff's foreman directed his drivers to start the horses and they proceeded with the load. After going a short distance, the pile driver came into contact with the live wire, and some of the horses were injured. A short time thereafter the horses that were not injured were attached to the truck, and it with the pile driver was taken to the place of destination without assistance or further acci-

shock knocking the horses down on their knees. Thereafter the wires were raised at the request of deceased. On the occasion in question the derrick was moved across the field to the power line and, although the day was clear and there was nothing to prevent deceased from seeing that the clearance was doubtful, he drove the derrick against the telephone wires with such force that the supporting poles were pulled towards each other, causing the power wires to sag so that they came in contact with the derrick. The derrick was rigged with two wire cables, a supporting cable and a pulling cable. The pulling cable reached the ground and trailed along some distance and from it and other parts of the apparatus sparks and flashes were issuing. The supporting cable was attached to the derrick, ran to the top of the mast and thence to a hemp rope by which it was fastened to the crossbeam and did not touch the ground at any point and there was no sign of electricity in it. Deceased told one of the men to untie the rope and let the derrick down so that it would be released from the wires but the man refused to do so, whereupon deceased attempted to release it although he was warned by another man to keep away. While he had hold of the hemp rope within a foot of the supporting cable he received a shock which killed him. Deceased could have telephoned defendant to shut off the power and that was done after the accident. Under these circumstances it was held that deceased was guilty of contributory negligence and judgment for defendant was affirmed. Druse v. Pacific Power & Light Co., 86 Wash. 519, 150 Pac. 1182 (1915).

Defendant's high-power transmission line runs parallel with and along the edge of the right of way of the public roads, the wires being supported on cross arms 40 feet above the ground and carrying a very heavy voltage. Plaintiff, a boy 16 years old but well grown and strong, was employed as one of a hay-stacking crew. The derrick upon which he worked consisted of large timbers in the form of skids placed upon the ground upon which was reared a stack pole 45 feet high, on top of which was an arm 18 feet long arranged so it would swing or

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dent. In doing so it was kept along the curb and passed under the cross-wires. The front wheels of the truck were four, and the rear wheels six, feet apart. When the accident occurred and the propelling power was removed from the truck, it stopped immediately, and its left front wheel was on or very near the defendant's track, and its left rear wheel on or about three feet from the track. The turn to the left and the distance traveled had been sufficient so that the truck, instead of being along the curb, as it was when the conversation mentioned took place, was at or upon the defendant's track. The front part of the truck was at least sixteen feet from the curb. The horses were all in the center of the street along the defendant's car tracks.

There is no claim that either of the parties hereto were unlawfully occupying the public street. Upon the facts disclosed, neither had the right to use the street to the exclusion or injury of the other. The use of it by each was subject to reasonable use of the other.

revolve freely. From the end of the arm a long cable extended through a block and tackle which, when pulled down, formed a loop reaching nearly to the ground and as the derrick was being pulled along the road plaintiff was sitting in the loop so formed and riding. The arm of the derrick swung around and came in contact with defendant's wires while plaintiff's foot touched the ground and he received a shock causing injuries for which this suit was brought. The trial judge in directing a verdict for defendant said that defendant's duty was to put its wires high enough to have the road safe, not for all travel but for usual and ordinary travel, and there was not any worthy evidence tending to prove that, at the time defendant built its power line, hay derricks 45 feet high with an arm projecting above the mast were so generally hauled over the road as to constitute ordinary and usual travel. The evidence that the owner of the derrick in question hauled the derrick over the road in question did not show a custom of the community to haul derricks and there was no evidence that other derricks shown to have been occasionally hauled over the roads were 45 feet high and the trial judge said that derricks of that height were not so generally hauled that the court could take judicial notice that such hauling was an ordinary use of the highway. The supreme court approved these conclusions and affirmed the judgment. Mayhew v. Yakima Power Co., 72 Wash. 431, 130 Pac. 485 (1913).

III. Threshing outfit.

A. Striking telephone wires.

Plaintiff was driving on the highway with a threshing outfit, when the smokestack of his engine came in contact with the telephone wires of defendant, suspended over the highway. Upon hearing someone call out that he was against the wires, he stopped the engine and went forward on the running board to investigate, when the wires broke loose and threw him down causing injuries for which this suit was brought on the ground that defendant was negligent in maintaining its wires so low over the highway as to obstruct and endanger travel thereon. Defendant's answer denied negligence, and alleged that plaintiff's

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It is not necessary or desirable to discuss the rights of the parties in case either had attempted to assert and enforce its alleged rights as against the asserted and alleged rights of the other. Their apparent relation to each other on the day of the accident was one of mutual helpfulness. The purpose of the wrecking crew in accompanying the plaintiff's employees so far as appears was to protect the defendant's property from injury. So far as they were assisting the plaintiff, their service was voluntary and gratuitous. There was no express contract between them. There was no implied contract except that reasonable care would be exercised in whatever was actually done or undertaken by either. The defendant's employees had lifted the wires to permit the plaintiff to pass under them when it first came upon Bay street without asserting any claim to be paid therefor and remained to perform gratuitously any service that became necessary for the care of the defendant's property and the convenience of the plaintiff. That there was no necessity for lifting the

injuries were caused by his own negligence. Plaintiff had a verdict and defendant appealed from an order denying a new trial. On appeal no claim was made that the evidence was insufficient to sustain a finding that defendant was negligent as charged, but it was contended that both the complaint and the evidence conclusively showed that plaintiff's injury was the result of his own negligence, in that, when he stopped his engine upon being told that it was against the wires, he went forward from a place of safety to one of danger to investigate and that he knew before he started that the wires were taut against the smokestack and liable to break at any time and injure someone and that he fully appreciated the hazard. The court reviewed his testimony and held that, while detached portions of his cross-examination seemingly furnished some basis for the contention of defendant, his whole testimony if credible, of which the jury were the judges, made it clear that he did not in fact know of the condition of the wires when he started forward and did not learn of it till he was within 2 feet of the smokestack where he was injured, and held that plaintiff was not guilty of contributory negligence. Defendant excepted to an instruction that the jury might, in assessing damages, take into consideration any loss of time resulting directly from plaintiff's injury, the exception being based on the sole ground that loss of time was not pleaded, and the trial court, on plaintiff's motion, then allowed an amendment of the complaint in that respect. On motion for a new trial and on appeal defendant assigned the giving of the instruction as error, and assigned the same reason stated in taking its exception on the trial. In its brief defendant urged that the instruction was erroneous for the further reason that there was no evidence of the value of the time lost. The court held that defendant was limited to the ground relied on and urged in his exception and assignment of error in the trial court and held that the trial court did not abuse its discretion in allowing the amendment, and that the instruction was not reversible error. The verdict of $2,450 was alleged to be excessive and given under the influence of passion and prejudice. The court said

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wires generally along the street is shown by the fact that the plaintiff continued along the curb line without meeting any obstruction for 300 or 400 feet on Bay street to the height of ground near where the accident happened. The conversation that we have quoted consisted principally of expressions of opinion. That the plaintiff's foreman did not wholly rely on the opinion of the defendant's foreman is apparent from the conversation as given by him. He consulted with his drivers and concluded to proceed. The statement of the defendant's foreman amounted to an expression of opinion that the plaintiff could proceed safely if he would keep to the right, and it was accompanied by a statement in substance that he would raise the wires if it at any time became necessary.

The representative of each party was fully aware of the danger of coming into contact with a live wire. It cannot be assumed from the record that the members of the wrecking crew had a superior knowledge in regard to handling the truck with its heavy load to

that the evidence tended to show that plaintiff was a farmer; that he fell against the wheel of the engine, breaking his rib and seriously injuring his back and hip bone, causing severe pain; that he was confined to his bed for 2 weeks and has not been able to do any work since, as it hurts his spine; and that there was also medical testimony to the effect that, at the time of the trial, there was a weakness of plaintiff's hip due to the injury, a possibility of nerves or tendons included in the callous, and that in time, with the hardening of the tissues, excruciating pain might result and such condition might be permanent. It was held that while a consideration of the whole evidence led the court to conclude that the award was liberal it was not so excessive as to justify any interference with it on appeal. The order denying a new trial was affirmed. Stuhr v. Wright County Tel. Co., 119 Minn. 508, 138 N. W. 693 (1912).

B. Striking guy wires.

Plaintiff sued to recover for injury to his threshing machine when the grain elevator of the machine came in contact with a guy wire attached to one of defendant's poles and extending across the highway at a height originally of about 15½ feet above the surface of the traveled track. Plaintiff claimed that he sustained damages in the sum of $142. Defendant denied the allegations of the complaint and set up a counterclaim for $10 for damage to its wire and post. Plaintiff secured a verdict for $74.80. A new trial was denied and judgment rendered on the verdict from which judgment defendant appealed. The statute permitting the establishment of telephone lines provides that no such line or any appurtenance thereto "shall at any time obstruct or incommode the public use of any road, highway," etc., and that all wires strung upon poles shall be not less than 24 feet high at crossings and 14 feet at other places. There was evidence that after being put up, the wire sagged so that a person riding on a load of hay would have to lift the wire and that it struck plaintiff's machine, which was 14½ feet high, at a point about 13 feet from the surface of the highway. The court said there could be no doubt

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that of the plaintiff's foreman and his associates who had been engaged for years in the trucking business.

It required from 10 to 15 minutes to raise the wires in one place. It could not be done from time to time as the truck was moving. The necessity, if any, for raising the wires, had therefore to be determined in time to stop the truck and wait until the wires were raised before proceeding further. When the truck started, it did not move rapidly. It seems to have been under full control. As it proceeded, danger of contact with the live wire must have been apparent; but there does not appear to have been any effort to stop it before the accident to the horses which cut off the propelling power. It is quite evident from the testimony that, if the movement of the truck had been closely watched and the plaintiff's drivers had proceeded very slowly around the curve and past the tree, the truck could have been stopped on signal from the foreman the instant danger was imminent. In that case the defendant's workmen were

that defendant was bound to construct and maintain its wires so as not to incommode the public use of the highway in question. Defendant contended however that plaintiff was guilty of contributory negligence because the wire had been maintained upon the highway for about 2 years with the knowledge of plaintiff and, further, because he should have lowered his grain elevator while passing along the highway. The court said it could not be said as matter of law that plaintiff was negligent in moving his machine along the highway in question with the elevator erect, since, had the wire been properly constructed and maintained, it would not have come in contact with the elevator. There was evidence tending to show that plaintiff did not know the wire was so maintained as to strike the elevator and, in addition, that he was guiding his engine and giving it attention to keep it in the traveled track and out of the ditch and there was a strong wind blowing the smoke in his face so he did not see the wire. The court said that if plaintiff did not know the wire had sagged so it would strike the elevator, or if his attention was diverted so that he did not remember the defect and was not guilty of want of ordinary care in not remembering it, he was not guilty of contributory negligence. Defendant also cited a provision of the statutes making the owner of any steam engine liable for damages that may be caused by propelling it along a highway. The court held, however, that such statute had no application to the present case as no damage was caused by the engine being used in drawing the machine nor did it in any way contribute to the injury complained of. Judgment was affirmed. Chant v. Clinton Tel. Co., 130 Wis. 533, 110 N. W. 423 (1907).

IV. Cement-mixing machine.

An engineer in charge of a cement-mixing machine used by a paving company was directed to move the machine, which ran by its own power. The machine was 14 feet high and, as it had to be moved directly under an arc light belonging to defendant which hung about a foot lower than the top of the machine, another employee was detailed to hold the lamp out of the way with a stick. As the machine

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there to lift the wire at the place of immediate danger and permit the truck to continue as it did after the accident along the curb to the place of destination.

I am of the opinion that there is no justification for the assumption by a majority of the court expressed in words as follows:

> "We think that there is a fair question of fact for the jury as to whether the defendant's servants were not negligent in stating that they could and would lift the wire if danger became imminent and in inviting the plaintiff to drive on when as they now say that was an impossible thing for them to do. Whether there was danger or not was a matter of which they had knowledge and of which the plaintiff's servants had no knowledge."

The judgment of the appellate division should be affirmed, with costs.

HISCOCK, C. J., and CARDOZO and POUND, JJ., concur with ANDREWS, J.

COLLIN and CUDDEBACK, JJ., concur with CHASE, J.

Judgment reversed, etc.

was under the lamp the stick slipped and allowed the rim of the lamp to come in contact with the machine and the current passed through the engineer who was walking beside the machine with his hand on the steering wheel, killing him instantly. This action was brought by his administratrix and negligence on the part of defendant was alleged in that it violated a city ordinance concerning such lamps which required that "All exposed parts must be carefully insulated from the circuit." A verdict was directed for defendant and, on the first review, this action of the trial court was affirmed on the ground that the circumstances leading to the accident were not so within the range of fairly and reasonably anticipatable events as to render defendant liable for its assumed negligence in violating the provision of the ordinance quoted. Upon rehearing the court reversed its former position and reversed and remanded the judgment. In doing so the court held that the evidence was insufficient to warrant a finding that the provision of the ordinance was unreasonable; that the evidence warranted a finding that defendant violated the ordinance; that if it was so violated, plaintiff's assertion of negligence was sustained; and that the inquiry whether decedent's death was a reasonably anticipatable consequence of defendant's violation of the ordinance, should have been submitted to the jury. On the question of contributory negligence it was held that, since deceased as well as his superiors had the right to assume, until advised to the contrary, that the rim of the arc lamp was not charged with electricity but that the current was insulated as required by the ordinance, no contributory negligence or assumption of risk could have been attributed to deceased, as the general doctrine is that everyone may be presumed to act with due care and to observe the mandates of the law, including ordinances, and that there is no duty on one to anticipate another's culpable negligence. Briggs v. Birmingham Railway, Light & Power Co., 188 Ala. 262, 7 N. C. C. A. 466, 66 So. 95 (1914).

R. L. S.

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FOUR CORNERS BUILDING & LOAN ASSOCIATION v. SCHWARZWAELDER.

[Court of Errors and Appeals of New Jersey, March 4, 1918.]

88 N. J. Eq. 545, 103 Atl. 240, rev'g 88 N. J. Eq. 212, 101 Atl. 564.

1. **Building and loan associations—Loss on investment in mortgages—Liability of director for negligence.**

A building and loan association loaned money on a mortgage of a city lot; its solicitor certified that the mortgage was a first and valid lien; in fact, there was a prior mortgage held by an estate of which the defendant, one of the directors of the association, was an executor; the property was described by reference to the street lines as the only monument and by a number on a land company map; the name of the mortgagor in the mortgage held by the estate was different from the name of the mortgagor in the association's mortgage; the defendant had nothing to do with making the loan; he had no actual knowledge that the property covered by the two mortgages was identical; he held as executor many mortgages, and in the course of his business examined many properties; he knew his mortgages by street numbers, and not by numbers on a land company map; the association's mortgage was accompanied by a regular abstract of title in which defendant's mortgage was not mentioned and attached to which was a certificate by the association's solicitor, then a lawyer in good standing, that the association's mortgage was a first and valid lien. Held, that the defendant could not be found guilty of negligence for failing to apprise the association of the existence of the prior mortgage, that the directors had the right to pursue the usual business custom and trust the solicitor to close the loan and record the mortgage, and that, as the loss did not come until the solicitor turned aside the money from its proper destination—the satisfaction of the first mortgage—the association had already suffered the loss without the defendant having had any opportunity to prevent it, and he cannot be held for negligence.

2. **Building and loan associations—Loss on investment in mortgages—Proximate cause—Liability of director for negligence.**

A building and loan association loaned money on a mortgage of a city lot; its solicitor certified that the mortgage was a first and valid lien; in fact there was a prior mortgage held by an estate of which the defendant, one of the directors of the association, was an executor. The defendant had examined and valued the property for the purpose of a loan on the application of one Wagner and had reported to the association; the estate's mortgage was given by Daly; the title was at the time of Wagner's application in Crocker, the solicitor of the association; the minutes of a subsequent meeting of the directors at which defendant was not present recite that Wagner had sold the property (which was untrue); that all the committee, including the defendant, reported in favor of a loan to Sims (which was untrue as far as defendant is concerned). The defendant never actually had to do with the loan to Sims; his knowledge is claimed to have come from hearing the minutes with these false recitals read over at a later meeting; this fact was not suffi-

NOTE.

Liability of officers and directors of building and loan association for loss due to negligence.

Cross-references. Individual liability to third persons of corporate officers, directors or agents for "corporate negligence," see 7 N. C. C. A. 614-621; liability of bank directors for negligence, see 18 N. C. C. A. 495-554.

This action was brought by the receivers of a building and loan association, against the defendant who was president of such association, chairman of its executive committee, and its solicitor. It was the custom of the association, on accepting an application for a loan, to issue a check for the amount to the defendant

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ciently proved, but if the defendant knew all the facts, he knew the loan was large enough to enable Sims to satisfy the prior mortgage to the estate, and up to the time the check of the association for the loan was cashed might anticipate that the estate's mortgage would be paid before the solicitor closed the loan with Sims; the defendant had no reason to anticipate that the solicitor would forge a discharge of the estate mortgage; when the check had been cashed and the money turned aside from the satisfaction of the prior mortgage, the loss was already incurred. Held, the proximate cause of the loss was the rascality of the complainant's own solicitor, and the defendant cannot be held for negligence.

[Headnotes by the Court.]

Bill by a building and loan association against one of its directors to recover the loss on mortgages in which the association had invested. Decree for complainant reversed and record remitted in order that there might be a decree dismissing the bill.

For appellant—Andrew Van Blarcom.

For appellee—Thomas S. Henry and Francis Child.

SWAYZE, J. The complainant seeks to recover of the defendant the loss on two mortgages in which it had invested. This loss was caused by Crocker, the complainant's solicitor, falsely certifying that the mortgages were first liens, when in fact there were prior mortgages which he had procured to be canceled of record by false discharges.

The case differs from cases brought by receivers in the interest of creditors or stockholders of which Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775, and Id., 46 N. J. Eq. 25, 18 Atl. 824, is the leading instance. It differs also from cases brought by stockholders suing in their own right (Gerhard v. Welsh, 80 N. J. Eq. 203, 82 Atl. 871), and from cases where there was habitual neglect of duty, and the loss might have been prevented by proper attention, and from cases where the loan on its face was illegal or forbidden by the by-laws. The present case is more like Citizens' Building Association v. Coriell, 34 N. J. Eq. 383. There the defendant was held liable for losses on loans made on personal security, which on their face were

as its attorney, and he, on the conclusion of the transaction, would give his own check on a private bank, in which the association's check had been deposited, to the borrower for the amount of the loan. In the course of these transactions, he so commingled the money of the association with his own that it became a matter of difficulty to separate them, and tell where the association's money had gone. Regarding one of these transactions involving a loan of $2,100 the defendant did not deny liability but took the position that he knew "nothing about these matters." It was not contended that there had been any dishonesty on the part of the defendant. Holding him liable as a trustee of an express trust of the

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in violation of a by-law, but not liable for loss due to a defective acknowledgment of a mortgage, because, as the chancellor held, the directors properly relied on the knowledge and attention of the solicitor for the legality of the mortgages. In the present case the proximate cause of the loss was the fraud of the solicitor. The complainant is seeking to hold the defendant for the fraud of its own agent, who either paid the money to the mortgagors improperly and without seeing to it that prior liens were lawfully discharged, or more probably embezzled that money himself. To sustain the complainant's claim, reliance is had upon the fact that the defendant, as one of the executors of an estate, held a prior mortgage on each property. The real question therefore is whether the defendant was under any duty to the complainant to give actual notice of the existence of the mortgages held by the estate. Mortgages on two properties are involved, one of which may be called the Aschenbach East Orange mortgage, and the other the Sims South Orange mortgage.

The Aschenbach mortgage was on a city lot on North Eighteenth street, East Orange, described by metes and bounds referring to the street lines as the only monument. The number of the section and lot on a land company's map is also stated. There are no other identifying marks. The prior mortgage held by the estate of which defendant was an executor was given by William H. Daly. It is not shown that the defendant had anything to do with making the Aschenbach loan. The appraisement was made by a committee of which the defendant was not a member. It is not claimed that he had any actual knowledge of what property was covered by the Aschenbach mortgage, but it is sought to hold him on the theory that he was negligent in failing to discover that a mortgage given by Aschenbach was on the same property on which the estate held a prior mortgage given by Daly. As there was no similarity in the names of the two mortgagors, he can only be held in case we are prepared to say that he ought to have examined the description in the Aschenbach mortgage and recalled that it was the same description as in the Daly mortgage.

Cases might arise where a director of a building and loan associa-

funds of the association the court said: "In this situation it seems to me plain that, even if there were more doubt as to whether he had failed to return the money than there seems to be, the negligent trustee should suffer a possible loss rather than the association." Regarding another transaction involving a loan of $10,000, the collateral for which, the complainants contended, was such as ought not to have been accepted, the court, holding that defendant, sued alone, was not liable, said: "Here the gentlemen primarily liable would probably be the individuals entrusted with the duty of passing upon the sufficiency of the security." French v. Armstrong, 79 N. J. Eq. 289, 82 Atl. 331 (1912).

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tion should be held even to so stringent a liability. It would depend on the circumstances of each case. Here the defendant as executor held many mortgages; in the course of his business he examined many properties; the description in the Aschenbach mortgage contained nothing to excite attention; it must have differed little from the description of adjoining lots; the defendant knew his mortgages by street numbers and not by numbers on a land company map. The name of the mortgagor was different. Above all that, the Aschenbach mortgage was accompanied by a regular abstract of title in which the Daly mortgage was not mentioned, and a certificate by the complainant's solicitor, then a lawyer in good standing, that the Aschenbach mortgage was a first and valid lien. We think that the most that could be required of defendant by way of care upon an examination of the affairs of the association would be to ascertain that the usual papers, bond, mortgage, insurance policy, and abstract were in hand, and that the solicitor had certified as he had. In most cases this would be more satisfactory even than an actual reading of the mortgage.

But, even if the defendant could be found guilty of negligence in this respect, there would still remain an insuperable difficulty in the complainant's way. It is not claimed that the defendant should have been present when the mortgage was executed and the money paid. As business is done, that would be obviously impracticable. The directors had the right to pursue the usual business custom and trust the solicitor to close the loan and record the mortgage; in fact, such were the solicitor's duties under the by-laws. He alone could properly attend to paying off prior incumbrances and making sure that complainant's mortgage was a first lien. The loss did not come until the solicitor turned aside the money from its proper destination, to the satisfaction of the first mortgage, and either wrongfully paid it to Aschenbach or embezzled it himself.

When the money was thus turned aside, the association had already suffered the loss without the defendant having had any opportunity to prevent it. He might, indeed, have subsequently made an exami-

A suit in equity for a discovery and an accounting was brought by the receiver of an insolvent fraternal lodge, organized to transact a building and loan business, against its officers, the supreme executive board and the supreme board of trustees. The bill alleged neglect of duty in that these officers had, contrary to the laws of organization, allowed a "secretary's account" to be created at the bank in which the moneys of the organization were deposited; that they had allowed the secretary to draw from this account; that they had allowed him to perform their several duties as officers, such as collecting dues and assessments and other money due from members and that such secretary entered them on his own individual books of account; that they had allowed the secretary to pay warrants

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nation and discovered that the mortgage was not a first lien, but there is nothing in the case to show that this discovery could have made it possible for the complainant to prevent the loss. The solicitor could hardly have been solvent; his dishonesty speaks loud to the contrary; at any rate, in the absence of evidence, we cannot find that he was solvent.

As to Aschenbach, no suggestion is made that recovery could ever have been had of him. If it could, complainant ought not to seek it of defendant. The result is that, if we could find negligence on the part of the defendant, it necessarily came too late to be the cause of complainant's loss, and the decree below was wrong. This is not a punitive proceeding, but an attempt to recover actual damages caused by defendant's negligence.

The facts as to the Sims South Orange property are somewhat more complicated. The property belonged in 1909 to Roland D. Crocker, who was the solicitor of the complainant. He conveyed to Mabel Daly by deed dated October 1, acknowledged October 11, and recorded October 19, 1909. Mabel Daly and her husband, William H. Daly, mortgaged to the defendant and his coexecutor October 11, 1909, by a mortgage dated and acknowledged on that day and recorded October 21, 1909. The property was then reconveyed by the Dalys to Crocker by a deed dated October 11, acknowledged November 19, and recorded November 20, 1909, and the title remained in Crocker until as late as April 1, 1913, when he conveyed it to Sims. On October 10, 1912, Louis Wagner applied to the complainant for a loan on this property, which then belonged to Crocker, subject to the defendant's mortgage. The defendant and two others were appointed a committee to appraise the property. The defendant alone did so. Thereupon the directors ordered that the committee be continued, and report to the officers, who were given power to grant the loan if a satisfactory report was made; and later the officers were empowered to grant such amount as should be unanimously recommended by the committee. The defendant never formally joined with his fellow-committeemen in recommending a loan. Wagner never owned

irregularly drawn; that they had failed to audit the books of the secretary and demand a regular monthly report from him; by reason of which failure of duty the sum of $125,000 or more of the funds of the organization were lost or misappropriated. It was the theory of this bill that the funds came into the possession of the defendants as trustees, officers and agents and through their joint and several negligence the loss to the organization occurred. Conspiracy was not charged nor were specific losses traced or charged to specific conduct. It was contended that there was a common duty to safeguard the funds and that the court should have inquired into the specific conduct of each defendant, and, if such conduct appeared to have contributed to the result, hold each responsible. A de-

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the property; and proceedings for a loan to him were dropped. It seems probable that both Wagner and Sims were merely tools of Crocker. On April 25, 1913, the complainant's minutes recite that Wagner had sold the property to Sims (which was untrue); that all of the committee (including the defendant) reported in favor of a loan to Sims (which was untrue as far as the defendant is concerned). It was then ordered that the committee's recommendation be received and granted. The defendant was not present at this meeting. He never actually had to do with the loan to Sims. The effort is to bind him by the acts of the others, because at a later meeting on May 23d, at which he is said to have been present, the minutes of the meeting of April 25th are said to have been approved. The fact is doubtful, since the approval of May 23d seems on its face to relate to a special meeting of April 30th, and not to the regular meeting of April 25th. The secretary, however, testifies that the approval of May 23d covers both the meetings April 25th and April 30th. The defendant denies that he ever heard the resolution of April 25th read. The point is of some importance, since it is all there is to show that the defendant knew anything about a Sims loan. In view of the defendant's denial and the secretary's admission of the careless way in which the minutes were kept, we think the complainant has failed to sustain the burden of proof. This question, however, loses much of its importance in the view we take of the case. If we assume that the defendant knew that the Sims loan was to be on the same property as the abandoned Wagner loan, and that he ought to have recalled that the estate held a mortgage given by Daly on the same property, that would not charge him with knowledge that the Sims mortgage would be a second mortgage. The amount proposed to be loaned was $1,500 more than the mortgage held by him and his coexecutor. He had the right to assume that his mortgage would be paid out of the money loaned by the association on the new mortgage. He must assume that, if he believed that Crocker, the solicitor, was an honest man; the complainant itself so held Crocker out by making him its

murrer to this bill was overruled and upon appeal from such order, it was affirmed. Snover v. Boynton, 173 Mich. 539, 139 N. W. 266 (1913).

S, a director, was the owner of 36 shares of stock in the defendant building and loan association. He delivered them to A as security for a loan of $2,000. Subsequently S applied to the secretary of defendant for payment of these same shares, and this officer paid him their withdrawal value without demanding the surrender of the certificates or making any inquiry concerning the same. Shortly thereafter B, one-fourth owner, and agent of A's wife, A having died, inquired of the secretary regarding this stock and was informed that payment had been made to S, who was subsequently adjudged a bankrupt. This action was brought against the association to

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solicitor. If we assume that the defendant knew all the facts that the most careful investigation would have disclosed, he knew that, although the loan had been authorized in April, the check had not been cashed until July 10th. Up to that time he certainly might anticipate that his mortgage would be paid, and it would serve no useful purpose, and would, no doubt, be regarded by his fellow-directors as a foolish intrusion, for him to inform them to the existence of a mortgage of which the law charged them with constructive notice. Their very proper answer to him would be, "Our solicitor will find the existing liens when he examines the title, and attend to their satisfaction."

The prior lien would have been satisfied in the ordinary course; but the complainant's solicitor, instead of taking the ordinary course, undertook to satisfy the record by a forged discharge. The defendant had no reason to anticipate the solicitor's crime. Until the check had actually been cashed and sufficient time had elapsed for Crocker to pay off defendant's mortgage without his in fact doing so, the defendant might properly trust that the complainant's own solicitor would protect his client's interests. A delay of three months is not unusual when prior liens have to be satisfied. When the check was cashed and the money misappropriated, the loss was already incurred, as in the case of the Aschenbach mortgage. Nothing that the defendant could do would save the complainant from the loss. If there had been proof that by prompt action the money could have been saved, the case would be different; the failure to take prompt action might be negligence of the defendant intervening between Crocker's act and the final loss to complainant. In that event the failure to act promptly might well be the proximate cause; but, in the absence of such evidence, the proximate cause is the rascality of the complainant's own solicitor.

The decree must be reversed, and the record remitted, in order that there may be a decree dismissing the bill. The defendant is entitled to costs in both courts.

compel the issue of stock of the par value of $3,600 or to pay the notes evidencing the loan with interest. Affirming judgment for the plaintiff the court held that the secretary was guilty of gross negligence and that his negligence was the negligence of the association; that it was chargeable with the notice that it would have obtained but for such negligence. It was contended by plaintiff that the association had actual notice by reason of S being a director in the corporation. But the court held, that notice to a director, where acting solely in his own private interest, is not notice to the corporation of which said director is an officer. Allmon v. Salem Building & Loan Ass'n, 275 Ill. 336, 114 N. E. 170 (1916).

F. A. D.

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SWIFT & CO. v. INDUSTRIAL COMMISSION et al.

[Supreme Court of Illinois, April 15, 1919.]

288 Ill. 132, 123 N. E. 267.

Rehearing denied June 5, 1919.

1. **Workmen's compensation—Illinois act—Finding of fact by industrial commission—Conclusiveness on Supreme Court.**
Where there is competent evidence before the industrial commission fairly tending to prove a fact, the finding of such fact by the commission precludes its review by the Supreme Court.

2. **Workmen's compensation—Illinois act—Notice of accident—Compliance with act.**
Where, within 30 days after the accident, an injured employee tells a foreman of his employer of his injury, section 24 of the Illinois Workmen's Compensation Act [Call. 1916 Stat., par. 5475(24)] is complied with.

3. **Workmen's compensation—Illinois act—Death of beneficiary—Construction of act.**
The proviso in section 21 of the Illinois Workmen's Compensation Act [Call. 1916 Stat., par. 5475(21)] concerning the death of a beneficiary receiving compensation provided for in section 7, etc., applies to those cases where such beneficiary dies leaving surviving a parent, sister or brother of the deceased employee who was at the time of his death dependent upon the deceased employee for support and who was receiving from such beneficiary a contribution towards support.

4. **Workmen's compensation—Illinois act—Proportionate shares of beneficiaries—Determination by industrial commission.**
Paragraphs (a) and (f) of section 7 of the Illinois Workmen's Compensation Act [Call. 1916 Stat., par. 5475(7)] do not provide for determination by the industrial commission of the proportionate share which each beneficiary

CASE NOTE.

Apportionment of awards under compensation acts.

I. Widow and children, 546-550.
A. In general, 546-547.
B. Necessity of apportionment, 547-548.
C. Exclusion of widow, 548.
D. Division per capita, 548-549.
E. Procedure on petition for lump sum award, 549-550.
II. Widow, children and children by former marriage, 550-551.
III. Children, 552.
IV. Parents, 552-554.
A. Necessity of division, 552-553.
B. Propriety of division, 553.
C. Propriety of award to one alone, 553-554.
V. Parents, brothers and sisters, 554-555.
VI. Allowance to attorney, 555-556.
VII. What law governs, 556-558.

Cross-references. Lump sum awards under compensation acts see 19 N. C. C. A. 441-459, 14 N. C. C. A. 346-354.

I. Widow and children.

A. In general.

In Zoladtz v. Detroit Auto Specialty Co., 206 Mich. 349, 172 N. W. 549 (1919), an employee received injuries resulting in his death. The industrial accident board awarded compensation of $7.79 a week for 300

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is entitled to receive where the beneficiaries are all of the class specified in paragraph (a) of such section although the commission must, in order to determine the total amount of compensation, determine who is entitled to receive the same.

5. **Workmen's compensation—Illinois act—Compensation for death—Application of provisions regarding reduction on death of beneficiary.**

By paragraph (a) of section 7 of the Illinois Workmen's Compensation Act [Call. 1916 Stat., par. 5475(7)], relating to the amount of compensation which shall be paid for death where the employee leaves a widow, child or children, the employer becomes liable, at all events, to pay a sum equal to four times the average earnings of the employee within the limitations there prescribed as to amount, and the legislature did not intend that the provisions of section 21 of the Act [Call. 1916 Stat., par. 5475(21)], regarding reduction of compensation in the event of the death of a beneficiary, should apply to cases enumerated in such paragraph.

6. **Workmen's compensation—Illinois act—Award for injuries resulting in death—Validity—Failure to determine shares of beneficiaries.**

On a claim for compensation under the Illinois Workmen's Compensation Act [Call. 1916 Stat., par. 5475(1) et seq.] for fatal injuries to an employee who was survived by a widow and a minor child, held that the Industrial Commission did not err in making the award to the deceased's administratrix who was also his widow without determining the amount to which each beneficiary was entitled.

7. **Workmen's compensation—Illinois act—Award for medical services—Propriety.**

On a claim for compensation under the Illinois Workmen's Compensation Act [Call. 1916 Stat., par. 5475(1) et seq.], held that an award for medical services was improper since the employee had elected to secure his own physician and, under section 8 of the Act [Call. 1916 Stat., par. 5475(8)], had elected to do so at his own expense.

Writ of error to review a judgment affirming an award by the industrial commission for injuries resulting in death. Affirmed.

weeks and found that decedent left a widow, and four children aged 12 years, 7 years, 4 years, and 17 months respectively and that the children were as dependent as the mother. Compensation was ordered to be paid to the mother, but, should she die before all the award was paid, the unpaid balance was to be paid in equal shares to any of the children then surviving. This award was held proper and was affirmed.

B. Necessity of apportionment.

Deceased, while engaged in unloading barrels of meat, was struck and knocked down by one, receiving an injury on the leg. An abscess developed which was opened and drained and deceased was better for a time but osteomyelitis developed, necessitating an operation on the bone. Later an interne at the hospital permitted him to get out of bed, when he fell and broke his leg where the bone had been weakened, after which another operation was performed and he died in a few hours from osteomyelitis, lowered resistance from long illness, hemorrhage and shock. A wife and two children survived, an administrator was appointed and qualified and filed an application for compensation, and an award made of $5.10 a week for 416 weeks. It was held under paragraph (f) of section 7 of the compensation act, which provided: "The distribution by the personal representative of the compensation paid to him by the em-

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For plaintiff in error—T. M. Coen.

For defendant in error—Charles W. Lamborn.

MR. JUSTICE STONE delivered the opinion of the court:

The circuit court of Cook county affirmed the award of the Industrial Commission in favor of the defendant in error, Beatrice Kucinski, administratrix of the estate of Tony Kucinski, deceased, for injuries received by him while in the employ of the plaintiff in error and from which it is claimed he subsequently died.

Tony Kucinski was at the time of his death twenty-eight years of age, and for a number of years, with short intervals of absence, was in the employ of the plaintiff in error. His last employment was for about one year. It appears from the evidence that the alleged accident occurred on or about September 10, 1915. While the deceased was pushing a truck loaded with boxes and cases he slipped and fell and some of the cases fell upon him, striking him in the region of the back and hip. It appears that he left the employment of the plaintiff in error about four weeks after the injury. For a time after that he was able to be about and walk with the aid of a cane and had some medical treatment. On December 27 following he was taken to the Michael Reese Hospital, where upon examination his hip was found to be infected with incipient tuberculosis and an operation was performed for the removal of an abscess. On February 24, 1916, a more advanced tubercular hip condition was found. Thereafter it

ployer shall be made pursuant to the order of the court appointing him," that the industrial commission was not required to find and declare the proportion of the award each of the beneficiaries should receive. G. H. Hammond Co. v. Industrial Commission, 288 Ill. 262, 123 N. E. 384 (1919).

C. Exclusion of widow.

For the authority of a compensation commission to apportion an award between decedent's two minor children to the exclusion of the widow, under a statute providing that if there be more than one person wholly dependent upon deceased the death benefit shall be divided equally among them "unless otherwise ordered by the commission," see Perry v. Industrial Acc. Commission, 176 Cal. 706, 18 N. C. C. A. n224, 169 Pac. 353 (1917).

D. Division per capita.

In Texas Employers' Ins. Ass'n v. Boudreaux, — Tex. Civ. App. —, 213 S. W. 674 (1919) an award of compensation, amounting to $2,297.85, net, was made in a lump sum to the widow and two minor children, one-half to the widow and one-half to the children. On appeal by the insurance association it was contended that the compensation should be shared by the beneficiaries per capita. The compensation act provides for the distribution of compensation according to

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was discovered that his lungs were tubercular. About May of the same year he was taken to the Cook County Hospital, and died the following August of pulmonary tuberculosis. Application for the adjustment of his claim was filed February 25, 1916. The testimony of deceased was taken in the Cook County Hospital on the 11th day of May, 1916. Beatrice Kucinski, his widow, was appointed administratrix of his estate and appears as defendant in error here.

It appears from the evidence that prior to the injury deceased had enjoyed good health; that he had never had any trouble with his hip or leg and had never limped or suffered from rheumatism. The testimony of attending physicians tends to show that the appearance of tubercular infection at the hip was caused by the blow received by the deceased in the accident in question and that the infection later spread to his lungs, causing death. It does not appear to be urged by the plaintiff in error that the accident was not the cause of death.

The commission found as a fact that both the deceased and the respondent were working under and subject to the Workmen's Compensation Act of Illinois; that the deceased did on the 10th day of September sustain an accidental injury which arose out of and in the course of the employment; that the respondent had notice of the accident and that claim was made within the time prescribed by law; that the deceased died as a result of the accidental injury; that respondent is liable for hospital and medical services to the amount of $150, in addition to compensation of $6.50 per week for a period

the laws of descent and distribution. The statutes as to descent and distribution provide for descent and distribution of separate property and also for descent and distribution of community property. The court held that the act clearly indicated that the law as to community property should apply where the rights of husband and wife are involved and that, in other cases, the law as to separate property should apply and therefore the apportionment was properly made.

E. Procedure on petition for lump sum award.

In Lovasz v. Carnegie Steel Co., — Pa. —, 109 Atl. 601 (1920), in which the court decided that payments under an award to a widow and minor children could not be commuted to a lump sum payment without the joinder of a guardian for the children acting under the authority of the court, though not called upon to decide the question of apportionment of an award as between a widow and minor children said that, while compensation payable at stated intervals is given to the widow, that does not vest in her the absolute right to squander the money and deprive the children of the support intended by law, as the state, acting through one of its designated agencies, will, when called upon, see that the fund is properly applied and that, though no guide is given by the act as to the relative per cent the children's inter-

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of 416 weeks. The circuit court affirmed the award after striking from the same the sum of $150 awarded for medical services.

It is contended by the plaintiff in error that no notice was given of the alleged accident within thirty days thereafter, as required by the compensation act; that since the deceased is survived by a widow and a minor child it is error to award compensation to the administratrix of the estate of the deceased, such right to compensation being an independent right vested in the dependents of the deceased; that the commission having held compensation was due to the representative of the estate, it was error to refuse to determine the relative interests of the surviving dependents in such and to apportion the same between the dependents upon demand and request of plaintiff in error on the hearing before the Industrial Commission. Cross-errors are assigned by the defendant in error averring that the court erred in striking from the award of the Industrial Commission the sum of $150 for medical services.

Concerning the contention of plaintiff in error that no notice of the injury was given, as required by section 24 of the Workmen's Compensation Act, the record shows that the deceased testified concerning the manner of his injury, and that immediately after the injury he told Joe Lukidc, a foreman of plaintiff in error, that he had been injured and how it happened; that he was sent to the company doctor, who examined his hip, applied medicine of some sort and told him that he would be all right by the next day; that he returned to work but that the pain increased for three or four weeks, at the

est will represent, it certainly is some part of it and surely not less than the difference between the amount the widow would receive without children and with children and that, wherever the act is silent with respect to the adjustment of any particular claim or interest in a fund allowed by it, or the orderly administration of the fund to preserve such interest, the law, as it previously existed will step in and fill the gap which otherwise might occur.

II. Widow, children and children by former marriage.

Decedent, who received injuries arising out of and in the course of his employment resulting in his death, left surviving a widow and one child by the marriage. There also was a son of deceased by a former marriage not living at home, and a daughter of the widow by a former marriage, who lived with the employee and her mother at the time of his death, all of the children being under 18 years of age, and the question arose as to who were entitled, as dependents, to share in the payment due on account of the death of the employee. The statute, designating dependents, which was applicable, provided: "A child or children under the age of 18 years * * * upon the parent with whom he is or they are living at the time of the death of such parent, there being no sur-

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end of which time he told Lukidc that his hip hurt him so much that unless he could get easier work he would have to quit, and that Lukidc told him there was no other job for him, and that he should go home and stay there until he was ready to come back. Section 24 of the Workmen's Compensation Act provides, among other things, that notice of the injury shall be given within thirty days, with certain exceptions, and further provides "that the failure on the part of any person entitled to such compensation to give such notice shall not relieve the employer from his liability for such compensation, when the facts and circumstances of such accident are known to such employer, his agent or vice-principal in the enterprise." The commission found that notice of the injury was, in fact, given as required by statute. There is evidence in the record tending to prove that deceased notified Lukidc, who the deceased testified was plaintiff in error's foreman, of the injury shortly after its occurrence. While it is earnestly urged that Lukidc was not a foreman of the plaintiff in error, it is not the province of this court to weigh the testimony on that point. As has been repeatedly held by this court, where there is competent evidence before the commission fairly tending to prove a fact, the finding of that fact by the commission precludes its review here. (Smith-Lohr Coal Co. v. Industrial Com., 286 Ill. 34; Big Muddy Coal Co. v. Industrial Board, 279 id. 235; Albaugh-Dover Co. v. Industrial Board, 278 id. 179.) As the foreman was the agent of the plaintiff in error, it follows that section 24, regarding notice, has

viving dependent parent: Provided, that in the event of the death of an employee who has at the time of his death a living child or children by a former wife or husband, under the age of 18 years, * * * said child or children shall be conclusively presumed to be wholly dependent for support upon such deceased employee, and the death benefit shall be divided between the surviving wife or husband and all the children of the deceased employee in equal shares, the surviving wife or husband taking the same share as a child. The total sum due the surviving wife or husband and her or his own children shall be paid directly to the wife or husband for her or his own use and for the benefit of her or his own children, and the sums due to the children by the former wife or husband of the deceased employee shall be paid to their guardians or legal representatives for the benefit of such children." The court held, that the widow, the child of the marriage, and the child of deceased by a former marriage were entitled to share in the compensation, the shares of the widow and the child of the marriage to be paid to the widow and the share of the son by a former marriage to be paid to his guardian. The daughter of the widow by a former marriage, not being a child of deceased, was held not entitled to share under the terms of the statute although she was a member of the employee's family at the time of his death. In re Holmberg, 231 Mass. 144, 120 N. E. 353 (1918).

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been complied with. Wabash Railway Co. v. Industrial Com., 286 Ill. 194; Parker-Washington Co. v. Industrial Board, 274 id. 498.

Plaintiff in error's second contention is that the court erred in affirming an award of compensation to the administratrix while the evidence shows that the widow and a child survived; that while compensation for disability prior to death is payable to the administrator, compensation on account of death is payable to the dependents; that it was not only the duty of the commission to award the compensation to the dependents, but it was incumbent upon it to apportion the compensation between the widow and child.

Section 7 of the Compensation Act, as amended in 1915, provides as follows: "The amount of compensation which shall be paid for an injury to the employee resulting in death shall be: (a) If the employee leaves any widow, child or children whom he was under legal obligation to support at the time of his injury, a sum equal to four times the average annual earnings of the employee, but not less in any event than $1,650 and not more in any event than $3,500. Any compensation payments other than necessary medical, surgical or hospital fees or services shall be deducted in ascertaining the amount payable on death."

Paragraph (f) of said section 7 provides as follows: "The compensation to be paid for injury which results in death, as provided in this section, shall be paid at the option of the employer either to the personal representative of the deceased employee or to his beneficiaries, and shall be distributed to the heirs who formed the basis for

III. Children.

An employee, 72 years old, died as a result of drinking muriatic acid from a bottle left by tinners, mistaking it for a bottle of water he kept in about the same place for his own use. Compensation was awarded and the insurer alleged there was error in ordering it to pay to the two surviving partially dependent daughters equal sums, claiming that, under the statute which provides "if there is no one wholly dependent and more than one person partly dependent, the death benefit shall be divided among them according to the relative extent of their dependency," there must be evidence that certain amounts were contributed to each daughter. The court held that the evidence was ample to support the finding as to the partial dependency of such daughters upon the sum of money which was contributed each week to the family fund for the support of the family, and the decree was affirmed. In re Osterbrink, 229 Mass. 407, 118 N. E 657 (1918).

IV. Parents.

A. Necessity of division.

In re Pagnoni, 230 Mass. 9, 118 N. E. 948 (1918) was a case in which the committee of arbitration found that both parents of deceased were partially dependent on the deceased employee and an award of $2.56 per week for 500 weeks was made to

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determining the amount of compensation to be paid by the employer, the distributees' share to be in the proportion of their respective dependency at the time of the injury on the earnings of the deceased: Provided, that, in the judgment of the court appointing the personal representative, a child's distributive share may be paid to the parent for the support of the child. The payment of compensation by the employer to the personal representative of the deceased employee shall relieve him of all obligations as to the distribution of such compensation so paid. The distribution by the personal representative of the compensation paid to him by the employer shall be made pursuant to the order of the court appointing him."

In support of his contention that the Industrial Commission should apportion the amounts due to the several beneficiaries, counsel for plaintiff in error cites Smith-Lohr Coal Co. v. Industrial Com., supra. The question decided in that case arose by reason of a contest between the widow and the parents of the deceased as to who was entitled to the compensation, and this court in that case held: "The statute as to distribution of the amount paid by the employer to the personal representative of the deceased applies only in cases where the employer voluntarily pays the compensation to the personal representative of the deceased without a hearing and determination before an arbitrator or the Industrial Commission. If the compensation is fixed by the Industrial Commission it is required to determine who is entitled to the compensation before it can determine the amount. * * * The fact that the claimants were the persons described in

them jointly. It was held that this award was not in compliance with the statute which provided that: "If there is no one wholly dependent and more than one person partly dependent, the death benefit shall be divided among them according to the relative extent of their dependency" and that if the award was to be made to both parents, the relative extent of their dependency, individually, was to have been found. The court pointed out that both claimants were willing to have the entire amount awarded to the father who was the head of the family and to rely upon having the case reopened for further hearing if the father should die during the period of compensation, and apparently it approved of that method of avoiding the difficulty of determining the relative extent of dependency.

B. Propriety of division.

As to the propriety of an equal division of an award between the father and mother of deceased under the New York act prior to the amendment of 1916, see Moran v. Rodgers & Hagerty, Inc., 180 N. Y. App. Div. 821, 16 N. C. C. A. n188, 168 N. Y. Supp. 410 (1917).

C. Propriety of award to one alone.

As to the validity of an award, made alone to the father of deceased on an application in the name of both the father and mother, without a con-

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paragraphs (a) and (b), under which paragraphs the amount of the compensation provided is the same, could not operate to relieve the Industrial Commission from the duty of determining the person or persons who were entitled to the compensation. We do not construe the statute in such cases as this to leave it to the probate court to determine who is entitled to the award made by the Industrial Commission." In the case at bar there is no contest as to who shall receive the benefit of the award, and the rule laid down in the Smith-Lohr Coal Co. case on that point has no application here.

It is also contended that in view of the proviso in section 21 of the Compensation Act, providing for the reduction of compensation in the event of the death of the beneficiary before the completion of the compensation payments, it is necessary to determine what the relative interests of the widow and child are in the compensation, so that, in the event of the death of either, the payments of compensation, so far as the deceased beneficiary is concerned, can be determined and the employer not subject to a judgment and execution for the entire amount. Section 21, as amended in 1915, provides in this regard as follows: "Any right to receive compensation hereunder shall be extinguished by the death of the person or persons entitled thereto, subject to the provisions of this act relative to compensation for death received in the course of employment: Provided, that upon the death of a beneficiary, who is receiving compensation provided for in section 7, leaving surviving a parent, sister or brother of the deceased employee, at a time of his death dependent upon him for

dition that the mother file a waiver, see Buhse v. Whitehead & Kales Iron Works, 194 Mich. 413, 16 N. C. C. A. n189, 160 N. W. 557 (1916).

V. Parents, brothers and sisters.

Deceased was killed by a machine which fell upon him while he was assisting in loading it on a wagon. He was 16 years old at the time of his death and in compensation proceedings the arbitrator found that deceased left surviving him his father, mother, brother and sister; that the father was not able to earn sufficient wages to support himself and family; that the sister was a minor and the brother in ill health; that the entire earnings of deceased were paid to the mother to be applied to the necessary support and living expenses of the entire family; that the brother worked a portion of the time and likewise turned over his earnings to the mother; that the mother had no money in the bank; and that substantially all of the earnings of deceased were expended in the support of the family along with other moneys given to the mother by the father and brother. An award was allowed to the father as administrator. The commission in allowing the award did not determine which of the relatives were dependent upon deceased. The court held that, while there was no contest between the respective relatives as to the dependents entitled to payment of the award, never-

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support, who were receiving from such beneficiary a contribution to support, then that proportion of the compensation of the beneficiary which would have been paid but for the death of the beneficiary, but in no event exceeding said unpaid compensation, which the contribution of the beneficiary to the dependent's support within one year prior to the death of the beneficiary bears to the compensation of the beneficiary within that year, shall be continued for the benefit of such dependents, notwithstanding the death of the beneficiary."

The proviso in section 21 applies to those cases where the beneficiary receiving compensation provided for in section 7 dies leaving surviving a parent, sister or brother of the deceased employee who was at the time of his death dependent upon the said deceased employee for support and who was receiving from such beneficiary a contribution towards support. In this case the only beneficiaries are the widow and a child, whose compensation is payable under paragraph (a) of section 7. The death of either of these beneficiaries would not leave surviving "a parent, sister or brother of the deceased employee," hence it follows that the proviso in section 21 has no application to compensation awarded under paragraph (a) of section 7. As we understand paragraphs (a) and (f) of section 7, they do not provide for determination by the Industrial Commission of the proportionate share which each beneficiary is entitled to receive where the beneficiaries are all of the class specified in paragraph (a) of said section, although, as was held in the Smith-Lohr Coal Co. case, the commission must, in order to determine the total amount of com-

theless when there was no voluntary payment on the part of the employer and the commission must determine the compensation it is the duty of the commission to determine the person or persons entitled to the compensation. The judgment was reversed and remanded with directions to the circuit court to remand the same to the industrial commission for further proceedings consistent with these views. Paul v. Industrial Commission, 288 Ill. 532, 18 N. C. C. A. 292, 123 N. E. 541 (1919).

VI. Allowance to attorney.

Section 29(b) of the California workmen's compensation act authorizes the commission to "fix and determine and allow as a lien against any amount to be paid as compensation: (1) A reasonable attorney's fee for legal services pertaining to any claim for compensation." An employer against whom an award of $3,750.30 was made, to be paid $25 to the attorney as a reasonable attorney's fee and the balance to the widow in specified instalments, claimed that the act did not authorize the allowance of a sum of money to be paid directly to the attorney. The court said it was difficult to see how the employer was injured by the form of the order since the amount of the attorney's fee was to be deducted from the award and held that the order was in compliance with the intention of the act. The award

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pensation, determine who is entitled to receive the same. That case does not, however, hold that it is incumbent upon the commission to determine how much or what proportion of the compensation every member of the class may receive. As was said by this court in the case of Wangler Boiler and Sheet Metal Works Co. v. Industrial Com. (ante, p. 118) [287 Ill. 118]: "Compensation under the act in question is analogous to and is to take the place of damages at common law and under the statute. While the right to compensation is not a subject of bequest of the beneficiary but continues in the dependents of the beneficiary only in the manner provided by said act, yet such right to compensation, when determined according to law, is no less a vested right and one that can be affected only by the act of the legislature that gave it. (Hansen v. Brann & Stewart Co., 90 N. J. L. 444.) The intention of the legislature to so treat that right is shown by section 9 of the act, which, as we have seen, provides that where a lump-sum settlement is awarded by the Industrial Board in case of an injury resulting in death there is no right of rejection either by the employer or beneficiary. The intention of the legislature that such right shall be a vested right is further shown by paragraph (g) of section 19 of the act, which provides for judgment in the circuit court on an award where there is a refusal or failure to pay the compensation, such judgment being treated as similar to an execution.—Friedman Manf. Co. v. Industrial Com., 284 Ill. 554." By paragraph (a) of section 7 the employer becomes liable, at all events, to pay a sum equal to four times the average earnings of

was affirmed. North Pac. S. S. Co. v. Industrial Acc. Commission of California, 174 Cal. 500, 163 Pac. 910 (1917).

VII. What law governs.

The original Workmen's Compensation Act of Texas omitted to expressly designate the beneficiaries entitled to receive the compensation but merely declared that it should be paid to "the legal beneficiary" of the deceased employee. "Provided, that the compensation herein provided for shall be distributed according to the law providing for the distribution of other property of deceased," and the question arose as to whether the beneficiaries should be determined by the law of descent and distribution or the law governing the recovery of damages for negligent or wrongful death. The court held that the proviso quoted left no doubt that the law regarding descent and distribution was intended to apply, not the death act. It was further urged that in all events the proviso meant that the compensation should be apportioned according to the law of descent and distribution but that the beneficiaries among whom it was to be allotted were to be ascertained from the death injury statute. It was held, however, that there was nothing in the act to warrant such an interpretation and that the distribution should be in all respects according to the law of descent and distribution.

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the employee, within the limitations there prescribed as to amount, and as we view the provisions of section 21 of the act the legislature did not intend that its provisions regarding reduction of compensation should apply to cases enumerated in said paragraph. The commission therefore did not err in making the award without determining the amount to which each beneficiary is entitled.

It is urged by cross-errors assigned by defendant in error that the circuit court erred in striking from the award the sum of $150 for medical services. There is no evidence as to what medical expenses were incurred by the deceased prior to February 24, 1916. The award of the Industrial Commission relative to the amount for medical services is based upon the testimony of Dr. Mueller for his services between the 24th day of February and the first day of April following, in the year 1916. The services were not rendered within eight weeks of the date of the alleged accident, to-wit, September 10, 1915, or within eight weeks of the first day of disability. The deceased was evidently under treatment prior to February 24. The services of Dr. Mueller were rendered at the request of the deceased. Section 8a of the statute in question, relative to medical and hospital services in case of injury not resulting in death, as amended in 1915, is as follows: "The employer shall provide necessary first aid, medical, surgical and hospital services; also medical, surgical and hospital services for a period not longer than eight weeks, not to exceed, however, the amount of $200. The employee may elect to secure his own physician, surgeon or hospital services at his own expense." There

Vaughn v. Southwestern Surety Ins. Co., — Tex. —, 206 S. W. 920 (1918).

An employee of a coal mining company died while at work in the mine, his alleged widow was appointed administratix and filed application for adjustment of claim with the industrial commission. The parents of deceased intervened, claiming they, instead of the widow, were entitled to an award. The arbitrator found that decedent died from natural causes and denied an award. The case was reviewed by the commission which set aside the decision and rendered an award in favor of the widow for $3,500, the circuit court confirmed the award and entered judgment thereon. On appeal the parents asked for a construction of the workmen's compensation act as to whether it requires the commission to determine who is entitled to the award or if that question should be left to be determined by the probate court when distribution is made of the award. The court held that the provision of paragraph (f) of section 7 of the act that "The distribution by the personal representative of the compensation paid to him by the employer shall be made pursuant to the order of the court appointing him," applies only in cases where the employer voluntarily pays compensation to the personal representative of a deceased employee without a hearing and determination before the commission and that, if the compensation is fixed by the commission, it is required to determine who is entitled to the

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is no evidence in the record tending to show that the deceased requested plaintiff in error to supply medical services, other than the letter of his attorney on February 24, 1916, to plaintiff in error, stating that he assumed that plaintiff in error would assume all obligations of the Workmen's Compensation act. Plaintiff in error maintains a staff of physicians. The testimony of deceased showed that he was familiar with that fact, yet he chose other medical aid in the treatment he received prior to February 24 and subsequent to the day of the injury, when the evidence shows he went to the company doctor. His selection of Dr. Mueller on February 24 was an election to secure his own physician, and under section 8 he must be held to have elected to do so at his own expense. The circuit court did not err in striking the sum of $150 from said award.

No reversible error appearing in the record the judgment of the circuit court will be affirmed.

Judgment affirmed.

compensation before it can determine the amount, this rule being held to apply to the present case although the claimants were those described in classes (a) and (b) of section 7 under which paragraphs the compensation is the same. Smith-Lohr Coal Min. Co. v. Industrial Commission, 286 Ill. 34, 121 N. E. 231 (1918).

R. L. S.

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PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RY. CO. v. COLE.

[United States Circuit Court of Appeals, Sixth Circuit, July 8, 1919.]

— C. C. A. —, 260 Fed. 357.

Certiorari denied, 250 U. S. 671, 63 L. Ed. 1199, 40 Sup. Ct. 15.

1. **Appeal and error—Waiver of error in overruling motion for directed verdict by introducing evidence.**
The introduction of evidence by the defendant operates as a waiver of any error in the action of the trial court in overruling defendant's motion, made at the close of plaintiff's testimony, for a directed verdict in its favor.

2. **Federal Employers' Liability Act—Action for injuries to steel-car repairer—Sufficiency of evidence.**
In an action under the Federal Employers' Liability Act by a steel-car repairer for injuries to his eyes when, while using a pneumatic hammer under the direction of the leader of his gang to drive out a rivet which had stuck—the hammer being used without a safety spring and plaintiff's eyes being unprotected by goggles, a piece of steel was driven through one of his eyes as a result of the escape of the hammer's set and plunger, held that the testimony fairly and substantially tended to sustain the allegations of negligence

CASE NOTE.

Assumption of risk of injury through defective or inadequate tools, appliances or equipment, under Federal Employers' Liability Act.

I. Tools and like implements, 560-568.
A. Jack screw, 560-562.
B. Maul, 562-563.
1. Loose head, 562-563.
2. Defective head, 563.
C. Worn claw bar, 563-566.
D. Blunt pick, 566.
E. Sledge with crooked handle, 566-567.
F. Old spikes, 567-568.
G. Ladder, 568.

II. Machines and parts, 568-574.
A. Steam hammer, 568-569.
B. Emery wheel, 569-570.
C. Loose belt on coal chute carrier, 570-571.
D. Penstock on water tank, 571-572.
E. Scaffold rope, 572-573.
F. Cable of wrecking crane, 573-574.

III. Cars and parts, 574-581.
A. Door on one hanger, 574-575.
B. Brake, 575-577.
1. Wheel too small and too low, 575-576.
2. Ratchet out of order, 576-577.
3. Air brake defective, 577.
C. Handhold between car ends, 577-578.
D. Broken drawbar supports, 579.
E. Hand car, 579-581.
1. Rear wheels too low, 579-580.
2. Defect causing derailment, 580-581.

IV. Locomotive appliances, 581-584.
A. Water glass, 581-582.
B. Lubricator, 582-584.

V. Cap and rail on boat, 584-585.

Cross-references. Risks assumed under Federal Employers' Liability Act, see 8 N. C. C. A. 834-871; instructions as to assumption of risk in actions under Federal Employers' Liability Act, see 7 N. C. C. A. 685-700; assumption of risk of injury through violation of safety statutes, under Federal Employers' Liability Act, see 19 N. C. C. A. 391-406; assumption of

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on the part of defendant in the matter of the absence of the safety spring and the order of the leader of the gang.

3. **Federal Employers' Liability Act—Action for injuries to steel-car repairer—Question for jury.**

In an action under the Federal Employers' Liability Act by a steel-car repairer for injuries to his eyes when, while using a pneumatic hammer under the direction of the leader of his gang to drive out a rivet which had stuck—the hammer being used without a safety spring and plaintiff's eyes being unprotected by goggles, a piece of steel was driven through one of his eyes as a result of the escape of the hammer's set and plunger, held that, whatever might be the merit of a safety spring or the need of using one on the hammer, it was not error on the part of the trial judge to decline to hold as matter of law that defendant could both indulge its employees in a practice not to use such springs and insist that their failure to use them absolved it from all duty respecting their use.

4. **Trial—Motion by defendant for directed verdict—How evidence must be viewed.**

On defendant's motion for a directed verdict in its favor, made at the close of all of the evidence, it is the duty of the court to take that view of the evidence most favorable to the plaintiff.

5. **Federal Employers' Liability Act—Action for injuries to steel-car repairer—Question for jury.**

In an action under the Federal Employers' Liability Act by a steel-car repairer for injuries to his eyes when, while using a pneumatic hammer under

risk by employee ordered into dangerous place or to work with dangerous appliance, see 5 N. C. C. A. 568-588n.

I. Tools and like implements.

A. Jack screw.

The plaintiff was injured by the drawbar of a caboose falling upon him while he was engaged in its repair. The jackscrew which he was using in the work was defective and it was by reason of such that the accident happened. The trial court instructed the jury: "Under the Federal Employers' Liability Act, the common-law doctrine that employees assume the risks, dangers and hazards normally incident to the business, still obtains. It is pleaded by the defendant in this case, and the defendant has the burden of proof on that. The rule is that the employee assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks, and those due to the employer's negligence, he does not assume until made aware of them or until they become so obvious and immediately dangerous that an ordinarily prudent man would observe and appreciate them; in either or both of which cases he does assume them, if he continue in the employment, without objection, or without obtaining from the employer an assurance that the matter will be remedied." From a judgment on a verdict for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the question of assumption of risk was correctly and fairly submitted to the jury. King v. Norfolk-Southern R. Co., 176 N. C. 301, 97 S. E. 29 (1918).

While the plaintiff, an employee of the defendant railroad company was repairing the drawhead of a caboose in defendant's yard, he received painful and serious injuries by the drawhead falling on him, by reason of a defective jackscrew, which he was using in the work, alleged to have been negligently furnished to him by

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the direction of the leader of his gang to drive out a rivet which had stuck—the hammer being used without a safety spring and plaintiff's eyes being unprotected by goggles, a piece of steel was driven through one of his eyes as a result of the escape of the hammer's set and plunger, held that the question whether the gang leader was such a vice principal of defendant that his order to plaintiff was binding on the latter was one for the jury.

6. **Federal Employers' Liability Act—Action for injuries to steel-car repairer—Negligence of fellow-servant.**

In an action under the Federal Employers' Liability Act by a steel-car repairer for injuries to his eyes when, while using a pneumatic hammer under the direction of the leader of his gang to drive out a rivet which had stuck—the hammer being used without a safety spring and plaintiff's eyes being unprotected by goggles, a piece of steel was driven through one of his eyes as a result of the escape of the hammer's set and plunger, held that, although some of the evidence tended to show both that the gang leader was a fellow-servant of the plaintiff and that such leader's acts were of a careless and negligent character, directly causing plaintiff's injuries, under the rule of the Federal Employers' Liability Act, in spite of the opposed common-law rule, the negligence of the gang leader was to be treated as that of defendant and, prima facie at least, as entitling plaintiff to recover.

7. **Federal Employers' Liability Act—Action for injuries to steel-car repairer—Question for jury.**

In an action under the Federal Employers' Liability Act by a steel-car repairer for injuries to his eyes when, while using a pneumatic hammer under the direction of the leader of his gang to drive out a rivet which had stuck—

the defendant. Answering, defendant denied negligence and pleaded, among other defenses, that of assumption of risk. In appealing from a judgment for plaintiff for $1,500, defendant contended, among other things, that the charge given by the trial court on the issue of assumption of risk was erroneous. That charge was as follows: "'That issue bears upon the defendant's plea of assumption of risk. Under the Federal Employers' Liability Act, the common-law doctrine that employees assume the risks, dangers, and hazards normally incident to the business, still obtains. It is pleaded by the defendant in this case, and the defendant has the burden of proof on that. The rule is that the employee assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks, and those due to the employer's negligence, he does not assume until made aware of them or until they become so obvious and immediately dangerous that an ordinarily prudent man would observe and appreciate them; in either or both of which cases he does assume them, if he continue in the employment, without objection, or without obtaining from the employer an assurance that the matter will be remedied'—a definition that accords with the controlling decisions on the subject. Chesapeake & Ohio Railroad v. De Atley, 241 U. S. 311, 36 Sup. Ct. 564, 60 L. Ed. 1016; Gila Valley Railroad v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521." In affirming the judgment for plaintiff the court held that the charge objected to correctly and fairly instructed the jury as to the issue of assumption of risk, and that the evidence warranted the conclusion of the jury on that issue in favor of the plaintiff. King v. Norfolk-Southern R. Co., 176 N. C. 301, 97 S. E. 29 (1918).

The plaintiff, a section hand, was engaged at the time of the accident in using a jack in raising and lowering the track as part of certain repair work. The jack was old, worn and broken, and on several of the section

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the hammer being used without a safety spring and plaintiff's eyes being unprotected by goggles, a piece of steel was driven through one of his eyes as a result of the escape of the hammer's set and plunger, held that to what extent the goggles supplied by defendant would have afforded protection at the time of the accident was purely a matter of inference and was not to be stated as matter of law.

8. Federal Employers' Liability Act—Necessity of alleging contributory negligence.

Since contributory negligence does not bar an action under the Federal Employers' Liability Act but only mitigates damages, it is not necessary to the introduction of an issue in that behalf through the evidence either to allege such negligence or present an issue on that subject in the pleadings.

9. Federal Employers' Liability Act—Action for injuries to steel-car repairer—Duty to instruct jury on contributory negligence.

In an action under the Federal Employers' Liability Act by a steel-car repairer for injuries to his eyes when, while using a pneumatic hammer under the direction of the leader of his gang to drive out a rivet which had stuck—the hammer being used without a safety spring and plaintiff's eyes being unprotected by goggles, a piece of steel was driven through one of his eyes as a result of the escape of the hammer's set and plunger, held that, notwithstanding the lack of a formal issue of contributory negligence in the pleadings, it was the duty of the trial judge, such issue having been brought into the case through the evidence, to instruct the jury upon the subject of contributory negligence and to rule that the burden of proving such negligence was upon the defendant.

men protesting to the foreman, in the presence of the plaintiff, against the use of it, he had promised that a new one would be secured, if they continued to use the old one in the meantime. The "dog" used to trip and lower the jack was broken off, and the plaintiff while using his fingers for that purpose, had one of them entirely cut off by the jack falling upon it. From a verdict and judgment for the plaintiff in the sum of $900, the defendant appealed. The court, in affirming the judgment, held that the finding of the jury was open to the interpretation that the intention of the plaintiff in continuing in the service was to stay only until the new jack arrived, and not indefinitely, regardless of the defective condition, and the failure to provide a new one; and that as the plaintiff relied on the promise to remedy the defect causing the injury, he did not assume the risk arising therefrom even though he had knowledge of it. Missouri, K. & T. Ry. Co. v. Brown, — Tex. Civ. App. —, 180 S. W. 1117 (1915).

B. Maul.

1. Loose head.

The plaintiff, a member of a bridge gang, was struck on the head by the steel head of a maul, weighing about eight pounds, which flew off the handle, while being used by a fellow-servant close by. Shortly before the accident, the foreman had been notified of the unsafe condition of the maul. He refused to allow the same to be repaired, however, and soon after his refusal the accident in question occurred. The plaintiff had not used the maul and knew nothing of the loosened condition of the handle. From a verdict and judgment of $1,000 for the plaintiff, the defendant brought error contending a verdict should have been directed in its favor because of the assumption of risk of the plaintiff. The court in affirming the judgment held that while an employee assumed the ordinary risks incident to his employment, among which would be the risk of injury from a defect arising in a

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10. Federal Employers' Liability Act—Action for injuries to steel-car repairer—Burden of proof—Instructions—Harmless error.

In an action under the Federal Employers' Liability Act by a steel-car repairer for injuries to his eyes when, while using a pneumatic hammer under the direction of the leader of his gang to drive out a rivet which had stuck—the hammer being used without a safety spring and plaintiff's eyes being unprotected by goggles, a piece of steel was driven through one of his eyes as a result of the escape of the hammer's set and plunger, held that, if there was error in the ruling of the trial judge that the burden of proof rested on the defendant under its defense that plaintiff's negligence was "the sole, proximate cause" of his injuries—as such judge understood the position taken by defendant—such error was harmless in view of the instruction previously given that the burden was on the plaintiff to show defendant's negligence.

11. Federal Employers' Liability Act—Action for injuries to steel-car repairer—Assumption of risk—Question for jury.

In an action under the Federal Employers' Liability Act by a steel-car repairer for injuries to his eyes when, while using a pneumatic hammer under the direction of the leader of his gang to drive out a rivet which had stuck—the hammer being used without a safety spring and plaintiff's eyes being unprotected by goggles, a piece of steel was driven through one of his eyes as a result of the escape of the hammer's set and plunger, held that, under the testimony, it could not be said as matter of law that plaintiff had any such knowledge of the situation as to understand that danger to himself was involved in his compliance with the order of the gang leader, who had adjusted the hammer and was holding the exposed part of the set, to turn the air into the hammer.

simple tool unknown to the master, and arising after being placed in the hands of an employee, still if the defect was known to the master and was not repaired, the risk of injury therefrom would not be assumed by an employee knowing nothing of the defect. Ft. Smith & W. R. Co. v. Holcombe, — Okla. —, 158 Pac. 633 (1916).

2. Defective head.

The plaintiff, a section hand, was injured by a sliver of steel flying from a maul used by a fellow employee some 30 feet away, and penetrating his thigh. To a plea of assumed risk the plaintiff demurred, and the court sustained the demurrer. The plaintiff recovered judgment in the sum of $500, from which the defendant appealed. The court, in reversing the judgment, held that the defendant should have had the benefit of its plea of assumed risk. As the court said: "If, in fact * * * [plaintiff] did know of the defective condition of the spike maul which he and his coemployees used in driving spikes, and the danger of sprawls or slivers of steel flying therefrom, and, with this knowledge, he continued to work with or in dangerous proximity to the defective spike maul without obtaining from the defendant or its foreman an assurance that the defect would be remedied or the danger removed, then he did so at his own risk." The court also pointed out that the negligence of the defendant in furnishing worn and battered mauls did not amount to a violation of a statute enacted for the safety of employees, so as to deprive the defendant of the benefit of its plea of assumed risk. Louisville & N. R. Co. v. Patrick, 167 Ky. 118, 180 S. W. 55 (1915).

C. Worn claw bar.

Plaintiff, a laborer, was employed in the work of tearing down a bridge of the defendant, and was attempting to draw a bolt from a bridge cap with

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Action under the Federal Employers' Liability Act for injuries to a steel car repairer. Judgment for plaintiff affirmed.

For plaintiff in error—Thomas M. Kirby.

For defendant in error—A. E. Powell.

Ellsworth G. Cole recovered judgment against the railway company in the sum of $5,000 for personal injuries sustained through alleged negligence of the company, and reversal is sought.

At the time the injuries were received, October 6, 1916, plaintiff and two others, Roy Dugan and W. H. Cole (plaintiff's brother) were in the company's employ as repairers of steel cars. This group of persons and other similar groups then working for the company were called "gangs," and there is testimony substantially tending to show that one member of each gang was treated by all concerned, including the company, as the leader, the superior in authority, of the particular gang with which he was associated, and that Roy Dugan acted in this

a claw bar when the claws slipped from their hold on the bolt, causing plaintiff, who was bearing down on the free end, to lose his balance and fall to the ground, a distance of 12 feet. To recover damages for the injuries so sustained he sued under the Federal Employers' Liability Act. The petition alleged that the claw bar was caused to slip and plaintiff was caused to fall by reason of the claws on such bar having become battered and worn to such an extent that they would not take a firm hold on the bolt that was being drawn. It was charged that defendant was negligent in that it failed to furnish him with a reasonably safe tool with which to do the work. Defendant interposed the defenses of contributory negligence and assumed risk, but the jury returned a verdict for plaintiff for $5,000, on which judgment was entered. On appeal it appeared that the evidence substantially sustained the contentions of the plaintiff as to the character of the tool he was furnished. The questions therefore principally involved were, whether the furnishing of this claw bar, defective as alleged, was negligence on the part of the defendant, and whether the plaintiff assumed the risk of injury by using such claw bar. In affirming the judgment, the court said: "It is the unbroken rule in Missouri that the servant never assumes the risk, where such risk grows out of the negligence of the master. * * * Now in the instant case, if the furnishing of the worn and battered claw bar was negligence upon the part of the master, then under the Missouri rule, so long and so firmly fixed, there is no assumption of risk in the use of such tool. If the tool was so patently defective that an ordinarily careful and prudent man would not have used it, then we have the plaintiff doing what an ordinarily careful and prudent man would not have done, having in view his own self-protection, and such use would be negligence upon his part, which negligence contributed to his injury. In other words, we would have negligence upon the part of defendant, and con-

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capacity with respect to his gang, though, it is true, there was a general foreman of the steel car repair department, with an assistant foreman, also a gang foreman, who had charge of certain gangs working on steel cars. Thus the Dugan gang became an important object of inquiry at the trial.

When the accident occurred Dugan had been in the employ of the company some 11 months and the Cole brothers about 6 months. The work of this gang involved the use of an ordinary type of pneumatic hammer designed for riveting sheets of steel. Each of these hammers comprises a cylindrical barrel tapering toward the muzzle, with a grip handle and air connection at the rear end, and a plunger operating lengthwise through the greater portion of the barrel by means of compressed air. The hammers are provided with contrivances of different sizes, called "sets," each of which consists of a cylindrical head and shoulder, with a cylindrical extension fitting into the muzzle of the barrel and intended to be operated in connection with the plunger. The hammers were operated by one man, who, holding the hammer with the set pressed against the protruding end of the rivet

tributory negligence upon the part of the plaintiff. But under the federal law, this contributory negligence does not bar a recovery, but may be only shown to reduce the damages. If, therefore, the furnishing of this claw bar in its defective condition was negligence upon the part of the master, there is no assumption of risk in the case, and the most there is for the defendant is the alleged contributory negligence, and the demurrers to the evidence could not be sustained on that ground, under the federal law." Williams v. Pryor, 272 Mo. 613, 200 S. W. 53 (1917).

The plaintiff, an experienced trackman, was injured on two different occasions by splinters of steel flying into his eyes from a chisel and a claw bar which were being used in certain work. On the first occasion, a coemployee was holding a chisel while the plaintiff was striking it with a maul in the work of cutting a rail into two parts. On the second occasion, the plaintiff was holding a claw bar used to pull spikes from ties while a coemployee struck the heel of it. Both the chisel and the claw bar had been used until the heads were battered and worn, making it possible for splinters to fly therefrom. The plaintiff had been a trackman for the defendant at this point for 9 years, and had used the claw bar in question a number of times previously. As a result of the second accident, the plaintiff lost the sight of one eye. From a directed verdict for the defendant, the plaintiff appealed. The court, in affirming the judgment, held (1) that the tools in question were "simple tools," and not coming within the Federal Safety Appliance Acts, the defense of assumed risk was open to the employer; (2) that as the plaintiff knew of the condition which caused the injury he thereby assumed the risk as a matter of law; (3) that the fact that the work was done under the direction of a foreman did not prevent assumption of risk, as the tool used was a simple one, and the injury resulted from the use of it; (4) that the acts of the plaintiff in using

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and applying the air, completed the operation of forming another head on the rivet with the aid of a person located on the opposite side of the plates and pressing against the normal head of the rivet a device known as a "dolly bar."

The usual course pursued by the Dugan gang when riveting appears to have been as follows: Dugan heated the rivets and put them in place, W. H. Cole operated the hammer, and the plaintiff manipulated the dolly bar. In the afternoon of the accident, however, under the order of Dugan, the usual course of work mentioned was changed, so that the plaintiff operated the hammer and W. H. Cole handled the dolly bar. The particular work involved was patching a hopper car. The bottom of the car was wedge-shaped, and the sides of the wedge are called "hopper sheets"; it was one of these hopper sheets that was being repaired; the car seems to have been on trestles and about three feet above the floor. Dugan placed a heated rivet in one of the holes designed for it, and W. H. Cole pressed it through the two sheets with a dolly bar; this work was done from the outside of the hopper; the rivet stuck, and had to be driven out; whereupon

the defective tools in question did not amount to contributory negligence so as to only reduce the amount of the recovery, but constituted assumed risk, which barred any recovery at all. Donahue v. Louisville, H. & St. L. R. Co., 183 Ky. 608, 210 S. W. 491 (1919).

D. Blunt pick.

The plaintiff was, by direction of defendant's foreman, at the time of the accident, engaged in tamping rocks under the ties with a tamping pick. A fellow employee was doing similar work about six or eight feet away. The picks supplied by the defendant were, when new, square and flat, but by continued use had become rounded and wedge shaped. When the employee working near the plaintiff plunged the pick into the bed of crushed rock, one of the rocks flew up into the plaintiff's eye and caused the injury in suit. The defendant contended that as the plaintiff knew of the dangers incident to the use of the defective pick, he assumed the risk. The plaintiff, on the other hand, contended that the foreman promised to remedy the defect, and that he continued to work in reliance thereon. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held (1) that because of the complaint and promise to repair, the plaintiff did not, as a matter of law, assume the risk, such question being properly left to the jury; (2) that the tool in question was not to be regarded as a simple tool so as to bring the plaintiff within that rule which declared neither complaint nor assurance of safety would prevent the servant's assumption of risk of danger from a simple tool, the defective condition of which is known to him. Swaim v. Chicago, R. I. & P. Ry. Co., — Iowa —, 170 N. W. 296 (1919).

E. Sledge with crooked handle.

The plaintiff at the time of the accident was holding a chisel against a rivet head on one of the defendant's

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the plaintiff, from the inside of the hopper, attempted and failed to drive the rivet out with a drift pin (an ordinary steel punch) and hammer. It is said that the usual way of driving out such a rivet was through the use of a "handle drift" and a sledge; but the plaintiff testified that the portion of the car in which he was required to work was so narrow that there was "not room enough to swing the sledge to hit the hand drift." Dugan, reaching through an adjacent opening into the hopper, grasped in one of his hands, on which he was wearing a glove, a drift pin, and the exposed part of the set held in the hammer, placing the head of the drift pin against the head of the set and the end of the drift pin against the protruding end of the obstructed rivet, and then ordered plaintiff to turn the air into the hammer for the purpose of driving out the rivet. Plaintiff obeyed this order, with the result that the set was driven from Dugan's grasp, and, with the plunger, against the side of the car, so that one or the other rebounded, striking plaintiff under his left eye, and a small piece of steel was driven through this eye. The effect of

cars while a fellow employee struck the chisel with a sledge. A glancing blow from the sledge struck the chisel from the plaintiff's hand and hurled it against his head, severely injuring him. The plaintiff's complaint alleged that the injury was due to the negligence of a fellow employee, and that the sledge was defective, since its handle was bent and crooked, and was more likely to strike the chisel sideways. From a judgment sustaining a demurrer to the complaint, the plaintiff appealed. The court reversed the judgment, holding that a fellow employee's negligence was not one of the risks of the employment still assumed by the employer under the Federal Employers' Liability Act. Hovaneck v. Great Northern R. Co., 165 Wis. 511, 162 N. W. 927 (1917).

F. Old spikes.

The plaintiff, a section hand, was at the time of the accident engaged in driving spikes in new ties that were being substituted for old ones. The ties were exceptionally hard, and instead of new spikes being furnished with which the work might have been done more safely, the plaintiff was directed to use the old ones, which were known in many cases under such circumstances to rebound. The plaintiff objected to the use of such spikes, but the foreman abruptly ordered him to use them or give up his job. In following the order given, the old spike rebounded and struck the right leg of the plaintiff above the knee and shattered one of the bones. From a judgment sustaining a demurrer to the petition, plaintiff appealed. The court, in affirming the judgment, held that the plaintiff assumed the risk of proceeding with the work when he knew it was dangerous, and that the fact that he must either have given up his position or have done the work was immaterial upon the question of assumption of risk, since he had knowledge of its existence. "If the order was negligent," said the court, "and the servant knew of the peril of complying with it, or if he had equal means with his master of knowing of the peril, or by the exercise of ordi-

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the injuries was to destroy the left eye and to impair and threaten the sight of the other.

Dugan's gang was the only one at work in or about the repair shop during the afternoon of the injury. The general foreman of the car shop and his assistant, the foreman of the gangs of the car department, together with the gangs themselves, were given the privilege of attending a base ball game in the afternoon, and all availed themselves of the opportunity except the Dugan gang. Dugan testified: "We simply had the privilege of leaving if we wanted to, and we didn't exercise the privilege. * * * We had a job sheet the day of the accident; it was in my possession on the job. It was in my name; my name was at the head of the sheet. The other men's names were on the sheet. I supposed they put my name on the sheet first, because they wanted me to lead the gang. They told me to lead the gang, anyway." The plaintiff testified in respect of this occasion: "No foreman were [was] present except Dugan, foreman of our gang."

nary care might have known thereof, then he cannot recover for an injury received in complying with the order." Hightower v. Southern Ry. Co., 146 Ga. App. 279, L. R. A. 1917 C 481, 91 S. E. 52 (1916).

G. Ladder.

The deceased, an electrician, was engaged at the time of the accident in installing new safety devices, called protectors, which were designed to sustain the defendant's signal wires in the event of a break. These protectors were attached to the wires by two bolts and set over the insulators. In performing the work, the deceased worked on the metal arm of a latticed steel strut. A ladder had been hoisted and suspended from the lower arm between two wires, and the deceased was upon it. When ready to begin work, he signaled for one of the wires to be grounded by an appliance known as a ground stick. The deceased was shocked by contact with the outer wire before it was grounded. He was wearing linen or canvas gloves, though the defendant had furnished rubber gloves for the better protection of the linemen. The ladder upon which the deceased was standing when killed was a hook ladder about six or seven feet long with metal hooks and rungs of wood. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in reversing the judgment and granting a new trial, said: "Had there been evidence that the ladder was unsuitable, and that it was the proximate cause of the injury, its unfitness was obvious to the intestate, an experienced lineman, and he assumed the risk of using it. It was therefore reversible error to refuse so to charge on request." Horan v. New York, N. H. & H. R. Co., 171 N. Y. App. Div. 180, 157 N. Y. Supp. 185 (1916).

II. Machines and parts.

A. Steam hammer.

The plaintiff, employed by the defendant as a blacksmith's helper, was directed to do a certain piece of work with a steam trip hammer. While at-

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WARRINGTON, Circuit Judge (after stating the facts as above). In view of the assignments of error and the contentions presented in support of them, it is important to call attention to the issues made both upon the pleadings and at the trial below. In addition to general allegations of the petition describing the situation and the acts which led to the injuries, plaintiff in substance alleged "full care and caution" on his part, and that the injury was "due solely and proximately to the negligent acts and omissions of the defendant": (a) In supplying the pneumatic hammer without a safety spring, which spring would have prevented the set from being driven from the hammer; and (b) in attempting through foreman Dugan to drive out the obstructed rivet with the air hammer and a drift pin, and in giving the order in that behalf through Dugan, who knew that the order could not be safely obeyed, while plaintiff did not know this, or have equal means of knowledge with either defendant or its foreman giving the order. In its answer defendant admitted its corporate capacity, and operation of the railroad, that at the time in question plaintiff was in its employ and received certain injuries, but in-

tempting to place the material in a position to be struck, the hammer gave way, due to its defective condition, and falling unexpectedly, so injured his hands that one thumb had to be amputated and the other was badly smashed. It appeared that the plaintiff had complained on several occasions to the defendant's foreman concerning the defective condition of the hammer, and that the latter had promised that it would be repaired if he would continue with the work. From a verdict for $3,000 and a judgment on the same for $2,400, the defendant appealed, contending that if the plaintiff had used tongs to hold the material in place, as he had been instructed, the injury would not have occurred. The court, in affirming the judgment, held that even though the plaintiff knew of the defective condition of the hammer he did not assume the risk of such a condition, after a promise of repair had been made by the defendant, unless an ordinarily prudent person, situated as was the plaintiff, would not have assumed the risk. As to the issue presented by the plaintiff using his hands to hold the material in place, and thereby adopting an unsafe method of doing the work instead of pursuing the safe method of using tongs, the court held that such was a question of contributory negligence and not of assumed risk. "Assumed risk and contributory negligence," said the court, "are distinct defenses, the doctrine of the former being founded upon contract, the latter being solely a matter of conduct." Southern Pac. Co. v. De La Cruz, — Tex. Civ. App. —, 201 S. W. 428 (1918).

B. Emery wheel.

The plaintiff, who for 6 weeks previous to the accident had been working in the defendant's roundhouse and machine shop, was directed by his foreman to make certain repairs to an engine. In performing this work, it became necessary to grind down a certain pin on an emery wheel. While

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terposed a general denial as to every other allegation, and, "answering further," said that plaintiff's injuries were the direct and proximate result of risks which were open and obvious, and which were known to and appreciated by plaintiff, or in the exercise of ordinary care should have been known to and appreciated by him, and that "by reason of the premises the same were assumed." However, in the course of the trial, both in its cross-examination of one or more of plaintiff's witnesses and in presenting its own testimony, defendant sought to show contributory negligence of plaintiff.

At the close of plaintiff's testimony, and again at the close of all the testimony, defendant presented a motion to direct a verdict in its favor on the ground that there was not "sufficient proof of actionable negligence to entitle the case to go to the jury," and that, if there was "any proof of any negligent act upon the part of the defendant company, a clear case of assumption of risk as a matter of law is made upon the plaintiff's own testimony." Both motions were overruled, and it need not be said that defendant's introduction of

the plaintiff, prior to that time, had used the emery wheel, still he was not aware of the danger incident to the grinding of metals on them and the sparks which would fly from them. He was not informed of such danger by the defendant's foreman, and no eye protectors or "goggles" were furnished. While engaged in the work aforesaid, a small particle of steel was thrown off and penetrated his eye, with the result that it finally had to be entirely removed. The defendant pleaded contributory negligence and assumption of risk. The jury found for the plaintiff in the sum of $7,500 damages, but returned a verdict of only $5,000 because of his contributory negligence. From judgment entered thereon, the defendant appealed, contending that as the jury found that the plaintiff was guilty of contributory negligence, it necessarily followed that he assumed the risk. The court affirmed the judgment, holding that the defenses of contributory negligence and assumption of risk were entirely independent, and that the jury could find that one of the defenses was established and not the other. The court followed the distinction adopted in Thomas v. Quartermaine, L. R. 18 Q. B. Div. 697, where it was said: "But the doctrine of volenti non fit injuria [assumed risk] stands outside the defense of contributory negligence and is in no way limited by it. In individual instances the two ideas sometimes seem to cover the same ground, but carelessness is not the same thing as intelligent choice." Kuchenmeister v. Los Angeles & S. L. R. Co., — Utah —, 172 Pac. 725 (1918).

C. Loose belt on coal chute carrier.

The plaintiff's decedent worked around a coal chute of the defendant in which baskets of coal, each weighing from 80 to 100 pounds, were elevated by machinery somewhat extensive in size and complicated in character. At the time of the accident, the buckets had caught on some obstacle at the bottom of the shaft, and the deceased was attempting to remove it. In doing so, the buckets filled with coal ran backwards of

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evidence operated as a waiver of error, if there were any, in denying the motion when it was first presented.

We are convinced that the testimony fairly and substantially tends to sustain the allegations of negligence on the part of defendant. In the first place, the testimony shows without denial that the pneumatic hammer, commonly called the "Little David," was furnished by defendant for this work and without a safety spring, and that a proper safety spring attached to the hammer would have held the set as well as the plunger in place at the time the air was admitted into the hammer upon Dugan's order. While there is testimony tending to show that at some time, seemingly prior to plaintiff's employment, defendant caused orders to be given orally, possibly amounting to a rule, that employees operating the air hammers should use safety springs with them, yet these orders were not carried out. According to some of defendant's own testimony, the men fell "into the habit of refusing to use the safety spring," and the company acquiesced in this practice. The company seems to have contented itself with keeping safety springs on hand, but without furnishing any, except

their own weight and crushed decedent to death. A belt which connected the buckets with a motor furnished the only check to such backward movement, though a device could have been used which would have formed an effective and certain check. The belt, on the occasion of the accident, had slipped from the pulley. The deceased had been warned by the foreman at the time he started to work never to attempt to remove obstructions from the pit without making certain that the belt was on, but nevertheless he neglected to do so this particular time. It was shown, upon the trial of the case, that the deceased was thoroughly familiar with the machinery, and knew that the belt, which frequently came off, served as the only check to keep the buckets from running backwards. From a finding by the jury that the defendant was negligent in providing proper safety appliances, and that the deceased did not have reasonable opportunity to understand the danger to which he was exposed at this particular time, and from a judgment entered on the verdict for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that though the plaintiff had reasonable means of knowing the machinery and its condition, still the finding of the jury that he did not appreciate the danger of the situation at this particular time placed the matter within the rule that such appreciation must exist in order for assumption of risk to bar recovery. Brizendine v. Union Pac. R. Co., 96 Kan. 691, 153 Pac. 495 (1915).

D. Penstock on water tank.

The plaintiff's decedent, a locomotive fireman, fell from the tender of his engine and was killed while attempting to swing the arm of the penstock away from over the engine after the tank had been filled with water. The penstock stuck, and the deceased was compelled to exert additional pressure to move it. Thereupon it suddenly gave way and precipi-

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upon the request of an employee. In practice, however, application for a spring or its use was rarely ever made; in a word, it was open to the jury to find that, if the company ever did impose a rule requiring the use of these springs, it knew prior to and at the time of the accident that the rule was not observed—in truth, that it was ignored. This derives importance in view of the admitted fact that the air hammer plaintiff was operating at the time of his injury was not provided with a safety spring, and of the clear conflict in testimony as to whether he was even instructed as to the need or the use of the spring. Further, plaintiff testified:

"I did not use the safety spring * * * while working for the company. I did not know that there were any safety springs provided."

And Dugan testified:

"We were not using one [a safety spring] on the day of the accident, because the bosses of our gang did not demand us to use them. I never made a request for them."

Whatever, then, may be the merit of the safety spring or the need of using one on a pneumatic hammer, it cannot be that it was error

tated him headfirst to the ground. There was evidence that the defendant knew about the defective condition of the appliance in ample time to have remedied it before the accident. The deceased, on the other hand, had only recently been transferred to this division, and had made but four or five trips when the accident occurred. From a verdict directed for the defendant, and judgment thereon, the plaintiff appealed. The court reversed judgment and remanded the case for a new trial, holding (1) there was sufficient evidence of negligence to make the question proper to be submitted to the jury, and (2) that the plea of assumption of risk was affirmative in character, and did not need to be negatived by the plaintiff in order to make out a prima facie case for the jury. Kenyon v. Illinois Cent. R. Co., 173 Iowa 484, 155 N. W. 810 (1916).

E. Scaffold rope.

The plaintiff, a painter, was injured by the fall of the scaffold upon which he was working, due to the breaking of a three-quarter-inch rope which supported the scaffold to the top of the tank which was then being painted. Two other persons were on the scaffold with the plaintiff at the time of the accident. The plaintiff testified that he did not know of the defective condition of the rope, though there was evidence to the effect that he was a member of the group which heard their foreman instruct his men that as the line was old and worn not more than two men should be on it at any one time. The plaintiff had not assisted in the adjusting of the rope to the scaffold previous to the accident. From a judgment for the defendant, the plaintiff appealed. The court, in reversing the judgment and remanding the case, held that if the plaintiff knew of the unsafe condition of the scaffold and continued to work thereon, or should have had such knowledge, from the defect being so obvious that a person of ordinary intelligence, situated as

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in the trial judge to decline, as in effect he did in denying the second presentation of the motion to direct, to hold as matter of law that the company could both indulge its employees in a practice not to use such springs and insist that their failure to do so absolved the company from all duty respecting such use. Such a course of conduct in an employer is manifestly inconsistent with his responsibility to an employee, and in principle is opposed to well-settled rules of decision in that behalf. Heskett v. Pennsylvania Co., 245 Fed. 326, 330, 157 C. C. A. 518 (C. C. A. 6); Coal Co. v. Marcum, 257 Fed. 287, — C. C. A. —, decided by this court January 7, 1919.

In the next place, the use to which the air hammer was put without a safety spring accentuates, not alone the defendant's neglect of duty to plaintiff in supplying him with such a working tool, but also the character and degree of defendant's negligence in directing plaintiff to use the ill-equipped machine to drive out the obstructed rivet. Defendant itself presented testimony tending to show that Dugan's method already described, of driving out the rivet, was both unusual and dangerous; but it is observable that the danger so pointed out

he was, would have known of it, the plaintiff must be held to have assumed the risk. The court, however, in passing upon the evidence, held that it was a question for the jury whether the plaintiff had such knowledge of the defect in the rope. The court also held that a defective rope like that in question was not a defective appliance in violation of any statute enacted for the safety of employees such as would remove from the employer the right to plead assumption of risk. McFarland v. Chesapeake & O. R. Co., 177 Ky. 551, 197 S. W. 944 (1917).

F. Cable of wrecking crane.

The plaintiff, employed as engineer on a wrecker used in clearing away wrecks from the railroad lines, was at the time of the accident engaged in lifting a box car weighing about 49 tons, which had become derailed, back onto its own trucks standing upon the tracks. The work was being performed under the direction of the company's superintendent. The machinery of the wrecker allowed the boom and the cab in which the machinery was operated to swing at right angles to the flat car upon which the same were placed. While lifting the box car in question, the cable broke, with the result that the long boom dropped forward down across the box car upon that side, and the cab of the wrecker in which the plaintiff was stationed fell backwards to the ground on the opposite side. The plaintiff was thrown out of the cab and severely injured. The negligence alleged was the use of defective cables, permitting the work to be done with the metal casting in the floor of the flat car badly broken, failing to use "outriggers" as a protection against the heavy load, it being averred that if these had been used the accident would never have happened, and in allowing the wrecker and cables to be overloaded. It appeared that the plaintiff knew of the defective conditon of the cables and casting, but that the defendant had

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was a danger to Dugan rather than to the plaintiff, and this was because of Dugan's act in attempting to hold in contact the set, the drift pin, and the protruding rivet, end against end, for the purpose of utilizing the impact of the hammer when he ordered plaintiff to turn on the air. The fact that Dugan escaped, while plaintiff received injury from this act, cannot as matter of law be said to relieve defendant from the consequences of so conducting the work. In thus ascribing the work to defendant, we may again call attention to the testimony tending to show Dugan's immediate authority over his particular men and work, and his right of control; it can make no difference that there was testimony opposed to this; the test arose under defendant's second presentation of its motion to direct, and upon such a motion it was the duty of the court to take that view of the evidence most favorable to the plaintiff.

This presented the question whether Dugan was such a vice-principal of the company that his order to turn on the air was binding on plaintiff, and clearly such an issue of fact was one for the jury.

promised only a short time before to repair them, and had even made an inspection of the wrecker and compiled a list of the parts that were needed. It also appeared that it was dark at the time of the accident, and that the plaintiff, who was in the cab and acting under orders from the superintendent outside, did not know the weight that was being lifted and whether "outriggers" were necessary. From a verdict and judgment for the plaintiff in the sum of $8,000 damages, the defendant appealed. The court, in affirming the judgment, held that the question of assumption of risk was properly submitted to the jury. As the court pointed out in determining whether the plaintiff assumed the risk because the "outriggers" were not used, the question was not whether the engineer used ordinary care in ascertaining whether they were set, but whether he had actual knowledge of the necessity for using them, or under the circumstances should have known of it. Houston Belt & T. Ry. Co. v. Christian, — Tex. Civ. App. —, 209 S. W. 816 (1919).

III. Cars and parts.

A. Door on one hanger.

The plaintiff, a brakeman, was injured while attempting to replace a car door which he discovered hanging by one hanger or roller. The door, in falling upon him, struck the top of his head, and fractured the inner plate of his skull. The iron bar upon which the car door moved was bent, and the holes through which the bolts containing the hangers passed were enlarged so that they would not hold the bolts. It appeared that it was the duty of the plaintiff, when the train stopped, to examine the cars for defects, and so far as possible attempt to repair them. From a verdict and judgment for the plaintiff in the sum of $12,500, the defendant appealed. The court affirmed the judgment, saying: "He [the plaintiff] assumed the risk incident to replacing the door. He did not assume the risk consequent upon a defective condition of the car door, which he did not and could not see under the circumstances. It was in the nighttime. He had a

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E. I. Du Pont de Nemours & Co. v. Kelly, 252 Fed. 523, 524, 164 C. C. A. 439 (C. C. A. 4); Moss v. Gulf Compress Co., 202 Fed. 657, 663, 664, 121 C. C. A. 67 (C. C. A. 5). More than this: Although some of the evidence tends to show both that Dugan was a fellow-servant of the plaintiff and that Dugan's acts were of a careless and negligent character, directly causing the injury, yet under the rule of the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657-8665]), in spite of the opposed common-law rule, Dugan's negligence is to be treated as that of the defendant, and, prima facie at least, as entitling plaintiff to recover. Ches. & Ohio Ry. v. De Atley, 241 U. S. 310, 313, 36 Sup. Ct. 564, 60 L. Ed. 1016; Law v. Illinois Cent. R. Co., 208 Fed. 869, 870, 126 C. C. A. 27, L. R. A. 1915C, 17 (C. C. A. 6); Central R. Co. of New Jersey v. Young, 200 Fed. 359, 366, 118 C. C. A. 465, L. R. A. 1916E, 927 (C. C. A. 3). And here again an issue of fact was presented requiring submission to the jury. However, then, the showing of negligence on the part of defendant may be viewed, it is not open to defendant

brakeman's lantern. It did not give much light. The defects were high on the side of the car. The defective condition of rod and hangers was not discovered by the plaintiff until after he was injured. He did not assume the risk consequent upon these defects until after he had discovered the dilapidated condition of the car door." Smith v. St. Louis & S. F. R. Co., 95 Kan. 451, 148 Pac. 759 (1915).

B. Brake.

1. Wheel too small and too low.

The engine of the train on which the plaintiff was brakeman had been coupled to several box cars on a side-track with the intention of moving them to the main track and there attaching them to the train. The forward movement had been started, when the plaintiff went on top of the cars and attempted to release the brake of the rear car. The brake was tightly set, and the plaintiff, releasing it by grasping the brake wheel and kicking loose the retaining latch, was caught by the recoil of the brake and thrown from the top of the car, thus sustaining the injuries in suit. It appeared from the plaintiff's evidence that he knew, from the noise made by the brakes when the engine moved the cars, that the brakes were set; that he frequently found the brakes set so tight that he could not release them by himself, and under such circumstances called for help; that he thought he could release the brake himself in the case in question, and that he knew there would be a recoil when the brake was released. The negligence of the defendant, complained of, was that the brake wheel was too small, and not sufficiently high above the level of the car, and was too tightly set. From a judgment for the plaintiff, the defendant appealed. The court reversed judgment and remanded the case for a new trial, holding (1) that the provision of the state constitution requiring the submission of all questions of assumption of risk to the jury was inapplicable, since the present case was brought under the Federal Employers'

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to insist, as it does, that upon that question plaintiff should have been nonsuited.

2. In reaching the conclusion just stated we of course have in mind that the position taken by defendant in both the answer and the motion to direct was in effect that, despite any showing of actionable negligence on its part, plaintiff must fail, as a matter of law, because of his assumption of the risk involved in applying the air to the pneumatic hammer at the time he received his injuries. Before taking up this feature, however, we may consider the question of contributory negligence, which, as we have already stated, defendant seems practically to have introduced at the trial. Defendant, through its cross-examination of plaintiff, brought out testimony tending to show that it had provided him with goggles, that he had been accustomed to wear them, that cars were often "in a more or less rusty condition, and that the constant rapping of the hammer would jar those particles loose, and that they," as also "pieces from the rivets and what not," would "fly off," and yet that he was not wearing the

Liability Act and was to be governed solely by it; (2) that as a servant under such act assumes all ordinary risks known to him, or which in the exercise of ordinary care should have been known to him, except where the carrier has violated the provision of some statute enacted for the safety of its employees, the plaintiff must be considered, as a matter of law, as having assumed the risks causing his injuries. Chicago, R. I. & P. Ry. Co. v. Hessenflow, — Okla. —, 170 Pac. 1161 (1918).

2. Ratchet out of order.

The plaintiff, on the night of the accident, was assisting as switchman in the work of classifying cars in one of the defendant's switchyards. He was riding on a gondola freight car that had been kicked on to a track which was called a pocket track, and it was his duty to stop the car by setting the brake, and then to jump off. The brake was located on a platform on the rear of the car, about on a level with the floor of the car, and about 4 feet from the ground. The brake on the car was out of order in that the ratchet would not hold, and it was necessary for the plaintiff to keep hold of the tightening brake, and bring the car to a stop. He was, as a result, on the car longer than if the brake had been in order, but he had almost stopped the car and was ready to get off when he noticed another car, about 15 feet away, coming towards him. Fearing a collision, he walked across to the opposite side, and jumped off of the platform to the ground. In jumping off, he struck the ground "stiff legged," thereby sustaining a rupture. From verdict and judgment of $3,500 for the plaintiff, the defendant appealed. The court, in reversing the judgment, held that the plaintiff assumed the risk, which under the Federal Employers' Liability Act barred his right of recovery. As the court pointed out, the plaintiff's act in jumping was an ordinary and usual incident of his employment, the "stiff leggedness" of the jump not being caused by the impending collision, and there being nothing unusual in such a collision when cars were being switched. Wall

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goggles at the time of the accident; also through its cross-examination of Dugan defendant drew from him a statement that he had known plaintiff to use goggles, and that he was using them on the day, but not at the time of the accident. Defendant, moreover, introduced direct testimony tending to show that the men engaged in this character of work were all provided with goggles and requested to wear them, "to protect their eyes from flying pieces of steel or scale or anything that might fly in working with steel parts." We have seen that defendant also presented testimony to the effect that Dugan's method of driving out the rivet was unusual, and also that it was dangerous to him, because of the difficulty of holding the parts in place simply with the hand to receive the force of the hammer; and one of the obvious effects, if not a distinct purpose, of such proof of Dugan's act, was to emphasize plaintiff's need of goggles in turning on the air.

Without setting out further specific efforts of defendant to show plaintiff's conduct, it is clear enough from the testimony thus pointed

v. Elgin, J. & E. Ry. Co., 196 Ill. App. 429 (1915).

3. Air brake defective.

The plaintiff's decedent, a brakeman, was at the time of his accident engaged in the work of setting out several cars of ballast. The forward part of the train containing the cars of ballast had been separated from the rear section of the train which contained the merchandise. The deceased, while in the performance of his duty, was crushed to death between the two sections of the train, due to the engineer backing the forward part of the train without any signal or warning. The plaintiff's declaration alleged negligence on the part of the engineer and a defective air brake. From a verdict and judgment of $2,000, the defendant appealed. The court reversed and remanded the case, but held upon the question of assumption of risk that while the deceased assumed the ordinary risks of his occupation and those defects and risks which were known to him and could have been discovered with reasonable care, he nevertheless did not assume any risk created by the negligence of others or arising out of defects in cars or equipment. Warren v. Jackson, 204 Ill. App. 576 (1917).

C. Handhold between car ends.

The plaintiff was engaged at the time of the accident in dressing and preparing blocks of stone to be used in the construction of a wall which was being built to prevent the water of a certain creek from washing away the railroad track. When a stone had been prepared by him, a crane operated from a flat car running upon a temporary track would pick it up, carry it to the place where it was needed in the wall and then deposit it there. The crane had picked up a certain stone and was proceeding down the temporary track at the rate of about one mile an hour, when the plaintiff attempted to board the flat car upon which the crane was stationed. At the end of the car as it approached was a perpendicular brake rod, on the top of which was an ordi-

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out that its tendency was to charge plaintiff himself with fault; and in view of the apparent concurring effect of this with plaintiff's showing of defendant's negligence, we do not know of any term which so appropriately and accurately defines his claimed failure to use goggles as that of contributory negligence. It should be added that in rebuttal, after testifying that neither at the time of his employment nor at any time thereafter had the company's foreman of gangs instructed him to get goggles or to wear them continually, plaintiff explained that the work assigned him at the start was "to buck rivets," that is, to use the dolly bar; that when he commenced work one of his co-workers told him to obtain an order for goggles from the foreman of the gangs, and in this way he received a pair, but without any instructions at all. It would seem, from the description given of the goggles supplied by the company, that they were of heavy glass with the usual surrounding wire netting; but to what extent they would have afforded protection at the time of the injury

nary brake wheel, and the plaintiff, in attempting to get upon the car, grabbed the brake rod and attempted to put his foot into the space between the rod attached to the sill of the car. For some reason he failed, and his foot slipped, causing him to fall under the car, with the result that his limb was so severely crushed that it had to be amputated between the knee and the ankle. The stirrups on the side of the car were bent underneath, and would have been difficult to use, but the plaintiff made no attempt to use them. From a judgment for the defendant, the plaintiff appealed. The court, in affirming the judgment, said: "Without making excerpts from any of the cases referred to, the rule announced is that if the defects constituting the alleged negligence of the master are known to the servant, or by the exercise of ordinary care could have been known, and the danger incident to performing the work is appreciated by him, then the risk is assumed by the servant. It is extremely doubtful, under the testimony, whether it was a part of the plaintiff's duty to board the car for the purpose of working the brake, as it is shown by a number of witnesses that another person was at the brake, and there was consequently no necessity of his getting upon the car. This is not positively denied by him, but he says that if there was any one at the brake he did not observe him. Under the rule referred to, however, the plaintiff assumed the risk of attempting to board the car in the manner he did. It is undisputedly shown that the rod upon which he attempted to place his foot was not made or constructed for the purpose of mounting onto the car from the ground, but it was put there to serve as a handhold for the servants in coupling the car, or in connecting the air when the car should be attached to a train. Plaintiff does not deny but that he knew the purposes for which it was maintained. * * * We are convinced that the testimony shows that he knew of the condition of the handhold, but if not he certainly could have known it by the exercise of even the slightest care." Young v. Norfolk & W. R. Co., 171 Ky. 510, 188 S. W. 621 (1916).

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is purely a matter of inference, and certainly is not to be stated as matter of law.

Further, it is to be inferred, from a special instruction defendant requested to be given to the jury, that it sought at the trial to show contributory negligence because of plaintiff's failure to procure and use a safety spring. The request follows:

"If you find from a preponderance of the evidence that the defendant furnished safety spring devices which were available to the plaintiff, that he knew the same were available to him, that he appreciated the purpose for which they were to be used, and he failed and neglected to use the same, and that such failure or neglect on his part was the direct and proximate cause of his injuries, then he cannot recover, and your verdict should be for the defendant company."

The request in this form was refused, though it was given with the necessary qualification that contributory negligence was not a complete defense. Grand Trunk Western Ry. Co. v. Lindsay, 201 Fed. 836, 844, 120 C. C. A. 166 (C. C. A. 7). Moreover, the learned trial judge understood that defendant was seeking to show negligence of

D. Broken drawbar supports.

The plaintiff, an assistant car repairer, was directed to assist a coworker in repairing one of the defendant's box cars. This car had a bad order tag attached to it, the defect noted thereon being described as a broken drawbar spring. To replace the broken one, the plaintiff crawled under the end of the car. As he did so, the drawbar fell to the ground, striking his right hip and severely injuring him. The plaintiff's superior had instructed him not to look for defects, as car inspectors were employed especially for that purpose. Such inspectors placed on the car the bad order tag in question with the defect discovered. In the present instance, however, no defect showing a broken drawbar was listed, though the irons holding the drawbar in place were broken, as might have been discovered by the inspectors upon a reasonably careful inspection. The drawbar itself was, in fact, not broken previous to its fall upon the plaintiff, and for this reason the defendant claimed it had no notice of the defect. The trial court overruled the defendant's motion for a directed verdict, and the jury having found in favor of the plaintiff, the defendant assigned error. The court, in reversing the judgment, held (1) that the plaintiff assumed the risk of injury from the falling of the defective drawbar, such being a risk naturally incident to the work; (2) that the defense of assumption of risk remained under the Federal Employers' Liability Act as at common law, except where the carrier violated the provisions of a statute enacted for the safety of its employees. Sims v. Minneapolis, St. P. & S. S. M. R. Co., 196 Mich. 114, 162 N. W. 988 (1917).

E. Hand car.

1. Rear wheels too low.

The plaintiff, a section hand, while assisting his foreman in placing a hand car on the track, slipped, fell, and was injured. The hand car in question was badly out of repair, and the axle of the rear wheels having been broken, the truck of a push car had been substituted, the wheels of

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the plaintiff, not only as contributing to the injury, but even as constituting the sole cause of the injury; thus in stating defendant's contentions he said:

"The defendant also, as a further defense, contends that the plaintiff was himself guilty of negligence, and that his negligence was the sole, proximate cause of the plaintiff's injuries, and that therefore for that reason he is not entitled to recover."

Despite the fact that the issue of contributory negligence was brought into the case through the evidence, counsel earnestly contend that it was error for the court to instruct the jury upon this issue. The basis of this is lack of formal issue of contributory negligence in the pleadings. Thus, at the close of the charge defendant requested the court, but the request was refused, to withdraw from the jury all that the court had said on the question of contributory negligence, and for the reason in substance that there was no predicate in the answer on which the question of contributory negligence could properly enter into the case—"even through the evidence." Grant-

which were lower than those of the hand car. This caused the wheels to bind and affected the running of the car both on the rails and on the ground. Three men were generally used to lift the car. The defect above mentioned, the absence of the help of the additional man together with a sudden lift of the car by the foreman, throwing the greater weight upon the plaintiff, all concurred in causing the accident. It appeared that the plaintiff had complained of the condition of the car to the foreman, who promised to procure a new hand car and an additional man if the plaintiff would continue to use the car a few days longer. The plaintiff recovered a verdict for $8,000. A remittitur of $2,000 was filed and judgment rendered for $6,000. The court in affirming the judgment held that the plaintiff did not, as a matter of law, assume the risk, and that the question was properly left to the jury. The court pointed out (1) that the hand car being an appliance not included in a federal statute enacted with reference to assumption of risk, that defense was open to the defendant; (2) that as the foreman was the immediate superior of the plaintiff, and the proper person to whom to make the complaint, his promise to remedy the condition under which the plaintiff worked, and which caused the injury, bound the defendant, and relieved the plaintiff from any assumption of risk incident thereto. Carnahan v. Chicago, B. & Q. R. Co., 102 Neb. 76, 165 N. W. 956 (1917).

2. Defect causing derailment.

The plaintiff, a section foreman, sustained the injuries in suit as the result of a hand car upon which he was riding jumping off of the track. The trial court instructed that the defense of assumed risk applied only to perils or risks ordinarily incident to the service, and excluded other risks, even though known to the plaintiff, and under which he continued to work without complaint or promise to correct the same. From a judgment for the plaintiff in the sum of $1,500, the defendant appealed. The court, in reversing the judgment and remanding the case, held that the instruction was

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ing the request would have been both to change the charge and to leave the evidence tending to show negligence of plaintiff himself and the course of trial in that behalf unexplained, either as to burden of proof or otherwise. It is to be noticed that the request did not include withdrawal of the evidence pointing to plaintiff's contributory negligence. Was it error, then, in the court below to explain the rights of the parties on the subject of contributory negligence? It is said, in addition to the lack of formal pleading upon the subject, that under the general denial the evidence was admissible to contradict the allegations of negligence contained in the petition; but, conceding such admissibility, it is not enough. It leaves the contributory feature of the same evidence unexplained. Besides, it overlooks the effect of the Federal Employers' Liability Act. The case is based on that act; and since contributory negligence does not bar the action, but only mitigates damages, it was not necessary, to the introduction of an issue in that behalf through the evidence, either to allege such negligence or present an issue on that subject in the plead-

erroneous. As the court pointed out, the common-law rule as to assumption of risk applied under the Federal Employers' Liability Act except where some statute enacted for the safety of an employee is violated by the employer, and under such common-law rule, an employee assumes all hazard arising from defects in appliances used by him that are open and apparent and known to him, unless he continues to use such defective appliance under a promise of his employer to repair. Bradley v. Vandalia R. Co., 207 Ill. App. 592 (1917).

IV. Locomotive appliances.

A. Water glass.

The plaintiff, an experienced railroad engineer, was injured by the explosion of the water glass of his engine. The glass in question was not guarded in the usual manner. The plaintiff had reported this fact to the foreman, who replied that one would be obtained, but for the plaintiff to use the engine without a guard on the glass in the meantime. This was done for about a week before the accident in question occurred. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the question of assumption of risk was properly left to the jury. As the court pointed out, it could not be said as a matter of law that the danger was so imminent that no ordinarily prudent man under the circumstances would continue in the employment in reliance upon the promise to repair, for it was not the function of the guard glass to prevent the bursting of the water tube, which might have occurred and caused injury even with the guard glass in place, but only to limit the effect of the explosion in case it happened to occur. The court further pointed out that an employee assumed the risk of defects arising from the employer's negligence if they were open and obvious and capable of being appreciated, unless the continuation in such work was the result of reliance on a promise by the employer to repair the defect; and even then the employee assumed the risk, if the danger was so imminent that no ordinarily prudent man would

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ings. Kansas City Southern Ry. Co. v. Jones, 241 U. S. 181, 182, 36 Sup. Ct. 513, 60 L. Ed. 943.

Nor is there any local rule of decision affecting the course pursued below. Defendant's theory of formal allegation or issue in the pleadings is based on Traction Co. v. Forrest, 73 Ohio St. 1, at page 4, 75 N. E. 818, at page 819, where Judge Spear said:

"From this it follows that there was no issue in the pleadings respecting contributory negligence. Nor was such issue raised by the evidence."

And, besides, the doctrine of contributory negligence there in question would operate as a bar to the action. Further, the rule deducible from Rayland Coal Co. v. McFadden, 90 Ohio St. 183, 107 N. E. 330, and Glass v. Heffron Co., 86 Ohio St. 70, 98 N. E. 923, cases commented on by defendant, we think shows that the fact that the pleadings present no issue of contributory negligence is not the only test of whether that issue may be rightfully introduced. Indeed, as we understand those cases, there is no difference of importance be-

have continued in the employment in reliance upon the promise. Seaboard Air Line R. Co. v. Horton, 239 U. S. 595, 60 L. Ed. 458, 36 Sup. Ct. 180 (1916).

B. Lubricator.

Plaintiff was employed by the defendant railroad company as an engineer. The engine, of which plaintiff had charge, was equipped with what was known as a Nathan lubricator, an appliance containing oil for the steam cylinders and the air pump, the oil being conducted to and within the parts where needed under steam pressure from the boiler. In order to give the engineer a view of the interior of the apparatus, and thus enable him to see that the oil was dropping properly, three cylindrical glass tubes were attached, one carrying the oil for each steam cylinder and one for the air pump. Each of these glasses was surrounded with a shield of perforated metal in two parts, hinged together and lightly clamped upon the glass tube by means of a spring to hold it in place. When the lubricator was in operation, the tubes were required to sustain the same steam pressure as the boiler. It was made to appear that these tubular glasses would sometimes break. This result was most likely to occur when a glass was newly installed, and before it had become properly tempered, when it was subjected to a sudden change of temperature, as when steam was admitted to it while cold, and sometimes after it had been worn thin because of long use. This type of lubricator had been in use upon engines of all kinds for something over 20 years prior to the date of the accident giving rise to this suit. Shortly before the accident, however, a new type, known as the Bull's Eye, had come into use, and it was recognized as a better appliance because, being unbreakable, it was safer for the engineer, and at the same time and for like reasons it obviated the loss of time and delay of trains attributable to breakage of lubricators of the Nathan type. For this reason defendant had begun to install the Bull's Eye lubricators on its engines, and at the

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tween them and the instant case; for although the answers there made, in addition to general denials, in substance alleged only that the injuries were caused by the fault and negligence of the respective plaintiffs, yet it was held in each case that such averments did not tender an issue of contributory negligence. This was to say that, unlike an ordinary plea of contributory negligence, those answers did not impliedly set up combined negligence. This is the most that could be claimed of the answer in the present case, even if the effect of contributory negligence were to bar the action, and not merely to mitigate the damages. In the Ohio cases last mentioned, however, evidence was submitted tending to show that both parties were negligent, that there was combined negligence; and so it must be said of the natural tendency and import of the evidence in the instant record.[1]

[1] It is worthy of remark that, in the opinion denying motion for new trial, Judge Westenhaver expressed the belief that in view of the plaintiff's actual injuries his recovery was materially reduced by reason of the mitigating effects of the testimony in relation to contributory negligence.

time of the accident in suit had placed them upon about 75 per cent of the larger engines. Among the engines not so equipped with the new appliance was that of the plaintiff. It was also shown that, as a matter of fact known to the defendant, the use of the Nathan lubricator was unsafe on engines of the type managed by the plaintiff herein for the reason that its normal boiler pressure was 190 pounds, whereas the Nathan lubricator was not safe to use on an engine with a pressure greater than 160 pounds. It further appeared, however, that the plaintiff was unaware of this additional danger in the use of the Nathan lubricator. In any event, on a night when the plaintiff, having taken his engine from the roundhouse and oiled it up in preparation for going on an interstate run, the glass tube of the Nathan lubricator of his engine exploded within some 10 minutes after he had warmed it up by the gradual admission of steam. As a result of this explosion the plaintiff lost the sight of an eye. Appeal was taken by defendant from a judgment for substantial damages recovered by the plaintiff in the trial court and affirmed by the state supreme court. Upon such appeal the principal question involved was whether the plaintiff should be deemed to have assumed the risk of injury incident to the use of this lubricator. In this behalf it appeared that plaintiff had testified that he had always been given to understand that if care were used by the engineer to warm the cylinder glass gradually on first commencing his steam, it was safe to use with a boiler having a pressure of 190 pounds. There was no evidence adduced by defendant to contradict these assertions. In affirming the judgment recovered by plaintiff the supreme court said: "Assuming, as the undisputed evidence shows he had a right to assume, that the glass was being subjected to no greater bursting strain than it was designed to withstand, he still knew that, under special circumstances that have been pointed out, there was danger of a glass bursting unless precautions were taken. Any risk of this character, unaffected by his employ-

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It must follow that it was the duty of the trial judge to instruct the jury upon the subject of contributory negligence and to rule that the burden of proving such negligence was upon the defendant; and as respects the ruling that the burden of proof also rested on defendant under its further defense that plaintiff's negligence was "the sole, proximate cause" of his injuries, as the trial judge understood the position taken by defendant, it is enough to say that if there was error in this ruling—a question we do not decide—it was certainly harmless, in view of the instruction the court had already given, that the burden was on the plaintiff to show defendant's negligence.

3. It remains to consider the subject of assumption of risk. This was made, as we have seen, an affirmative defense. It cannot be necessary to dwell upon that feature of the case. It was asserted in the motion to direct, as before shown, that, if there was any proof of any negligent act on the part of defendant, a clear case of assumption of risk as matter of law is made upon the plaintiff's own testi-

er's negligence, he undoubtedly assumed, as a risk ordinarily incident to the occupation he pursued. But this throws no light upon his right to recover, because if he was subjected to no greater risk than that just now indicated, the employer was not negligent and there was no ground of recovery. Under the trial court's instructions, the jury must be presumed to have found that the Nathan lubricator glasses had been shown by experience to be incapable of withstanding a pressure of 190 pounds; that defendant knew of this, and nevertheless negligently maintained such glasses upon plaintiff's engine. There was present, therefore, an extraordinary danger, not normally incident to plaintiff's employment; it was in its nature latent, and not obvious; and there is no evidence in the record that plaintiff had received any notice or warning of the increased hazard attributable to his employer's negligence. In short, while he knew there were certain dangers naturally incident to the use of tubular glasses upon the lubricator, there is nothing to show that he knew or had any ground to believe that his employer had been wanting in the exercise of proper care for his safety, or that because of such want of care the danger to him was greater than it ought to have been. Without this, he could not be held to have assumed the increased risk. Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 101, 58 L. Ed. 521, 524, 34 Sup. Ct. Rep. 229; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 504, 58 L. Ed. 1062, 1070, L. R. A. 1915 C 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915 B 475, 8 N. C. C. A. 834." Chicago & N. W. Ry. Co. v. Bower, 241 U. S. 470, 60 L. Ed. 1107, 36 Sup. Ct. 624 (1916).

V. Cap and rail on boat.

The deceased was employed as captain on a lighter owned by the petitioner and used in transporting freight in and about New York Harbor. At the time of the accident the deceased was in the act of placing a spliced loop of rope known as a "strap" over a bit of the lighter which had previously been passed to him from the tug. There then being some slack in the strap, a part of it slipped down over the starboard corner of the lighter. Suddenly, due to

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mony. Our consideration of the applicable testimony satisfies us that it cannot be said, as matter of law, that plaintiff had any such knowledge of the situation as to understand that compliance with Dugan's order to turn the air into the pneumatic hammer involved danger to himself. The testimony, when rightly considered, does not seem to prove this; its tendency, as we have said before, was to show that the danger to be apprehended was to Dugan rather than to plaintiff. It is hence vain to insist that plaintiff assumed a risk that was open and obvious, as well as known to and appreciated by him. The authorities requiring submission to the jury are too numerous to justify citation.

We conclude upon the whole case that the trial was fair throughout, that the charge was as favorable to defendant as the nature of its defense warranted, and that no reversible error intervened; accordingly the judgment is affirmed.

the action of the tide, the slack was violently taken up, and the corner piece of the cap, which was mounted on the log rail of the lighter, was thereby wrenched from its fastenings, and struck the captain on the head, inflicting a wound from which he subsequently died. The cap had only recently been rebuilt, and gave no indication that it was not in proper condition. There was evidence, however, to the effect that the manner in which it broke off showed that it was in a defective and rotten condition. A proceeding in admiralty resulted in a decree for the claimant for the value of the lighter. The court pointed out that the defect in the lighter was due to the petitioner's negligence. Upon the question of assumption of risk, the court said: "The decedent did not assume the risk of the petitioner's negligence in that respect, and, as there is nothing to show that he knew or should have known of the defective condition of the rail and cap, it follows that the claimant is not barred from recovery on the doctrine of assumption of risk." The Erie Lighter 108, 250 Fed. 490 (1918).

On appeal it was held that the question of liability was determinable by the Federal Employers' Liability Act. It was further held that the decedent did not assume the risk of negligence on the part of the railroad company, and that, since there was nothing to show that he knew or should have known of the defective condition of the rail and cap, he was not barred from recovery on the doctrine of assumption of the risk of injury. Appeal was taken by the railroad company from the decree awarding damages to the extent of the value of the lighter and its pending freight, and on this appeal the decree was reversed on the ground that the evidence did not justify a finding that negligence on the part of the railroad company had been proved. Erie R. Co. v. Hansen, — C. C. A. —, 260 Fed. 100 (1919), rev'g The Erie Lighter 108, 250 Fed. 490 (1918).

O. L. C.

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GARLAND v. FURST STORE.

[Court of Errors and Appeals of New Jersey, May 8, 1919.]

— N. J. L. —, 107 Atl. 38.

1. **Notice—Liability dependent on—When contest required.**
Where liability is made to depend at all upon notice to a party, the adversary party must establish the notice before the other is called upon to contest it.

2. **Negligence—Fall on premises of another—Presumption of negligence on part of owner—Res ipsa loquitur.**
A mere fall of a person on the premises of another, without any evidence to show how the fall was occasioned, raises no presumption of negligence on the part of the owner; and the doctrine of res ipsa loquitur, which is only applicable when the thing shown speaks of the negligence of the defendant, not merely of the happening of the accident, does not apply.

CASE NOTE.

Liability of storekeeper for injury to customer in store.

I. Slipping or falling, 586-606.
- A. Trapdoor in floor, 586-590.
  1. Passageway in store, 586-588.
  2. Rear of store dimly lighted, 588-589.
  3. Floor of barroom, 589-590.
- B. Outside cellar door, 590-591.
- C. Elevator shaft, 591-598.
  1. Guarded by rope, 591-593.
  2. Unguarded, 593-598.
- D. Stairway, 598-601.
  1. Dimly lighted, 598-600.
  2. Concealed by show cases, 600-601.
  3. Gate left open, 601.
- E. Hole in tin shop floor, 601-602.
- F. Balcony rail giving way, 602-604.
- G. Slipping while descending stairway, 604.
- H. Slipping while descending incline, 604-605.
- I. Slipping on piece of meat on floor, 605-606.

II. Tripping over obstructions, 606-612.
- A. Platform at doorway, 606-607.
- B. Rope in aisle, 607-608.
- C. Hat box in aisle, 608-609.
- D. Weighing machine near entrance, 609-610.
- E. Torn floor covering, 610-612.
  1. Rug in aisle, 610-611.
  2. Matting, 611-612.

III. Thrown by escalator, 612.

IV. Struck by flying or falling objects, 612-618.
- A. Fragment from box being opened, 612-613.
- B. Glass from show case, 613-614.
- C. Lid of refrigerator, 614-615.
- D. Falling awning, 615-617.
  1. Entering store, 615-616.
  2. Looking at show window, 616-617.
- E. Swinging doors, 617-618.

Cross-references. Liability of owner of premises for injury to person on premises for purpose of transacting business, see 7 N. C. C. A. 365-383; liability of storekeeper for injury to customer in store, see 7 N. C. C. A. 436-445; duty and liability to persons on premises seeking employment, see 6 N. C. C. A. 935-943.

I. Slipping or falling.

A. Trapdoor in floor.

1. Passageway in store.

Corbett v. Spanos, — Cal. App. —, 173 Pac. 769 (1918), in which a rehearing was denied by the supreme court

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3. Appeal and error—Review—Determination of case on record notwithstanding view by jury.

Whether a jury is ordered by the court to inspect or examine premises as an aid in ascertaining the truth of any matter in dispute between the parties to an action, under Evidence Act (2 Comp. St. 1910, p. 2229) § 30, or to view any place to enable the jury better to understand the evidence given in the cause under Jury Act (3 Comp. St. 1910, p. 2976) §§ 31-35, the judgment rendered by the jury should nevertheless be reversed, if legally unsupportable in and by the record under review, as the questions presented to an appellate court should be decided upon what appears in the record brought up from the court below, notwithstanding a view was had by the jury which tried the cause.

[Headnotes by the Court.]

4. Negligence—Fall by customer on floor of store—Action for injuries—Sufficiency of evidence—Safety of floor.

The fact, appearing in an action against a storekeeper for personal injuries sustained by a customer when she fell on the floor of defendant's store, that, while the floor was undoubtedly smooth, it apparently was not slippery as it had been traversed by thousands of people every week during the four years

July 8, 1918, was an action for damages for physical injuries alleged to have been sustained by plaintiff through the negligence of defendants, the appeal being from a judgment for defendants entered upon an instructed verdict at the close of plaintiff's evidence. Defendant S conducted a candy and light lunch business in a store owned by defendants W, where plaintiff was accustomed to take lunch. In the rear of the store there was a partition running across the width of the store, with a door in the center opening into a narrow and rather dark passageway, on the opposite side of which there was a room containing a toilet and wash basin for the use of the young women employed in the store. There was a trapdoor in the passageway with a flight of stairs leading down to the basement, where candy was made and stored, the stairway being frequently used by the employees when they wished to bring candy up from the basement. On the day of the accident plaintiff, having lunched at the store, asked one of the attendants if there was a dressing room in the place, and was shown to the toilet in question, the trapdoor being closed at the time, and, as it fitted flush with the floor, there was nothing to indicate its existence to plaintiff, and she received no warning concerning it. While plaintiff was in the toilet some person, whose identity was not shown on the trial, but presumably an employee, lifted the trapdoor and left it open, and when plaintiff attempted to return to the outer store, she did not notice it, but, in opening the partition door, which swung towards her, she stepped backwards and through the trapdoor, falling down the steps to the basement. The court of appeals held that the lower court correctly instructed the jury to bring in a verdict for defendants upon the facts because plaintiff had not shown some breach by the defendants of a duty owing to her. The court stated the law of the state as to the duties owing by a proprietor of a store to his customers and to the public to be to keep his premises and passageways to and from it in safe condition, and to use ordinary care to avoid accidents or injury to those properly entering upon his premises on business, but that this rule applies only to such parts of the building as were a part of or used to gain access to, or constituted a passageway to and from the business portion of the building, but that this rule does not apply to such parts of the building as were used for the private purposes of

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succeeding its construction and no one had ever been known to slip on it before, tends to show that the floor was reasonably safe for the use of persons resorting to the store.

5. **Negligence—Fall by customer on floor of store—Action for injuries—Sufficiency of evidence—Negligence of storekeeper.**

In an action against a storekeeper for personal injuries sustained by a customer when she fell on the floor of defendant's store, held that there was no testimony worthy of the name which showed that the defendant was negligent.

Minturn, and Black, JJ., dissenting.

[Additional Headnotes by Publishers' Editorial Staff.]

Appeal by defendant from a judgment affirming a judgment in favor of plaintiff, who sued for personal injuries sustained when she fell on the floor of defendant's store. Reversed.

the owner, unless the party injured had been induced, by the invitation or allurement of the owner, express or implied, to enter therein. The court found that, while the complaint alleged that the so-called dressing room was placed by the defendant S at the disposal of his customers, absolutely no evidence in support of the allegation was produced except the fact that on the occasion in question plaintiff was showed to it by an attendant in response to her query as to whether or not there was a dressing room in the place, and in addition, it affirmatively appeared that there was no sign on the door to the passageway leading to the toilet in question to indicate that there was a dressing room there for the use of customers, and the simple equipment of the room, as well as its situation in a poorly lighted passageway, negatived the idea that it was intended for the use of any other than the employees of S. The court further said that the attendant who showed plaintiff the way was not called to testify, and it was not shown that she had any authority to permit the use of the room by the patrons of the place, and, in the absence of such showing, no inference of a general invitation or inducement by the proprietor of the store could legitimately be drawn from that single instance of its use by permission of the servant. It was further claimed by plaintiff that the trapdoor and stairway were constructed and maintained in violation of the provisions of a certain ordinance of the city and county, providing that stairs or stairways passing from one floor to another should not be covered with a permanent flooring, but should be kept free from all obstruction so as to give the fire department and fire patrol easy access from one floor to another. The court said that while it was very doubtful whether or not this trapdoor, which could be easily opened and shut, came within the prohibition of the ordinance, it was unnecessary to decide the point, as the ordinance was purely a fire protection measure, and manifestly not intended to provide for the protection of the general public from injury, and therefore, conceding the ordinance to have been violated, plaintiff could not claim that such violation constituted negligence, because she did not come within any class of persons which the ordinance was designed to protect.

2. **Rear of store dimly lighted.**

While plaintiff was in defendant's store examining goods and being waited upon by defendant, the telephone rang and defendant went to answer it, at the same time telling plaintiff to look along there and see

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For appellant—Runyon & Autenreith and Walter L. McDermott.

For respondent—Doherty & Kinkhead and Richard Doherty.

WALKER, Ch. This is an action at law for alleged negligence resulting in personal injuries. It was tried before Judge Cutler and a jury in the Hudson circuit court, and upon the trial, on motion of the appellant, the jury were permitted to view the scene of the accident. Motions to nonsuit and to direct a verdict were denied, the jury rendered a verdict for the plaintiff, and upon appeal to the Supreme Court the judgment was affirmed. From the judgment entered upon that affirmance an appeal has been taken to this court.

if she found other goods that would suit her better than what she had chosen, and, while plaintiff was walking along examining other goods, she fell through a hole in the floor, the door of which when closed came even with the floor, but which had evidently been left open, and received injuries for which she was under medical treatment for some time. She was corroborated by one witness who was apparently disinterested, and it was shown that the opening in the floor was in the rear of the store about 5 feet from the rear wall, and that the store in that part was dimly lighted at the time of the accident. At the close of plaintiff's case, on motion of defendant's attorney, the complaint was dismissed. In reversing the judgment and ordering a new trial the court said: "A mere recital of these facts shows that defendant was put upon his proof as to his freedom from negligence under the circumstances shown. He had impliedly invited the plaintiff upon his premises and they were under his entire control. The rule in such cases is that, where the thing is shown to be under the control and management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care." Gallagher v. Halpern, 95 N. Y. Misc. 185, 159 N. Y. Supp. 160 (1916).

3. Floor of barroom.

Defendants were engaged in conducting a saloon, and plaintiff entered it for the purpose, according to his testimony, of using the toilet attached to and in the rear of the saloon, and, after having done so, and returned to the barroom, plaintiff, not wishing, as he stated, to use the convenience of any place without some return, went to the bar and ordered a drink of beer, and having been served, and started to drink, he observed a picture upon the opposite wall of the saloon, and, being interested in painting, walked across to examine it, and in doing so fell into an open trapdoor and was precipitated into the basement, suffering severe injuries. In the present suit for damages for such injuries, plaintiff recovered judgment, and defendants appealed. There was some conflict in the evidence as to whether the space in front of where the picture hung, and of which the trapdoor when closed formed a part of the floor, was a portion of the open or public area of the saloon, or was separated therefrom by a piano and other obstructions, indicating that it

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The complaint alleges that the defendant, in conducting a department store, maintained a slippery tiled floor in the basement, which from its nature and from the negligent manner of its construction was dangerous to persons walking upon it, and that it was negligently permitted to become slippery. It appears that the plaintiff, on May 20, 1916, went to the store of the defendant, and into the shoe department in the basement. The floor, according to the plaintiff's testimony, was tile or marble, and in front of the benches where the shoes were sold were strips or runners of carpet. The plaintiff made a purchase, and then proceeded to walk across the floor to the stamp desk, and, using her own words:

"I just walked along from where I got the package to the stamp desk,

was private and not intended for public use. In that respect the plaintiff testified that there was no obstruction between the bar and the picture, and that he walked directly across the room towards it and to the open space into which he fell. Upon that question the jury found in plaintiff's favor, and the court of appeals was not asked to pass upon the conflict in the evidence. Defendants urged, however, that the undisputed evidence did show that plaintiff, having entered upon the premises for the purposes indicated by his own testimony, became and was throughout the period of his presence there a mere licensee toward whom, as such, the defendants owed no duty other than that of refraining from causing him an injury by a wilful or grossly negligent act. The court said, however, that plaintiff, having entered defendants' premises with an intent and purpose which would have constituted him a mere licensee, appeared to have fulfilled that purpose and terminated that relation when, upon returning from the toilet to the barroom, he determined to become, and did in fact become, a customer of the defendants by ordering and partaking of a drink at their bar; and that from the moment of his changed intent and action his relation to defendants changed from that of a mere licensee to that of a customer to whom the defendants would owe a duty of ordinary care, a duty which was violated by negligently leaving an open and unguarded trapdoor in that portion of the floor space of the barroom which was open and accessible to customers. Judgment for plaintiff was affirmed. Braun v. Vallade, 33 Cal. App. 279, 164 Pac. 904 (1917).

B. Outside cellar door.

In Hordes v. Kessner (N. Y. Misc.), 159 N. Y. Supp. 891 (1916), it appeared that plaintiff visited defendant's store for the purpose of purchasing a pair of shoes for her little girl, and, the first pair shown not being suitable, plaintiff stepped out through the store door to examine some shoes in the window, and as she walked along she fell into a doorway opening into a cellar and received the injuries complained of. The defendant testified that there were two doors covering the opening into the cellar, and that as plaintiff was about to enter the store some person had gone into the cellar, and that defendant, who kept the store and waited upon customers, stood outside and near the door guarding the entrance to the cellar, and told plaintiff he would wait on her as soon as the man came out of the cellar. After waiting awhile he closed one door and went into the

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and as I got to the side, to go to hand my slip, my two feet was taken, and I had slipped down on my left hip."

The plaintiff testified that at the spot where she fell the floor was clean. She said:

"I noticed that it was clean; * * * nice and clean."

The plaintiff was accompanied at the time by her daughter. Just what caused the plaintiff to fall does not appear from the testimony; and it appears that no foreign substance, such as oil or grease, was on the floor when and where she fell. It did appear that the floor was such as may be found in bank buildings; it was made of solid concrete in 1912, and was smooth and in good order; that it had been

store to wait on plaintiff, and as plaintiff went out of the door to look at the shoes in the window defendant cautioned her to look out for the opened cellar door, as the man was still down there, this warning being corroborated by a disinterested witness who heard it and not being disputed by plaintiff. The day was bright and sunny, and the door in full view of plaintiff, and she saw the open cellar door when she entered the store. The court said that under the undisputed testimony no negligence could be attributed to the defendant, and a judgment for plaintiff was reversed and a new trial ordered.

C. Elevator shaft.

1. Guarded by rope.

In Foley v. Hornung, 35 Cal. App. 305, 169 Pac. 705 (1917), it appeared from the complaint that defendant was a merchant, conducting his business in a building on the ground floor of which his general merchandise business was conducted, and to which access was had at an entrance on a street; that there was a basement in the building about 9 feet below the ground floor; that towards the rear of the ground floor there was a large hole or opening in which was an elevator used for the purpose of conveying goods to and from the basement to the ground floor, and so located that any one entering the store for the purpose of making a purchase would be liable to fall into the hole or opening; that plaintiff entered defendant's store for the purpose of purchasing a tent, and was met by defendant, who directed her to the rear end of the store to look at some tents which defendant was offering for sale; that while she was passing to the rear of the store for that purpose, and having no knowledge that there was an opening or trap in the floor, she stepped into and fell through the hole to the basement, receiving the injury complained of; that such opening was wholly unprotected or closed. Defendant's answer alleged that the hole mentioned was carefully guarded by a rope firmly suspended a distance of 2½ feet above the floor of the storeroom, and about 4 feet from the edge of the opening, in such a manner that it was plainly visible to the sight of any person proceeding towards the opening, and formed an effectual obstruction; that defendant's store was divided into two departments, the fore part of which was arranged for the reception of customers and of displaying and dispensing merchandise, and the rear portion was used as a workshop; that on the date in question defendant proceeded to the rear portion of the store to procure a tent to

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traversed by thousands every week in the four years since its construction; and that no one had ever been known to slip on it before. It is true that plaintiff's daughter said the basement floor was very slippery, and that anybody could slide along it at the time her mother fell, not that it was more slippery where she fell. Floors are either smooth or rough, and smooth floors are not necessarily slippery ones.

The grounds of appeal are the refusal to nonsuit, the refusal to direct a verdict, and the affirmance of these refusals in the supreme court.

To sustain the judgment in this case counsel for the plaintiff respondent urges that the proof before the jury made the defendant prima facie liable under the doctrine of Phillips v. Library Co., 55

show to plaintiff in the front portion of the store, and before departing enjoined her to remain in the front portion of the store until he returned with the tent; and that plaintiff disregarded the instructions of defendant and deliberately walked over or under the rope and was proceeding towards that portion of the storeroom used as a workshop when she fell into the opening. The cause was tried by the court with a jury, and plaintiff had a verdict on which judgment was entered and from which defendant appealed. Plaintiff's testimony tended to sustain the allegations of her complaint, and defendant's testimony substantially supported the allegations of the answer, and was corroborated by the testimony of several witnesses, including some of his employees, some of the corroborating witnesses saying that they heard defendant tell plaintiff to stay where she was, and some of them testifying that a rope was stretched across the room at the time. The court said that the conduct of plaintiff on the occasion in question was not such as to suggest negligence on her part, but that it was the most natural thing to follow defendant to the place where the tents were, and thus avoid the necessity of bringing forth for inspection a bulky and rather heavy article, and that she may not have heard defendant tell her to wait in the front part of the store, as she testified that she did not. The court said it was negligence on the part of defendant, if the rope was in place, to lift it up and pass under it, as she testified that he did, without cautioning plaintiff to avoid the elevator hole. The court said they did not think it could reasonably be said that plaintiff was a mere licensee in entering the back part of the store, but that the jury accepted, as true, the testimony of plaintiff that she was invited by defendant to go to that part of the store, and it was clearly defendant's duty to use all reasonable means to make that part of the store safe for one visiting it. Plaintiff recovered a verdict for $2,000, and in support of a motion for a new trial the defendant filed affidavits of some of the members of the jury, tending to show that while deliberating they were unable to agree upon the amount that should be awarded to plaintiff; that they agreed that each should write the amount for which he believed a verdict should be rendered upon a slip of paper and cast the same as a secret ballot; that the sum of the various amounts to be voted by the 12 jurymen should be divided by 12, and that they should be governed by the quotient obtained by such division; and that the quotient so found was $2,104, which, not being a round

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N. J. Law, 307, 16 Am. Neg. Cas. 701n, 27 Atl. 478, and Schnatterer v. Bamberger, 81 N. J. Law, 558, 1 N. C. C. A. 669, 79 Atl. 324, 34 L. R. A. (N. S.) 1077, Ann. Cas. 1912 D, 139. In Phillips v. Library Co. it was held that the owner or occupier of lands, who by invitation, express or implied, induces persons to come upon premises, is under a duty to exercise ordinary care to render them reasonably safe for such purpose, or at least to abstain from any act that will make the entry upon or the use of the premises dangerous. Now, it will be noted that the premises in question in this case, upon which the plaintiff was invited to enter and where the accident happened, was the floor of the basement of defendant's department store. It was made of solid concrete composition, such as are the floors of bank

sum, was reduced to $2,000, which, without further consideration or discussion, was adopted and the verdict so entered. The jurors who made affidavits in support of the verdict confirmed the taking of a ballot upon the amount, but admitted that they did not agree to be bound by the result, and that after the quotient had been obtained the jury further considered the amount, and, after consultation among themselves, agreed that they would not adopt the quotient or result so obtained, but, after consideration and discussion, they did agree that the plaintiff should be awarded $2,000. The court said: "It is not unusual, nor is it objectionable, for each juryman to mark on a ballot the amount he thinks should be allowed, if any, and these ballots may subsequently be read by the jurymen. They thus get some idea of each other's views which may aid in reaching a concurrence of judgment. The misconduct of the jury for which a new trial may be granted arises 'whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to the determination of chance.'" The court said, however, that a verdict is not a chance verdict where the jurors agree to divide the aggregate amount by 12, and where it was understood that they were not to be bound by the result, and after the amount was so ascertained, the jurors unanimously agreed to adopt it as the sum to be returned. The judgment and order denying a new trial were affirmed.

2. Unguarded.

Defendants conducted a retail store, having a main floor for customers and a basement and upper floors for the storage of goods. A freight elevator was located in the corner of the store, which was for the use of employees only, and was operated by a rope by any employee who wanted to use it, so that, if the elevator was on the main floor and an employee on the upper floor wanted it, he would pull it up. The opening to the elevator on the main floor was protected by a door which pulled up by means of ropes and pulleys. The elevator was almost noiseless in its operation. Along the back wall of the store were shelves containing jardinieres, and in front of the shelves was a counter, the end of which came to an aisle which ran lengthwise of the store past the end of the counter and the elevator door to the shelves on the rear wall. Deceased came to the counter, inquired for jardinieres, and a clerk showed him one, and, upon being asked to measure it, placed the jar-

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buildings, and it does not appear that the plaintiff slipped upon any foreign substance in the fall which she sustained and which injured her. The floor was undoubtedly smooth, but, apparently, was not slippery, as it had been traversed by thousands of people every week the four years since its construction, and no one had ever been known to slip there before. It would thus appear that the premises were reasonably safe for the entry thereon of persons resorting to the store, and it is not shown that the defendant was guilty of any act which would make them dangerous. In fact, there is no contention to that effect.

In Schnatterer v. Bamberger the plaintiff, in going down steps leading to the basement of defendant's store, caught the heel of her

diniere on the shelf near the elevator door while she went for a ruler. At that time the elevator door was part way up, and about that time an employee on the upper floor pulled the elevator up. When the clerk returned deceased had disappeared, and shortly thereafter he was discovered in the basement where he had fallen down the elevator shaft, being severely injured and dying within a few hours. A number of witnesses introduced by plaintiff consisting of clerks, ex-clerks and patrons of the store testified that the aisle in front of the shelves where jardinieres were kept was used by customers for inspecting goods, and that goods were kept there for the inspection of customers just as they were kept upon the counter, and that customers frequented the aisle in front of the elevator door just as they did other aisles of the store. The testimony of the defendant was to the effect that this space in front of the elevator was used only by clerks and employees in moving merchandise, and was not used or intended to be used by customers. Plaintiff also proved by a number of witnesses that, before the injury, the elevator door was frequently left open when the elevator was moved from it, and that clerks and customers of the store, at various times before the injury, had come near falling into the elevator shaft when the door was left open, this testimony being admitted over the objection of defendant. The testimony of plaintiff was also to the effect that it was darker in front of the elevator door than in any other part of the store, and therefore more difficult to see. The jury were taken to the scene of the accident and made a thorough examination. It was contended by defendant that the admission of the testimony concerning the elevator door being left open, and the narrow escapes of other people from falling into the open shaft was erroneous, it being evidence of other acts of negligence introduced for the purpose of showing negligence in the particular case, and tending to introduce collateral issues into the case and to distract the attention of the jury from the main issue. The court held the testimony regarding the open door was admissible, not to show personal negligence of various employees, but as tending to show that the place was dangerous on account of the way the elevator was operated; and that the testimony relating to the narrow escapes of other people was also admissible, as tending to show the dangerous character of the situation under circumstances practically similar to those under which deceased met his death. It was further argued by defendant that it should have been given

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shoe in a brass nosing (originally attached to the edge of the wooden step to prevent its wear), which was loose, causing her to trip and fall, and it was held that the evidence failed to show the storekeeper had not used reasonable care in keeping the stairway safe for use, for the reason that it had not appeared that the defect had been brought to the notice of the storekeeper, or had existed for such a length of time as to charge him with notice of its existence, and that in the absence of proof of one of those conditions a prima facie case of negligence was not established. For aught that appears in the case at bar, the defendant had no notice of the alleged slippery condition of the basement floor.

The Supreme Court in its opinion in this case remarked that the

a peremptory instruction because deceased was, at the instant of the accident, at a place in the store where he was not impliedly invited to go; that his business in the store did not require him to go behind the counter lines and personally take the wares from the shelving behind the counters; and therefore the injury was one for which the defendant would not be liable. The trial court, proceeding upon the theory that the testimony introduced for plaintiff showing that customers frequently went into the space in question and examined goods upon the shelves, sometimes being invited into the space by the clerk and other times going there without an instruction, that they were waited upon in that space by the clerks, and that the shelves upon which the jardinieres stood were not directly behind the counter, or any other obstruction, and that there was no sign of any kind to warn customers that they were not expected to go into that space, left the question as to whether deceased was impliedly invited to go within the space to examine the jardiniere one for the jury under proper instructions. As to this the court said that if the testimony, either direct or circumstantial, was sufficient to establish the fact that plaintiff went within the space to examine jardinieres, it would not disturb the verdict, and held that, as there was no testimony, direct or circumstantial, that deceased was going into the space for any other purpose, the presumption was that he was continuing his examination with a view to purchasing jardinieres. In answer to an argument by defendant's counsel that it was equally probable that deceased temporarily abandoned the object of his visit to the store, and idly wandered into the space, and, through curiosity, looked into the elevator shaft, and for some unknown cause fell, the court said that, in the absence of any direct testimony, the jury, in view of the presumption of the continuation of his own purpose of buying jardinieres and of the instinct of self-preservation and the disposition of men to avoid danger, were justified in finding as a fact that deceased went there for the purpose of inspecting jardinieres, and that in such case a verdict would not be based upon presumptions, as it was insisted by a counsel for defendant, but upon proof of facts to which those presumptions were merely applied. In stating the duty of the proprietor of a store, the court said: "It is the duty of the proprietor of a store to which the public are impliedly or expressly invited to use reasonable care and diligence to keep the premises therein reasonably safe for persons visiting the store upon this invi-

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inquiry was whether there was any evidence of the existence of an unusually slippery condition; the notice thereof to the owner, if it existed, not being a contested point. This would appear to indicate that, in the opinion of the supreme court, notice to the defendant might be presumed, as it produced no evidence denying that it had received notice. So far as this observation purports to state a principle of law, it is erroneous. It is directly contrary to the ruling in Schnatterer v. Bamberger. There it was held that in the absence of proof that the defect had been brought to the notice of the storekeeper, or had existed for such a length of time as to charge him with notice, a prima facie case of negligence was not made out. The rule is that, where liability is made to depend at all upon notice to

tation, express or implied,'' and said that defendant was negligent in leaving the elevator shaft partly open and in not guarding it, and that there was sufficient testimony to satisfy a jury by a preponderance of the evidence that the proximate cause of the death of the deceased was defendant's negligence. Upon the question of contributory negligence the court said: ''An invitee in a store is not to be too circumscribed as to his movements while waiting for a clerk to exhibit goods. He has a right to inspect goods and frequent places used by other patrons of the store and provided for their use by the storekeepers,'' and held that the trial court was correct in declining a peremptory instruction asked by defendant. The jury was instructed that if they believed that the accident was due in part to the negligence of the defendant and also in part to the negligence of deceased, the damages should be reduced in proportion by the negligence of the deceased. Plaintiff claimed damages in the sum of $50,000, and the jury awarded a verdict for $25,000, which defendant insisted was excessive. The court said that the testimony showed that deceased was a healthy man; that he earned $1,800 a year; that his life expectancy was 24 years; that he lived 18 or 20 hours after the injury and suffered severely; that from the record they were unable to say whether or not the jury diminished the damages or that the deceased was guilty of contributory negligence, and that the court was unable to say from the record that the deceased was guilty of any negligence, or that the verdict should in any way be disturbed, and it could not say that it was the result of passion or prejudice, and it was impossible for the court to measure in dollars and cents the pain and suffering endured by deceased during the time that he lived. The judgment was affirmed. S. H. Kress & Co. v. Markline, 117 Miss. 37, Ann. Cas. 1918 E 310, 77 So. 858 (1918).

In Aiken v. Sidney Steel Scraper Co., 197 Mo. App. 673, 198 S. W. 1139 (1917), it appeared that defendant kept machinery for sale, and plaintiff, desiring to purchase an attachment or casting, went to defendant's establishment, was waited upon by defendant's employee in charge of the stock, and informed that they did not have what he wanted detached, but it was thought that what was wanted was attached to machinery which was kept in the basement, and they went down in the elevator to see, the employee running the elevator. They found what plaintiff wanted, and as it was necessary to have a mechanic detach it, which would take some time, the

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the defendant, the plaintiff must establish the notice before the defendant is called upon to contest it; in other words, it is not to be presumed.

It is not perceived that there is any difference in the law of negligence between a person slipping on a stairway or on a floor; and in Schnatterer v. Bamberger Co., supra, 81 N. J. Law, at page 561, 1 N. C. C. A. 669, 79 Atl. 324, 34 L. R. A. (N. S.) 1077, Ann. Cas. 1912 D, 139, this court, referring to the earlier case of De Mateo v. Perano, 80 N. J. Law, 437, 78 Atl. 162, observed that evidence of the previous knowledge of the landlord of the defective condition of a roof leader was deemed an element essential to carry the case to the jury, and this was laid hold of as a reason for deciding that notice of

employee invited plaintiff to a nearby place for lunch. On their return, as they entered the building, some one wanted to speak to the employee, and he stopped and said something to plaintiff about going on to the elevator, such as to go "to the elevator and wait for him to come," or to "go around to the elevator and I will be there in a few minutes," or "wait in the elevator." Defendant objected to that evidence being accepted as a direction for plaintiff to get into the elevator, and contended that it should be taken to mean that plaintiff was to go to the elevator, and that he would be along presently. The court said that, as it would make no difference in their disposition of the case, they would consider the latter to be the meaning of plaintiff's testimony. The testimony showed that when plaintiff went to the basement, before going to lunch, he did not observe that there was a gate at the elevator shaft, and the court said they considered it fairly to be inferred that he must have seen that there was no gate at that particular time working in connection with the movement of the elevator. Plaintiff testified that, after leaving the employee, he proceeded to the elevator, and observed again that it was poorly lighted at that place, there being only one electric bulb, and that down at the end of the room; that he walked to the elevator; that the empty space in the shaft looked exactly like the floor in the elevator, and, supposing it to be the floor, he stepped in and fell, it not being light enough for him to see distinctly. At the conclusion of the evidence in plaintiff's behalf, the trial court gave a peremptory instruction to the jury to find a verdict for defendant, and plaintiff appealed. It appeared that defendant was a sub-lessee in the building, and defendant contended that it was not liable because it was not in control of the building and elevator. The court distinguished the case from instances where the employee of the tenant in a building is injured in an elevator the operation of which the employer has nothing to do with, saying: "This case belongs to a different class, and is instituted by a party plaintiff sustaining an altogether different relation to the party defendant. This plaintiff was defendant's customer, invited into the building where it kept its goods for sale, and invited to go to the particular place where the goods were by way of an elevator which defendant undertook to operate." Upon the question of contributory negligence, the court said it was for the jury because, accepting the evidence in plaintiff's behalf for the fact, as it was bound to do, it was manifest that defendant,

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the defective step in the Bamberger store was requisite to be brought home to the defendant in order to create liability.

Nor does res ipsa loquitur apply. People frequently sustain falls when and where others do not. In Paynter v. Bridgeton, etc., Co., 67 N. J. Law, 619, 52 Atl. 367, it was held that a mere fall from a street car, without any evidence to show how the fall was occasioned, raises no presumption of negligence on the part of the operators of the car, and that the doctrine of res ipsa loquitur was applicable only when the thing shown speaks of the negligence of the defendant, not merely of the happening of the accident. In Kingsley v. D., L. & W. R. R. Co., 81 N. J. Law, 536, at page 541, 80 Atl. 327, 35 L. R. A.

for the purposes of transacting business with plaintiff, invited him to use an elevator which was so dimly lighted as to make appearances deceptive. It was not the light of broad day, so that one could be charged with listlessly and blindly blundering into an elevator shaft; nor was it so dark that one could know, or realize, that he could not see, but it was in that indefinable state between full light and complete darkness which permits one to see imperfectly, and frequently deceptively, as in twilight. The judgment for defendant upon the peremptory instruction was reversed and the cause remanded for a new trial.

D. Stairway.

1. Dimly lighted.

Plaintiff entered defendant's store with a vague purpose of buying something if she saw anything she took a fancy to. She saw counters with merchandise displayed upon them, one extending down the middle of the store and one down each side, the latter in front of wall shelves of merchandise with a space for the saleswoman to work between the wall shelves and the counters. Such an arrangement, the court said, in itself extended no invitation to a customer to go behind the side counters into the space which was obviously for employees. About halfway down the store the counter on one side had an opening or passageway through it, and immediately in front of or across the end of the passageway and against the wall was a book rack containing five shelves, one above the other, about 4 feet long, the shelves being filled with miscellaneous books with the titles displayed for selection and with a sign upon the rack stating that any book in the rack could be bought for 10 cents. There was a dim electric light about 6 inches above the book rack, and to read the titles of the books on the rack it was necessary to enter the passageway. Plaintiff decided to buy a book, and there being no saleswoman near the rack, and plaintiff, thinking the passageway was for that purpose, went into it to get where, by reading the titles of the books, she could select such as struck her fancy. In doing this she stepped a little to one side and fell down a stairway, which she did not and in the dim light was not likely to see, and which was located back of the counter and immediately adjoining the passageway, the gate to the stairway being tied open at the time with a string. In the present suit for damages for the injuries sustained, plaintiff had judgment, and defendant appealed. The court held that the implied invitation of a storekeeper was broad enough to include one who en-

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(N. S.) 338, Mr. Justice Minturn, speaking for this court, remarked that out of a car filled with passengers none had been produced to testify to the inherent or obvious danger incident to alighting therefrom, or that any other accident took place at that time, or at any other period, in the attempt to use the step and platform, and that the argument of negligence by the defendant in that case must proceed upon ad hominem lines, and not upon notice to the defendant from the happening of a previous accident, or from the clear obviousness of danger incident to the maintenance of a dangerous condition, and it was held in the case that the mere happening of an accident, without some proof of facts from which a violation of a duty to the

tered a general store with a vague purpose of buying if she saw anything that struck her fancy; that the question of invitation to a customer to enter the space in a store back of a counter, obviously reserved as a place for the sales employees to work, was for the court, because, in the absence of other circumstances there was no evidence of indirect invitation; but that under the circumstances shown in this case there was some evidence of implied invitation, and a jury question consequently arose, although the testimony showing the circumstances was undisputed, the court saying it was for the jury to visualize the situation from the evidence and decide whether the plaintiff had reasonable grounds from what she saw for believing that she was invited or expected to go where she did go for the purpose she had in mind. The judgment was affirmed. MacDonough v. F. W. Woolworth Co., 1 N. J. L. 677, 103 Atl. 74 (1918).

Plaintiff, while transacting business as a customer in the furniture store of defendant, fell down an open stairway in the floor and was injured. This action was brought for damages and plaintiff recovered judgment, from which defendant appealed, contending that he was entitled to judgment on the jury's special findings which were in substance as follows: That any person whose eyesight was in reasonably good condition, and particularly plaintiff, could have seen the stairway in question by merely looking towards the floor of the storeroom; that plaintiff and her daughter spent at least one hour walking about defendant's storeroom prior to the injury; that while plaintiff and her daughter were walking about the store prior to the injury defendant accompanied them and assisted plaintiff as she walked from the balcony, after having gone there to look at a desk; that when plaintiff went to the passageway leading to the top of the stairway she perceived that it was very dark there; that after entering the passageway leading to the stairway in question, and realizing the darkness thereof, plaintiff did not stop to consider her surroundings, her mind being fixed on kitchen utensils; that defendant's negligence consisted in failing to notify plaintiff of the presence of the stairway; and that after plaintiff entered the passageway leading to the top of the stairway she could not have seen the stairway by looking towards the floor and thus have avoided injury to herself. Defendant contended that the case was covered by the principle which requires normal persons of mature age to exercise their faculties for their own protection before entering dark places or passageways with which they are unfamiliar, and that the jury's

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plaintiff by the defendant may be legitimately inferred, as a rule will not constitute negligence. Now, in the case at bar, assuming that the floor was smooth, or even slippery, it is obvious that it was not so smooth or slippery as, for that reason, to cause falls, for, if it were, there would have been others besides that of the plaintiff, both at and before the time of her accident.

The mere fact that Mrs. Garland fell on the floor of the Furst store, without any evidence to show how the fall was occasioned, raises no presumption of negligence on the part of the owner, and the doctrine of res ipsa loquitur, which is only applicable when the thing shown speaks of the negligence of the defendant, not merely of the

findings show that plaintiff was guilty of contributory negligence. The court denied this contention, saying that plaintiff had no reason to suppose there was a mantrap in the floor of the storeroom obscured by the darkness caused by piles of goods stacked about; that her attention was attracted to some tinware and kitchen utensils on a shelf at one side of the room, and she and defendant had some conversation about them; that defendant told her to step around in there and look, and if she found what she wanted to come back and he would make the price right. With such an invitation, the court said, and no warning of danger, it could not be said that the plaintiff was negligent in not looking towards the floor, and the invitation as given would be bound to lead the plaintiff to believe that no danger to her lurked in the darkness behind the stack of goods. The judgment for plaintiff was affirmed. Reese v. Abeles, 100 Kan. 518, L. R. A. 1917 E 747, 164 Pac. 1080 (1917).

2. Concealed by show cases.

In Stanford v. Edward N. Elmore, Inc., 165 N. Y. Supp. 256 (1917), the evidence showed that plaintiff visited the store of defendant, a dealer in bric-a-brac and antiques, and, upon inquiring of a salesman for a specified form of candlestick, the salesman indicated that he had something of the kind at the rear of the store, and started to walk in that direction with plaintiff and her companion following him. There was an unobstructed passageway down the center of the room between 8 and 9 feet wide, along each side of which were piled up the bric-a-brac and antiques. Twenty feet down the passageway a stairway descended at right angles to the passageway, and one showcase was placed against the railing on each side of the stairway, each showcase adjoining the banister of the stairway and being at a distance of about 18 inches from the front of the stairway. When plaintiff had reached the first showcase and was looking at the candlesticks facing the rear of the store, with her side to the stairs, and as she turned around and moved slightly to allow her companion to see the candlesticks, her foot went over the edge of the stairway and she fell down the entire flight, sustaining the injuries for which she claims damages. Plaintiff testified that it was quite dark, and that she did not see the stairs at all or know that they were there, and that when she reached the showcase the salesman lighted a small light on the side of the showcase, so that as she looked into the case she looked towards the light, and that, while such light gave some light into the showcase, it gave absolutely no

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happening of the accident, does not apply. As the majority of this court said in Cronecker v. Hall, 105 Atl. 213, at page 214, that there was no testimony worthy of the designation from which it could be inferred that what the defendant's agent did was done in the scope of his master's business, so here it can as pertinently be remarked that there is no testimony worthy of the name which shows that the defendant was negligent. In our opinion a nonsuit, and, failing that, a direction of a verdict for the defendant, should have been ordered at the trial.

But the defendant respondent contends that, as there was a jury of view, the observations of the jurymen are evidence in the case,

light upon the floor or upon the stairway. Upon the authority of Gallagher v. Halpern, 95 N. Y. Misc. 185, 159 N. Y. Supp. 160, ante, a judgment dismissing the complaint was reversed and a new trial ordered.

3. Gate left open.

Plaintiff, a middle-aged woman, entered defendant's store to make some purchases. After she had bought a few articles and was seeking to buy a sugar box, she was asked by the saleswoman to point out the box, and following the saleswoman, she walked through an open space between two railings, at the same time pointing to a sugar box on a shelf against the wall of the store. While so engaged she fell down a flight of stairs which she did not see and of the existence of which she had been given no warning. The opening of the stairway was flush with the floor, and between the rails through which the saleswoman and the plaintiff passed on their way to the sugar box there was a gate which opened and shut by a spring lock, to prevent persons not connected with the store from going on to the floor space beyond it. Plaintiff testified that when she was brought upstairs after her fall she saw a gate across the opening through which she and the saleswoman had passed, and that the gate was not shut. Plaintiff recovered a verdict in the court below, and from the judgment entered thereon this appeal was taken, the single question presented being whether there was any evidence warranting the submission of the case to the jury. The court, in affirming the judgment, held that upon the evidence the jury could have drawn inferences either that the saleswoman in passing opened the gate to let the plaintiff follow her, in order to point out the sugar box, or that the gate was found open and left so by the saleswoman in order that the plaintiff could follow her for the purpose stated, and that there was sufficient, though meager, evidence from which the jury might properly have found that the saleswoman, by her conduct, invited the plaintiff to the spot where the latter met with her mishap, and that the question whether the defendant exercised reasonable care to keep and maintain its store in a reasonably safe condition, and the question whether plaintiff used reasonable care for her own safety, were, under the evidence, jury questions, and were properly submitted to the jury. Deronet v. F. W. Woolworth Co., 89 N. J. L. 669, 99 Atl. 126 (1916).

E. Hole in tin shop floor.

In DeWolfe v. Pierce, 196 Ill. App. 360 (1915), it appeared that defendants were conducting a hardware store and tin shop in a building having

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and, as a court of appeal cannot know what they saw, the verdict of the jury may not be set aside. The supreme court in its opinion stated that it was argued for appellant, and with much force, that the floor was of standard material, in general use for the purpose, and that there was no evidence of any lack of ordinary care in using and maintaining it; but the difficulty about adopting that line of reasoning was that the jury went to examine the floor, at the instance of the defendant's counsel, who asserted that it was in the same condition at the time of trial as it was in when plaintiff sustained her injury; that the jury came back and returned a verdict for the plaintiff; that what they saw or felt, or both, did not apear in the printed

two entrances from the street, one entrance being to the general store where smaller articles were kept and the other to a room called a warehouse, but in which defendant kept for sale stoves and heavier articles. Back of this room was a tin shop where one of defendants worked, and there was a door from each of the rooms into the tin shop. Before the time in question, defendant's customers desiring to purchase some of the larger articles or having business in the tin shop sometimes used the doorway into the warehouse. A short time before the accident a drayman in unloading a stove had broken a hole in the floor just back of the sliding door to the warehouse, and defendants had placed a stove over the opening so that customers entering that way would not fall in, but on the day of the accident the stove was removed and one of the defendants was engaged in repairing the floor, and had gone out of the room for a short time to get something needed in the repair work, leaving the door partly opened, and while he was gone, plaintiff entered the store, stepped into the hole and received the injuries for which this suit was brought. The defense was that plaintiff was a licensee on the defendant's premises when injured. Plaintiff recovered a judgment for $250 and defendant appealed. Upon appeal it was held that the fact that plaintiff's declaration alleged that the injury occurred in defendant's store building while the proof showed that it occurred in the so-called warehouse did not constitute a variance; that plaintiff in entering the warehouse door was not a mere licensee without invitation so as to excuse defendant from the duty of exercising care to keep such entrance free from danger, it appearing that such entrance was so used by customers entering the store with sufficient frequency to charge defendants with knowledge and to amount to an invitation to plaintiff to use that entrance; that the jury was justified in finding that at the time of the injury plaintiff was in the exercise of due care for his own safety; and that, although plaintiff in his testimony sought to magnify the injury, the verdict of $250 was not excessive.

F. Balcony rail giving way.

Defendant's company was a dealer in lumber, and plaintiff's intestate visited its premises for the purpose of buying a stick of lumber. He was directed by defendant's servants to its superintendent, and by him shown some lumber on the first floor; not finding what was wanted, the superintendent told him to come upstairs, and conducted him upstairs and along a balcony or elevated platform, about 3 feet wide, in front of the stalls

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case, and the court could not tell but that their observation disclosed a condition which, if referred back to the time of the accident, was persuasive of negligence on the defendant's part.

This was in effect a ruling that what the jury saw amounted to mute evidence tending to establish defendant's negligence, and for that reason, in addition to the other one given, namely, that there was evidence of an unusually slippery floor, stated arguendo, the judgment was affirmed, apparently upon the theory that, because the extent to which the view afforded evidence could not be known, the verdict could not be overridden, even if the proofs to be found in the record were not, in and of themselves, sufficient to sustain the

where the lumber was kept. There was a railing about 3 feet high on the outside of the balcony, supported by uprights, the ends of the rail being designed to rest in sockets or grooves on the top of the uprights. In passing along, decedent placed his hand upon the rail, when it came off and decedent fell 11 feet to the ground floor, and was killed. This structure had been in use for several years, and the rail was always removed when lumber was passed up from the ground floor to the stalls back of the balcony, and on such occasions it sometimes happened that the rail was not immediately replaced properly in the sockets. On the occasion in question the rail did not fall because of any break, nor because any part of the structure broke, but because it was not in the grooves or sockets on the posts. In an action for the death the jury found for plaintiff, and defendant appealed, the principal question being upon the propriety of the refusal of the defendant's motion for a direction of verdict made on the ground that defendant had performed its duty to decedent, that decedent exceeded the grounds of his invitation, and that the evidence raised merely a conjecture as to how the accident happened. The court held that the owner or occupier of premises who, by expressed or implied invitation, induces a person to come upon the premises, is under a duty to exercise ordinary care to render the premises safe for the purposes embraced in the invitation; that in the present case that duty included the duty to use ordinary care to have the guard rail of a balcony in a reasonably safe condition for the purpose for which it was used and intended to be used; that decedent was on the defendant's premises by the express invitation of defendant's servants, and was following the superintendent to the place where he was told to go; that he was thereby exposed to an unusual danger, of which the defendant knew or ought to have known; and that he was killed by reason of the guard rail being so insecurely placed as to fall when he put his hand upon it, and yet so arranged as to give no warning to any one using it as it was designed to be used, the guard rail, under the circumstances, being in the nature of a trap or concealed source of mischief; and that it was, therefore, clearly open to the jury to find that the defendant was negligent, and that a motion for a direction of a verdict was properly denied. It was also contended that the judgment should be reversed because the trial judge refused to grant a motion for a nonsuit made at the close of the plaintiff's case because there was no evidence that the person who invited the de-

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jury's finding. This we deem to be error. In our opinion, for reasons to be presently stated, a judgment should be reversed, if legally unsupportable in and by the record under review, notwithstanding a view of the premises by the jury.

The respondent urges that the view by the jury was had under section 30 of the Evidence Act. Comp. Stat., p. 2229. It is true that section 30 provides that, in case it shall appear that an inspection or examination of any premises would aid in ascertaining the truth of any matter in dispute between the parties to an action, it shall be lawful for the court to order an inspection or examination of the premises by the jury, or the opposite party or parties, or such persons

fendant to come upstairs was defendant's superintendent. The court held that this motion was properly denied as the defect in the evidence was supplied by evidence thereafter taken in the progress of the case. Judgment was affirmed. Sefler v. Vanderbeek & Sons, 88 N. J. L. 636, 96 Atl. 1009 (1916).

G. Slipping while descending stairway.

In Emerson v. S. S. Kresge Co., — C. C. A. —, 259 Fed. 206 (1919), was a suit for personal injuries caused by slipping on a stairway in defendant's store, and at the close of all the evidence the court directed a verdict for the defendant on the ground that there was no evidence of negligence on the part of defendant, and the question was brought to the court of appeals on writ of error, the sole question being the sufficiency of the testimony to authorize submission of the case. No complaint was made of the construction or lighting of the stairway, the theory of the petition being that while descending the stair plaintiff slipped on a piece of candy which had fallen on the stairs or near the head thereof, and plaintiff contended that she introduced substantial evidence of negligence in that a candy bin, whereon jelly beans were piled, and from which they might fall upon the floor, was placed near the head of the stairs; that the candy thereon was piled higher than the sides of the bin; and that not long before plaintiff passed that way an employee had spilled jelly beans on the floor near the stairway while pouring them into the bin. The court considered only the testimony of plaintiff, and found that it showed that the stairway was well constructed, having handrails and corrugated metal treads, was clearly lighted, and was swept at half-hour intervals by a porter, and said that it was not negligence to place a candy counter near the stair head, and that there was no evidence that the candy was habitually piled in the bin on the counter in such a way as to naturally or probably fall over the sides of the bin upon the floor or stairs. There was no evidence that any of the defendant's employees knew that any candy had fallen on the floor when it was emptied into the bin a short while before the accident, nor were the circumstances such as to charge defendant with such knowledge. The judgment was affirmed.

H. Slipping while descending incline.

In Blease v. Webber, — Mass. —, 122 N. E. 192 (1919), an action for damages received by plaintiff while in the store of the defendants, plaintiff testified that she was acquainted with a salesman in the defendant's employ, and that he had invited her to the store; that after making some pur-

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as shall be named as witnesses, which inspection or examination may be ordered either before or during the progress of the trial. This is not the jury of view statute, strictly so called. That is to be found in the Jury Act. Comp. Stat., p. 2976, §§ 31-35.

The inspection or examination by the jury under section 30 of the Evidence Act is not accompanied with showers, as is the case under section 31 of the Jury Act. That act in section 35 provides that the court may, at any time after the jury is drawn, order that the jury shall view any place, if in the judgment of the court such view is necessary to enable the jury better to understand the evidence given in the cause, and such view shall thereupon be had in such manner as

chases on the street floor, she went with the clerk to the basement, which she described as rather dark, darker than upstairs, although she had no difficulty in seeing her way around; that after reaching the basement she walked up a wooden incline or runway to another room where she made some purchases; that the salesman then took hold of her right arm and conducted her down the center of the runway; and that, when she reached a point about halfway down the runway, her feet slipped and she fell and broke her hip. It appeared that the runway was extensively used by rolling heavy trucks loaded with goods over it, and that it was smooth and slippery in the center. There was a strip of rubber matting 21 inches wide on the right side of the runway as the plaintiff walked down it, which she testified she did not see until after she fell, as the salesman was walking beside her and was between her and the matting. There was a verdict for plaintiff, and defendants excepted thereto. In overruling the exceptions the supreme court held that plaintiff was rightfully in the defendants' store by their invitation, and that they owed to her the duty to maintain the premises in a reasonably safe condition for her to use in accordance with the invitation; and that the jury could have found that the runway had been provided by the defendants as a means of passage for their customers; that it was in a slippery and dangerous condition, which made it unsafe for the plaintiff to pass over it; and that such a finding would warrant a finding of negligence. It was also held that it could not have been ruled as matter of law that the plaintiff was not in the exercise of due care, the circumstance that she did not see the rubber matting and did not walk on it in passing down the incline not being conclusive as to her conduct, as the jury may have found that she could not readily see it because the place was not properly lighted, or they may have found that, because the salesman was walking beside her, it was hidden from her view.

I. Slipping on piece of meat on floor.

Plaintiff went into defendant's market, and after buying some butter, turned to go to the meat counter, when she slipped upon a piece of meat covered with sawdust, and fell, receiving the injuries complained of. The floor of the market was covered with sawdust twice a day, and a man was employed by defendant whose duty it was to sweep the floor and keep it clean, and he was engaged all the time in the performance of that duty. The meat counter was used only for meats cut up for sale, no trimming of any kind

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the court shall direct. The motion in this case was for the appointment of a jury of view, rather than one of inspection or examination, assuming there is any substantial difference between them. Counsel for the defendant appellant moved for permission to have the jury go and look at the floor, and the trial judge ruled that he would allow the jury to go under the care of an officer to view the premises, and that each side might select a man—a shower, of course, although that was not stated. Obviously, if the court ordered an inspection or examination by a party or witness under the Evidence Act, either could give testimony before the jury as to what they saw; but if the jury made the inspection or examination, what they saw might aid in ascertaining the truth. That would be no more than en-

being done thereon, but occasionally a piece of meat would get on the floor. There was a verdict for defendant and the plaintiff excepted. The court held the duty of defendant to be to keep his premises in a reasonably safe condition for the use of those who visited the store at his invitation, and that he would be liable to plaintiff for an injury caused by his negligence while she was visiting the store at his invitation and was herself in the exercise of due care. The court held that there was sufficient evidence of plaintiff's due care, but that they failed to find any evidence of negligence on the part of defendant, saying: "The only evidence of negligence was the presence upon the floor of the piece of meat that caused the plaintiff to slip and fall. That could not be found to constitute negligence unless the meat had been there such a length of time that the defendant or his servants knew, or ought in the exercise of due care to have known, that it was there, and to have removed it. There was nothing to show how long it had been there. The fact that it was covered with sawdust, as the plaintiff testified that it was, had no tendency to show how long it had been there. Whether it was there when the floor was sprinkled with sawdust and should then have been seen and removed, or whether it had fallen or had been knocked from the meat counter a moment or two before and had become speedily covered with sawdust (it being undisputed that the floor was covered with sawdust all the time), were purely matters of conjecture." The exceptions were overruled. Norton v. Hudner, 213 Mass. 257, 44 L. R. A. (N. S.) 79, 100 N. E. 546 (1913).

II. Tripping over obstructions.

A. Platform at doorway.

Defendant, the proprietor of a wholesale liquor store, maintained a platform on the sidewalk at a grade with the store floors, which was used to facilitate the deliveries of goods sold by push carts. At the time in question plaintiff entered the store, bought a case of beer, and in departing stepped on the platform, which slid away, and he fell in the doorway. When he entered the platform had not been there. In his suit for damages for the injuries sustained in the fall, plaintiff alleged that the injury was caused by the negligence of defendant in failing to properly secure the platform and in obstructing the entrance so that plaintiff suddenly slipped and fell on and over said platform. The answer admits that

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abling the jury better to understand the evidence by a view under the Jury Act. It is quite impossible to believe that the legislature intended to place upon the statute books two schemes with reference to views by juries, one in which what they saw should be substantive evidence and the other not.

In the view we take of this question, it is unnecessary to decide to what extent an inspection or examination of premises under section 30 of the Evidence Act, or view of the premises under sections 31-35 of the Jury Act, may or may not be evidential, for in no event could either be conclusive, and thus prevent the court from controlling the issue as matter of law.

The defendant appellant cites two cases in this state on the ques-

defendant used his push cart in delivering orders, and maintained a platform elevated above the sidewalk on a level with the entrance to the defendant's store, extending out to the building line. The court rendered judgment for the plaintiff and defendant appealed. It was held that as the platform had been in use about a quarter of a century, weighed 75 pounds, was about 3 or 4 inches high, 5 feet wide and 6 feet long, and had a rail on each side, and that several people walked over it every day, and during the 25 years of its use no one ever had heard of an injury, there was no basis for a charge of negligence, as the defendant had no reason to suppose that a platform used in safety for so many years could suddenly become a source of danger. When defendant moved to dismiss, the trial court ruled that the platform could be considered in the nature of a nuisance, but the court said that this was not an action for a nuisance, but one of negligence, nor would the evidence sustain an allegation of nuisance as experience proved that the platform was wholly innocuous, and the propriety of its maintenance had never been challenged. The judgment was reversed and a new trial directed. Haleem v. Gold, 164 N. Y. Supp. 119 (1917).

B. Rope in aisle.

In Wine v. Newcomb, Endicott & Co., 203 Mich. 445, 169 N. W. 832 (1918), the testimony for plaintiff tended to prove that while she and her daughter were shopping in defendant's store and were passing along an aisle set with tables displaying goods, she fell to the floor, sustaining severe physical injury. The mother's testimony did not state what caused her to fall, and nothing in it tended to prove negligence on the part of defendant, but the daughter who accompanied her testified, in substance, that just before her mother fell she noticed that her own foot was in contact with a rope or cord on the floor, and that she had turned to call her mother's attention to it just as she fell; that she saw a man, apparently an employee, who was removing holiday decorations, handling a rope or cord, some of which was upon the floor in coils or in loops, one end of which was held by the employee and one loop or coil of which was about the foot or ankle of her mother after she had fallen, and that the rope slipped off when she was assisted from the floor. Upon conclusion of plaintiff's case, defendant moved for a directed verdict, and, the motion being denied, rested. The case was submitted to a jury

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tion of view: Gaunt v. State, 50 N. J. Law, 490, 14 Atl. 600, and De-Gray v. N. Y. & N. J. Tel. Co., 68 N. J. Law, 455, 53 Atl. 200. Gaunt v. State is, if anything, against his position. It was there held that upon the trial of an indictment for fornication, where the bastard and the putative father were viewed by the jury, the jury might consider whether there was a resemblance or not between them, and that in such cases the proper instrument of proof is inspection by the jury, and not the testimony of witnesses; that is, resemblance between the child and the putative father. But this case is not an authority to the effect that a judgment may not be reversed, because there has been a view by the jury. Mr. Justice Garrison, who wrote the opin-

and a verdict for defendant returned, a motion for a new trial was refused, and an appeal taken. The husband of the plaintiff also began a suit for damages for the injury resulting to him on account of the facts stated and the sums disbursed by him in curing his wife; the causes were heard together and submitted to the same jury with the same result. The court reviewed the instructions given by the trial judge, and found that they failed to state any rule for determining defendant's negligence under the circumstances, and while the fact that plaintiff tripped on the rope or cord was a necessary fact to be found, it was not made controlling or conclusive of defendant's negligence, and while plaintiff's request to charge upon that subject was somewhat discursive, they asked in substance for a proper rule for determining defendant's negligence. Upon the subject of the duty of plaintiff, the jury was told, in effect, that one who enters a busy store must keep his wits about him and pay attention to his surroundings, and cannot go about absent-mindedly and thinking of some particular subject, shutting his eyes to everything else. This instruction was held, in any event, to be an erroneous statement of the law as applied to the facts in the case, as it did not appear that plaintiff was acting differently from ordinary people who visit establishments like that of defendant to examine merchandise. The court said that, as a general proposition, a customer in such a place has the right to rely upon the safety of passage along passageways used by customers, and the trial court was requested to so instruct. The court also said that there was no evidence of any negligence of plaintiff contributing to her injury, as she did not see the rope or cord on the floor, and that she was not bound to anticipate that there would be any such obstruction. The defendant contended that there was no proof as to the person who put or allowed the cord to be put in the aisle being an employee of defendant, and to that the court said that some inferences may be drawn from the fact that one is employed in a place of business, apparently doing the work of an employee, and that, in the case at bar, there was evidence of the active agency of an apparent employee of defendant in making the passageway unsafe. The judgment was reversed and a new trial granted.

C. Hat box in aisle.

In Ginns v. C. T. Sherer Co., 219 Mass. 18, 106 N. E. 600 (1914), an action for injuries received by falling over a box in the aisle of defendant's store, it appeared that in the mil-

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ion, concludes with the assertion that the child was in court during the trial, and the attention of the jury was directed to it, that the defendant was a witness, and that in those circumstances it was not error for the court to refuse to charge the jury that they must not consider the question of resemblance at all, and that, if they did consider it, it must be from the testimony from the mouths of witnesses, and not from their own view. Thus it appears that the only question decided was that it was not error for the trial judge to refuse to charge that the jury must not consider the question of resemblance, and, if they did, it must be from the testimony of witnesses,

linery department of the defendant's store there was a passageway, on each side of which was a series of counters or tables used for displaying hats. The aisle was 3 or 3½ feet wide at the place of the accident, and there was evidence from which it could be found that the aisle was obstructed by a hat box which was about 19 inches in width and 9 inches in height, which had been left there for half an hour or more. A woman in charge of the department testified that it was her duty to see that there were no boxes in the aisle, and that it was against the rules and would be dangerous to allow them there. It was held to be for the jury to say whether this obstruction of the passageway was allowed to exist for so unreasonable a length of time as to constitute a violation of the duty which the defendant owed to the customers invited to its place of business; that it could not be ruled as matter of law that plaintiff was not in the exercise of due care, as the jury might consider that she was not bound to anticipate such temporary obstruction would be allowed to remain in the aisle for the substantial length of time that elapsed after she had first noticed it; and that the fact that she was walking behind the clerk and looking at her, and so failed to see the box just before she fell over it, might be found to be consistent with the standard of care by which a minor of her age must be judged, the fact that she was not thinking of the box at that particular time not being conclusive as to her want of care.

D. Weighing machine near entrance.

Plaintiff was lawfully in defendant's drug store, and as she turned from the soda counter to pass out of the store she fell over a weighing machine placed near the entrance, receiving injuries for which this suit was brought. On the trial, defendant presented a request for rulings that on all the evidence the plaintiff was not in the exercise of due care; that the defendant was not negligent in the maintenance of its premises; and that plaintiff was not entitled to recover, to the refusal of which the defendant duly excepted. In ordering a judgment for plaintiff on report from the superior court, the supreme court held that defendant owed plaintiff the duty to use ordinary care to keep its premises in a reasonably safe condition for her use as a customer, that the jury could find from the evidence which included a plan of the store that, when viewed in connection with the volume of patronage as described by plaintiff, the weighing machine had been placed too near the entrance to permit customers to make their exit in safety, and that the de-

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and not from their own view. The case, therefore, is not an authority on the precise question under discussion in the case at bar.

Nor is De Gray v. N. Y. & N. J. Tel. Co. That was a trial of an appeal from an award of commissioners who assessed land in condemnation proceedings. The trial judge charged, among other things, that the jury might adopt the opinions of witnesses so far as reasonable, and had the right to take into consideration their own experience as to whether certain structures were detrimental to the market value of abutting property, and if, in their experience, they were, the jury would make the compensation accordingly, and if they were not, and the jury were not inclined to adopt the views that had been

fendant in the exercise of due care should have discovered this probable danger and removed the machine. The court said that while the case was close, it could not say as matter of law that there was no evidence for the jury of the defendant's negligence. As to the contention that the plaintiff was negligent, the court pointed out that under the statute of 1914, ch. 553, that question was for the jury, who were to determine whether the presumption of her due care had been overcome by all the evidence, with the burden of proof on the defendant. Nye v. Louis K. Liggett Co., 224 Mass. 401, 113 N. E. 201 (1916).

E. Torn floor covering.

1. Rug in aisle.

Plaintiff, while a customer in the department store of defendant in the city of Pittsburg, caught her foot in a torn or worn spot in a carpet or rug which covered one of the aisles of the store, and was thereby thrown to the floor, sustaining personal injuries, to recover damages for which she and her husband brought this action, and were awarded judgment in the trial court. The action was based upon the alleged negligence of the defendant in failing to maintain the carpet or rug in a safe condition, and it was not disputed that, under the evidence, the question as to whether plaintiff's injuries were due to the defendant's negligence was for the jury. The error relied upon for a reversal was the failure of the trial judge to charge certain of defendant's requests or points for instruction to the jury, which embodied in substance the propositions that the defendant, as the proprietor of a department store, was not an insurer of the safety of its premises; that it owed to customers only the duty of exercising reasonable care to keep its store in a safe condition for their use; and that unless defendant had actual knowledge of the defective condition of the premises which plaintiff claimed caused her fall, or by reason of its having been in such a condition for so long a time had constructive notice thereof, the plaintiff could not recover. Outside of plaintiff's injuries, the only controverted facts in the case were as to whether the defendant had actual knowledge of the worn-out condition of the carpet or rug before the accident, and as to the length of time it had been in a defective condition. The court held that the proprietor of a store to which prospective customers were invited, like other persons who, expressly or impliedly, invited others upon his premises, was not an insurer of their safety while in the store, but owed to them merely the duty of

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expressed to the contrary, their award would be proportionally less. This was held to be error for several reasons, among which was that to avail a party of a fact known to a juror he must be sworn and examined as any other witness, so that his evidence, like that of any other witness, may be first scrutinized as to its competence and bearing upon the issue, and for the further reason that the court and parties may know upon what evidence the verdict was rendered. Under this charge the jurors were permitted to arrive at a verdict upon their personal knowledge or experience, and to be, in effect, witnesses before their co-jurors. This does not touch the question of the evidential effect of an inspection or view of given premises, or

exercising reasonable care to keep the store in a safe condition for their proper use, and that, as a consequence of that rule, it followed, in a case like this, where the defective condition was not a structural one but was due to the carpet or rug becoming out of repair, that before the defendant could be charged with failure to perform its duty to plaintiff, it was necessary for the jury to find either that the defendant had actual knowledge of the worn-out or defective condition of the carpet a sufficient length of time before the accident happened to have enabled it to repair it, or to have warned plaintiff of its condition, or that its actual condition, at the time of the accident, had existed for such a length of time prior thereto that defendant, in the exercise of reasonable care, should have discovered it before the accident and remedied it, or that its general condition before the accident was such that, in the exercise of reasonable care, the defendant must have anticipated that in all probability it would, unless repaired or replaced, become dangerous to customers or persons lawfully passing over it. The court further held that defendant's requests or points for instructions were in the main proper, and as they, or the rule of law intended to be conveyed by them, were not covered in the charge, and the jury's attention was not directed to the crucial points on which, under the evidence, the liability or nonliability of the defendant rested, there was error in declining to charge them, at least in substance, and that for this error the judgment must be reversed and a new trial granted. Kaufman Department Stores, Inc. v. Cranston, — C. C. A. —, 258 Fed. 917 (1919).

2. Matting.

In Hathaway v. Chandler & Co., 229 Mass. 92, 118 N. E. 273 (1918), plaintiff brought suit for injuries received while a customer in defendant's store when she tripped upon a strip of matting upon the floor and fell. There was no contention that she was not in the exercise of due care, and the only question considered was whether there was any evidence which would warrant a finding that the defendant was negligent. The trial court directed a verdict for defendant, to which plaintiff excepted. In overruling the exception the court said: "The plaintiff's fall of itself is not evidence of negligence. As there is nothing to show that the edge of the matting was raised, or was otherwise in a defective condition before the accident, there is no evidence of negligence on the part of the defendant. The condition of the matting before the accident does not

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whether or not, in a case where an inspection or view is had, the verdict may not be set aside as against the weight of the evidence, or because there was no legal evidence given on the trial which would support it.

The question being an open one in this state, we are at liberty to adopt that principle which we think more consonant with reason and better calculated to serve the ends of justice. In Seaverns v. Lischinski, 181 Ill. 358, 54 N. E. 1043, Chief Justice Cartwright observed that it had never been held in Illinois that a jury might return a verdict upon their own knowledge, unsupported by other evidence, whether such knowledge was acquired in or out of court, by a view

appear; whether it was raised or lay smoothly on the floor is wholly a matter of conjecture." Plaintiff offered to show that after the accident another person fell over the same matting while it was located in the same position that it was immediately after her fall. The exclusion of such evidence was sustained, the court saying that it was clearly inadmissible.

III. Thrown by escalator.

Defendant had in operation in its store a moving stairway to carry customers from the main floor to the balcony, it being placed between two stationary stairways, and being about 2 feet wide, with rails on each side to take hold of on making the ascent. It was claimed by plaintiff that on the day in question, while on the stairway, when she had nearly reached the top, she was thrown by a peculiar motion of the stairway, and fell upon her right knee and was injured. When plaintiff's proofs were submitted, the trial judge directed a verdict for the defendant because, in his opinion, no proof had been offered to show any negligence on the part of the defendant. Plaintiff on appeal urged that the question of defendant's liability should have been submitted to the jury, which was the only question upon this appeal. While there was some evidence of a jerky motion in the stairway at other times, the court said that, in effect, the plaintiff relied simply upon the happening of the accident to sustain her claim of negligence on the part of defendant, and said "that the mere fact of an accident occurring is no evidence of negligence is well established in this state." It was further urged, however, that negligence, like any other fact, may be inferred from the circumstances, but the court said: "But in making this contention counsel overlooks the fact that before this inference of negligence can be drawn, something more must be shown than the mere happening of the accident. In the case before us there was no testimony, direct or indirect, as to any negligence in the construction or in the operation of the stairway." Judgment was affirmed. Fuller v. Wurzburg Dry Goods Co., 192 Mich. 447, 158 N. W. 1026 (1916).

IV. Struck by flying or falling objects.

A. Fragment from box being opened.

Plaintiff, a boy about 12 years of age, went with a friend about 15 years of age to defendant's store. The friend intended to make purchases, and did so, but plaintiff did not intend to buy anything, and in fact bought nothing, merely accom-

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or otherwise, and a verdict based exclusively on knowledge so acquired would be set aside for want of substantial evidence to support it; that a verdict, unsupported by sworn testimony upon disputed facts has always been successfully challenged, whether there was a view or not, and if a jury had disregarded such evidence, or there was none which a reasonable person might believe and act upon, the verdict should be set aside; that in the very nature of things it is ordinarily impossible to put in the bill of exceptions persons, places, or things exhibited to a jury; that the sense in which a bill of exceptions is understood is that the bill contains all the evidence, if it contains that which was presented at the trial, although objects, persons, or

panying his friend on the latter's business. While the friend was being waited upon the store manager directed a boy to open a box, the opening of the box being in no way connected with the purchases made by plaintiff's friend, neither he nor plaintiff having any interest whatever in the box. While plaintiff was standing near his friend, and the box was about 3 feet away from him, and he was watching the boy who was stooping down to open the box, the boy proceeded to pry off the lid by inserting a hatchet under it and striking it with a hammer, and while this was being done a fragment of metal flew into plaintiff's eye and destroyed the sight. Plaintiff and his father brought this suit for damages, and at the close of plaintiff's case the court granted a motion for nonsuit, and, in affirming this judgment, the court said that: Merchants invite the public to enter their stores to buy wares. It cannot be said that they invite the entrance of those who accompany them, but who have no intention of purchasing; such persons are mere licensees. While it may be that they invite those who enter, who, after inspecting their wares, may become purchasers, such an invitation did not extend to young Fleckenstein [plaintiff], when he accompanied his friend into the store, and that, while plaintiff was lawfully in the store, he was there only as a licensee, and that there was no pretense that he was injured by a wilful act of any of the defendant company's employees, defendant was not liable for the injury. Fleckenstein v. Great Atlantic & Pacific Tea Co., 91 N. J. L. 145, 17 N. C. C. A. 439, L. R. A. 1918 C 179, 102 Atl. 700 (1917).

B. Glass from show case.

Defendant had the privilege of selling candy in a large store under a contract by which the store company furnished the show case, counter and fixtures. Plaintiff, while waiting for some candy she had ordered, was injured upon her foot by a piece of glass about 4 inches wide and an inch or two thick which fell from the show case, and it appeared that the bracket which supported the glass was out of place. In an action to recover for the damages sustained, plaintiff had a verdict and defendant excepted. The court held that defendant, in the conduct of his business, could be found to have invited customers to purchase the candy which he had to sell, and that it was his duty to use reasonable care to protect such customers from harm. No contention was made but that plaintiff was in the exercise of due care at the time of her injury. The court held, however, that the fact that plaintiff was injured by means

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scenes, of which the jury may have had a view, are not contained in it; that cases where a view has been permitted, which the jury might consider in arriving at their verdict, either as evidence or to enable them to construe and apply the testimony, stand on a somewhat different footing than where there has been no such view, and a verdict cannot be based alone upon seeing a rope, or a building, or the evidence of the senses.

In the case of People v. Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368, a criminal case, the New York court of appeals observed that if the view were a part of the trial, or was the taking of testimony upon the trial, it may be that the view could not take place in

of the glass falling upon her foot, and that the fall was due to a defective condition of the bracket, was not sufficient to entitle her to recover, but that she must go further and prove that her injuries were caused by some negligence on the part of the defendant, and said: "The record fails to show when the bracket had been forced from the position it originally was in; nor does it appear how long before the accident it was out of place. Whether the defective condition existed for a few minutes before the accident or for a longer period of time is wholly a matter of conjecture. There was nothing about the appearance of the bracket from which an inference could be drawn as to how long it had been out of its original position. There was no evidence that the defendant, or its servants or agents, knew of the defective condition or that the glass might fall, nor is there any evidence to show that they might have been informed of it by the exercise of reasonable care." The exceptions were sustained with an order to enter judgment for defendant. Kelley v. W. D. Quimby & Co., 227 Mass. 93, 116 N. E. 409 (1917).

C. Lid of refrigerator.

While visiting defendant's store for the purpose of purchasing an ice box, plaintiff was shown by one of the salesladies to a place where a number of boxes were standing open for inspection and, as she was examining one of the boxes, placed her hand on its upper edge for the purpose of enabling her to inspect its lower compartment and, while bending down for that purpose, the lid of the box dropped upon her hand, injuring her fingers, the damage to which is sought to be compensated by a recovery in this suit. Immediately after the falling of the lid the saleslady exclaimed that the same thing happened that morning. An expert furniture salesman who had had charge of an ice box department for 8 years in a store testified that it was the custom in the business to keep the lids of the boxes closed when they were displayed for sale. The testimony for defendant showed that the lid was held by a chain to prevent it from falling backwards, and it was inferable that there was no resistance by the chain or otherwise to prevent the lid from falling forward as it did. The trial court ordered judgment for defendant, and plaintiff appealed. On the appeal an initial objection was made to the introduction of the evidence of the exclamation made by the saleslady that the same thing happened that morning, and such testimony was held inadmissible because it was essentially an admis-

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the absence of the defendant; but they were not prepared to concede that the view was a part of the trial or was the taking of evidence. The trial could not take place in the absence of the judge, jury, and defendant, and yet the provision of the Code did not require the judge to attend upon the jury during the time it was inspecting the premises; that it was doubtless true that jurors might draw inferences from the objects which came under their vision; that, if viewing the locality during the trial were the taking of testimony, why was not the seeing of the locality before the trial the taking of testimony? that, if seeing were the taking of evidence, it would follow in every case that a juror who had seen, and was familiar with, the lo-

sion of a past occurrence of similar character. The court held that it could not be said as matter of law that the plaintiff's act in grasping the top of the box for the purpose of stooping down to examine its interior was negligence in the absence of a caution or warning from someone in authority. Upon the question of defendant's negligence the court said: "The falling of the lid itself under the circumstances was not without its importance upon that inquiry. Res ipsa loquitur is the maxim applicable to such a situation, and it raises a presumption of negligence which it is incumbent on the defendant to rebut by an explanation tending to relieve it of the presumption of absence of any or all care. In the case at bar, no attempt is made by defendant to explain the occurrence from that point, and, in the absence of an explanation comporting with the exercise of due care and foresight for harm, a case of prima facie negligence is established." In reversing the judgment and ordering a new trial the court said further: "We have intimated that the case at bar is barren of explanatory testimony, or of any semblance of it, and in that situation the liability of the defendant, upon the uncontroverted testimony, bespeaking negligence, as well as upon the legal presumption arising from the unexplained occurrence becomes manifest." Higgins v. Goerke-Kirch Co., 91 N. J. L. 464, 103 Atl. 37 (1918). From the judgment of the supreme court the defendant appealed to the court of errors and appeals, and the latter court concurred in the result reached by the supreme court, and, after pointing out that the action of the trial judge, who sat without a jury, in holding specifically that he could "find no negligence in law on the part of the defendant upon which liability in this case can be based," in effect found that, had there been a jury, the case was one for a nonsuit or a direction of a verdict for defendant, and, after agreeing with the supreme court that the evidence of the remark by the salesman should have been excluded, said: "We do not agree, however, that on the evidence the liability of defendant was 'manifest.' When the doctrine of res ipsa loquitur is invoked, the question of negligence is still one for the jury." The judgment of the supreme court was affirmed. Higgins v. Goerke-Kirch Co., — N. J. L. —, 106 Atl. 394 (1919).

D. Falling awning.

1. Entering store.

In Vigder v. Silverman, — N. Y. Misc. —, 171 N. Y. Supp. 393 (1918), plaintiff appealed from a judgment dismissing her complaint in an ac-

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cality, would be incompetent to sit as a juror, for he would have taken testimony in the absence of the accused, with which he had never been confronted.

In that case the view was had under a provision in the New York Code of Criminal Procedure, which, however, contains no peculiar feature distinguishing the view in those cases from one had in a civil cause. The case is a particularly strong one against the theory that a view by a jury constitutes the taking of evidence, because in that, a murder case, the defendant and his counsel were absent. It is true that defendant's counsel requested the view and waived the right of the defendant and himself to be present; but, after conviction of

tion for damages for injuries sustained by her through being struck on the head by an iron bar forming part of an awning attached to defendants' premises, when one of the defendants lowered the awning, as plaintiff was about to enter the store and was standing on the step leading thereto. The court held that plaintiff was entering defendants' premises by invitation, and that they owed her the duty of exercising reasonable care to safeguard her while on the premises, and that the evidence introduced by plaintiff would justify the jury in finding that the accident was due to the negligence of the defendants, either in the manner of lowering the awning or in having maintained it in a defective condition. Judgment was reversed and a new trial ordered.

2. Looking at show window.

While plaintiff was waiting for a street car, she stepped to defendant's window to inspect his display of goods, and while standing upon a 3-foot strip of land between the store building and the legal limits of a highway, which was paved and surfaced the same as the sidewalk, was injured by the falling of an awning, and this action was brought for the personal injuries sustained. By agreement the case was reported to the law court to determine the question of liability, the damages having been fixed by the jury at $500. The court held that plaintiff was upon the 3-foot strip of land as a licensee by the express or implied invitation and allurement of the defendant, and that he consequently owed to her the duty to see that his premises were in a reasonably safe condition. Defendant claimed that the awning fell as the result of a violent gust of wind against which he could not be expected to provide, and that the awning was substantial and carefully constructed. The supports for the awning were attached to the building by screws driven into soft pine plugs driven into the masonry, and the only examination apparently made of the awning was that of the clerk in raising and lowering it. The evidence showed that, according to the official record, the wind that day did not exceed the velocity of 26 miles an hour, and the court said that an awning which would fall under such a strain was most dangerous to the public. In rendering judgment for the plaintiff for $500, as found by the jury, the court said that the very circumstances of the accident seemed to establish the claim that the awning was insecure, and that the defendant failed to use proper care to make it reasonably safe, and quoted from another case as follows: "When the thing which has caused

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murder in the first degree, it was contended on behalf of the defendant that the inspection was part of the trial and the taking of evidence, which could only be done in the presence of the defendant in a capital case, and that his waiver was void. It was held otherwise, on the ground that the view was not a part of the trial, and was not the taking of testimony.

It should be noted that the inspection or examination under section 30 of our Evidence Act is to be ordered when it shall appear that such a proceeding would aid in ascertaining the truth of any matter in dispute between the parties to an action, not that it should be conclusive of anything or even evidence in and of itself; and the same

an injury is shown to be under the management of the party charged with negligence, and the accident is such as in the ordinary course of affairs does not happen if those who have the management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation (by a party charged), that it was caused by lack of proper care by the party charged with negligence.'' Leighton v. Dean, 117 Me. 40, 17 N. C. C. A. 443, L. R. A. 1918 B 922, 102 Atl. 565 (1917).

E. Swinging doors.

Defendant operated a large department store, the main entrance to which was through a vestibule or lobby extending parallel with the lot and street line about 20 feet and about 15 feet deep from the store proper, including a strip about 3 feet wide which was a part of the street. At each end of this entrance on the street there was a pair of heavy swinging doors equipped with springs, the space occupied by them, both while at rest and in motion, being mostly if not entirely outside the lot line and in the street, the whole entrance being enclosed and heated in cold weather. While plaintiff, a customer, was leaving the store and was about to pass out of one of the outside doors, some third person passed rapidly out, opening the one of the double doors nearest the building and letting it loose so that it came back with force, and in some way put the other door in motion so that it suddenly came back and struck plaintiff a violent blow on her right thigh and leg, knocking her down and causing injuries which developed into paralysis, from which she became almost helpless. Her suit for damages was tried three times, the present appeal being from the third trial which resulted in a verdict and judgment of $10,000 for plaintiff. Just prior to the last trial two additional counts to the declaration were filed in which the cause of action was based entirely on the charge that the lobbyway and doors extended beyond the lot line, and the case was apparently tried on the theory of those counts, there being no proof offered by plaintiff of improper construction or hanging of the doors and no evidence in support of an allegation that plaintiff was, at the time in question, a pedestrian walking along the street. It was held that the fact that the encroachment of the vestibule into the street showed that it constituted a public nuisance did not amount to negligence which was the proximate cause of the injury; that plaintiff was not a pedestrian upon the street by reason of the fact that the vestibule encroached thereon; and that plaintiff was not guilty of contributory negligence. The

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is to be remarked of a view under sections 31-35 of the Jury Act where, by section 35, it is provided that the court may order that the jury shall view any place, if such view is necessary to enable the jury better to understand the evidence given in the cause.

In our opinion the question presented to a court of review should be decided upon what appears in the record brought up to the appellate tribunal, notwithstanding that a view was had by the jury.

The judgment of the supreme court must be reversed, to the end that a venire de novo may issue.

MINTURN and BLACK, JJ., dissent.

court reversed the judgment solely on the ground that defendant was not shown to have been guilty of any negligence contributing to the injury complained of, and, in reply to a suggestion of plaintiff that inferences to the effect that the doors were improperly constructed and hung may be drawn from the proof as to the occurring of the accident, the court said: "We do not see how such an inference could be drawn from that proof, and if it be true that there is ground enough for that inference to sustain the action of the court in refusing to direct a verdict for defendant, still we are clearly of the opinion that there is no evidence of sufficient importance to warrant a judgment on that ground." In view of the fact that there had been three trials the case was reversed without remanding. Sehnert v. Schipper & Block, Inc., 193 Ill. App. 202 (1915).

The forefinger of plaintiff's right hand was crushed by a swinging door at the entrance to the retail dry goods store of the defendants. The door was one of three single doors between the vestibule and the store, and was made of plate glass with a border of wood at the top, bottom and sides, and was about 7 feet high, 2½ feet wide and 3 inches thick, the hinges being of a type that permitted it to be pushed open in either direction. As plaintiff was about to go from the vestibule into the store another person passed ahead of her and pushed the door open, and as it swung back she put up her hand to shield her head and glasses, and apparently allowed her forefinger to project beyond the edge of the door, so that it was caught between the edge and the door frame. It was held that the record disclosed no negligence on the part of the defendants, the doors being of ordinary construction, and substantially like those in general and common use, and there being nothing to show that they were not entirely safe when properly used by persons passing through them, and if, as the plaintiff's testimony indicated, the ordinary speed of the door was increased by another customer negligently pushing in the opposite direction, the defendants were not responsible therefor. It appeared that there was no pushing or jostling by the crowd of Christmas shoppers, and the court said that, assuming in plaintiff's favor that there was only the usual recoil of the doors, the failure to furnish doorkeepers or attendants in no way contributed to the accident. There was a verdict for defendants and judgment on the verdict was ordered. Smith v. Johnson, 219 Mass. 142, L. R. A. 1915 F 572, Ann. Cas. 1916 D 1234, 106 N. E. 604 (1914).

R. L. S.

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SEXTON v. CITY OF ROCKHILL et al.

[Supreme Court of South Carolina, July 13, 1917.]

107 S. C. 506, 93 S. E. 180.

1. **Municipal corporations—When city sued in tort not acquitted by acquittal of other defendants.**
Where in an action for personal injuries the city defendant was charged with maintaining a defective street and the other defendants were charged with operating an auto at a reckless speed without lights and without signal, the delict charged against the city is of a totally different character from that charged against the other defendants and, there being no sort of relationship between the city and such other defendants, the acquittal of the latter does not in law amount to an acquittal of the city.

2. **Municipal corporations—Failure to light street intersection—Want of ordinary care.**
Where, in an action against a city for personal injuries sustained by

CASE NOTE.

Absence or inadequacy of light as actionable defect in city street.

I. Injury to pedestrian, 619-627.
- A. Using sidewalk, 619-625.
  1. Stepping into ditch or culvert, 619-621.
  2. Hole at edge of sidewalk, 621-622.
  3. Hole in sidewalk, 622.
  4. Stumbling over obstacles, 623-624.
     - a. Steps, 623.
     - b. Projections, 623-624.
     - c. Fire hydrant, 624.
  5. Falling on steps in subway, 624-625.
  6. Collision with bicycle, 625.
- B. Walking from sidewalk into driveway, 625-627.
  1. Falling over carriage block, 625-626.
  2. Tripping on wire along parking, 626.
  3. Falling into hole, 626-627.
- C. Collision of hand cart and buggy, 627.

II. Injury to vehicle or occupant, 627-632.
- A. Collision with other vehicle, 627-628.
- B. Striking obstacles, 628-630.
  1. Bridge girder, 628-629.
  2. Trolley pole, 629-630.
- C. Driving into ditch, 630.
- D. Driving into dangerous stream, 630-631.
- E. Driving through fence at end of street, 631-632.
- F. Driving over low wall at end of street, 632.

Cross-references. Liability at common law for injury to person on sidewalk or street resulting from plan of construction, see 11 N. C. C. A. 212-234; liability of highway officers for injuries caused by defects in highways, see 8 N. C. C. A. 133-144; injury to automobile or occupants by defective highway, see 8 N. C. C. A. 922-941.

I. Injury to pedestrian.

A. Using sidewalk.

1. Stepping into ditch or culvert.

Defendant town had constructed an open ditch in a certain street and built a culvert covering the whole width of the street across this ditch. It was an unimproved section of the town and was sparsely settled. The culvert was unguarded and plaintiff, passing along this street in the eve-

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plaintiff as a result of the city's failure to light the street intersection at which plaintiff, while riding a bicycle, was struck by an automobile, it was admitted that the city owned the electric light plant and there was testimony tending to prove that an electric lamp was suspended at the place of the accident and that the lamps had been unlighted for at least five nights prior to the accident, held that, considering the place and all of the circumstances, a jury might reasonably infer that the city had failed to exercise ordinary care in the premises.

3. **Municipal corporations—Failure to light street as rendering it "defective."**
A failure to light a city street may, under some circumstances, render the street "defective."

4. **Municipal corporations—Negligent failure to have street lamp lit—"Mismanagement" of lamp.**
Where the electric lighting plant belongs to the city and the city has placed a lamp at a certain street intersection and lights such lamp upon occasion, a negligent failure to have it lit when a bicyclist, injured in a collision with an auto at such intersection, is traveling in that part of the street will be a "mismanagement" of such lamp.

ning, stepped off the end of the culvert, fell into the ditch and was injured. The town had, at this point, maintained a 2,000-candlepower arc light, furnished by a private company under contract to keep the streets lighted at all times from sunset until midnight, except at such times as there was unobstructed moonlight. The light had not been turned on for the reason that the moon was shining that evening. Reversing judgment for the plaintiff for $3,800, the court held that under these facts the question of negligence was one of law for the court, and that a demurrer for want of facts should have been sustained, since the injury could not have been anticipated in the exercise of reasonable prudence. "For discretionary acts," says the court, "a municipal corporation is not liable, and, where cities and towns are under no statutory obligation to light highways, they are not liable for a failure so to do." Town of Spencer v. Mayfield, 43 Ind. App. 134, 85 N. E. 23 (1908).

Defendant city, for the purpose of draining its streets, maintained a ditch, from one foot to 18 inches deep, along the side of one of its sidewalks in a sparsely settled neighborhood. There had been an electric light at the crossing nearby, but for some weeks prior to the night in question it had not been maintained. Plaintiff, a traveler on this street, stepped from the sidewalk into the ditch and was injured. Affirming judgment for the defendant the court said: "This obligation, resting upon a municipal corporation to keep its streets and sidewalks in a reasonably safe condition for travel does not impose upon it the duty of insuring those who travel such streets in the darkness of the night against dangers resulting from collision with objects necessarily and properly in the street and as a part of it, such as ditches and gutters constructed for the purpose of draining the street, and curbstones properly connected therewith, hitching racks, or posts properly located in the public street, or fire plugs or hydrants properly located in the street. It has been repeatedly held, and never denied, that no obligation rests upon the municipality to light its streets." Mitchell v. Tell City (Ind. App.), 81 N. E. 594 (1907).

Plaintiff, by stepping, at night, from a sidewalk into a depression caused by the lowering of the grade

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Appeal by the municipal defendant, in an action for personal injuries, from a judgment for the plaintiff. Affirmed.

For appellant—Dunlap & Dunlap and J. Harry Foster.

For respondent—Spencer, Spencer & White and Thomas F. McDow.

The following are the pleadings in the action:

Complaint.

Plaintiff, complaining of the defendants, alleges:

1. That he is a resident of the city of Rock Hill, county [of York] and state [of South Carolina] aforesaid: that the defendant city of Rock Hill is a municipal corporation duly incorporated under and by virtue of the laws of the state of South Carolina; and that W. G. Stevens is the mayor, and F. A. Dunlap and J. C. Hardin are councilmen of said city of Rock Hill.

of the street by a city, was injured. The difference in level between the sidewalk and the street proper was about 8 feet. There were no safeguards, no lights were burning, and although the street lights were there, they had not been lit for three or four weeks. The trial court charged the jury that the city was not required to keep the place lighted, and let in evidence as to lights, only for the purpose of showing whether or not the plaintiff could have seen or known the danger over which he was passing. Upon appeal, reversing judgment for the defendants, the court held that this was limiting the scope of the evidence too much. The court recognized the general rule that in the absence of statutory requirements a municipal corporation was not under any obligation to light its streets, and from the exercise of its discretion in regard to whether it would do so or not, or the manner of doing so, no liability would arise. But the court indicated that this rule might have been considered in connection with the principle imposing the duty on the city to use ordinary diligence to keep its streets in reasonably safe condition for passage. "Accordingly," said the court, "the better rule would seem to be that, if the city performs its duty with reference to keeping its streets in reasonably safe condition, the mere absence of an ordinary street light at a given point will not constitute such negligence as to render the city liable. But if the question is whether a city has performed its duty in regard to keeping a street in a reasonably safe condition, or whether it has been negligent in that regard, and in respect to failing to erect proper safeguards or to placing proper lights at a dangerous place where an injury occurs, the character of the light at that point, or its absence, may be shown as a circumstance bearing on the question of negligence." Williams v. Mayor, etc., of Washington, 142 Ga. 281, L. R. A. 1915 A 325, Ann. Cas. 1916 B 196, 82 S. E. 656 (1914).

2. Hole at edge of sidewalk.

Plaintiff was crossing a street in defendant city from her home to a store, nearly opposite, and when near the sidewalk she fell into a hole about 2 feet in depth and was injured. Just at the edge of the sidewalk, and nearly in front of the

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2. That the defendants L. L. Holler and C. H. Hailey are now and were at the times hereinafter mentioned residents of the state and county aforesaid, and engaged in business as partners under the firm name of Holler & Hailey.

3. That heretofore, on or about the 10th day of December, 1915, the plaintiff while riding his bicycle along Railroad avenue at its intersection with White street, both public streets and highways of the city of Rock Hill, was violently run into and knocked down by an automobile, owned by the defendants Holler & Hailey, and operated by one Romedy their employee in their business as a transfer; that in consequence of said collision, the plaintiff had his right foot crushed and the bones thereof broken, and his body bruised and painfully injured, and suffered great bodily pain and discomfort.

4. That said injuries and damages to this plaintiff were proximately caused by the carelessness, wantonness, recklessness and wilfulness of the said Romedy, agent of the defendants, Holler & Hailey, in operating his automobile at a high and reckless rate of speed, and without lights, and in failing to blow his horn, or make other of his approach, without regard to the rights of other travelers upon said public streets, and in violation of the ordinances of the city of Rock Hill.

5. That the said injuries and damage to this plaintiff were proximately caused by the failure of the city of Rock Hill, its agents and servants, to

store, instead of an open gutter, a long box had been placed and covered over with dirt, the hole having been caused, in all probability, by a wagon driving over and crushing the box. People customarily crossed at the place. It was a dark night and there was not sufficient light on the street. Affirming judgment for the defendant, the court held that "the absence of lights at the place of the injury, if such condition existed, was not negligence per se, but was only a relevant fact on the determinative questions whether the streets were kept in a reasonably safe condition and whether the authorities had properly performed their duty concerning them, at the time and place of its occurrence." Johnson v. City of Raleigh, 156 N. C. 269, 72 S. E. 368 (1911).

3. Hole in sidewalk.

Defendant, a railroad passing through plaintiff city, had constructed a culvert and built a board walk over it, up to its tracks. M, while passing from such tracks to the culvert, over the board walk, got her foot in a hole in this walk, and was thrown and permanently injured. She recovered from the city on the theory that its agent, the railway company, had failed to keep the public highway in a safe condition for travel. This action was then brought by the city against the railroad company to recover $5,966.70, the amount of the judgment for M. The complaint in the original action had charged the city with negligence in failing to sufficiently light the defective portion of the walk. The company now contended that, as this was an independent act of negligence, and as it was no part of the duty of the railroad company to maintain lights, it must be concluded that the judgment of the court in the original suit was based upon the whole complaint, which included the independent negligence of the city in not maintaining lights. Reversing judgment for the defendant, with instructions to enter judgment for the plaintiff city, the court held that, "The lighting of streets by a municipality is the exercise of a governmental function merely, and for a failure to exercise such a power negligence cannot be imputed against any city or town." City of Bloomington v. Chicago, I. & L. R. Co., 52 Ind. App. 510, 98 N. E. 188 (1912).

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properly and adequately light the said street at and near the point where plaintiff was injured; in maintaining said street in a defective condition, it not being properly lighted; in their failure to keep properly lighted and burning the street light at that corner, it being quite dark when this plaintiff was injured about 6 o'clock a. m., and in their maintaining said light in a defective condition, and by reason of their mismanagement of said light, it being under the control of the said city of Rock Hill, and within the corporate limits; and in this connection, that the plaintiff has not in any way brought about any such injury or damage by his own negligent act, or negligently contributed thereto so far as the said city of Rock Hill is concerned.

6. That said injuries and damage to this plaintiff were proximately caused by the joint and concurring negligence, recklessness, wilfulness and wantonness of the defendants city of Rock Hill, and Holler & Hailey, combining and concurring in the particulars above set forth.

7. That in consequence of said injuries this plaintiff has had his foot permanently injured, has suffered great bodily pain and discomfort, has been unable to carry on his usual avocation, or to do work of any sort, to his damage in the sum of five thousand dollars.

That in consequence of the injuries, as set out in paragraph 3 of this complaint, the plaintiff's foot is permanently injured, he has suffered great bodily and mental pain and discomfort, his nervous system has been per-

4. Stumbling over obstacles.

a. Steps.

Plaintiff, going along one of the public streets of the defendant city, at night, struck his right foot against some steps which projected in front of a residence into the sidewalk for a distance of about 4 feet, leaving about 5 feet of passway between the bottom step and the driveway of the street. This condition had existed for 30 years. It was a dark and drizzly night and the public lights were out and had been frequently going out for several months prior. The city owned the light plant and sold lights to private persons for gain. Upon appeal from a judgment for the plaintiff the court ordered a new trial, holding that in the absence of statutory requirement, a city is under no legal obligations to light its streets, and where it has undertaken to do so, the placing and character of the lights are largely within the discretion of the authorities. The court says: "Undoubtedly, temporary obstructions and hindrances on a highway, or permanent conditions, may be such that an absence of lights at the particular locality would import negligence. * * * But when the streets of a municipality are otherwise reasonably safe, the weight of authority and the better reason are to the effect that neither the absence of lights nor defective lights is, in itself, negligence, but is only evidence on the principal question whether, at the time and place where an injury occurs, the streets were in a reasonably safe condition." White v. City of Newbern, 146 N. C. 447, 13 L. R. A. (N. S.) 1166, 125 Am. St. Rep. 476, 59 S. E. 992 (1907).

b. Projections.

Plaintiff, while a traveler on a public way maintained by the defendant city, was injured by stumbling over a projection on the sidewalk and falling into an unguarded excavation along the side of the walk. The lot where the accident occurred was from 3 to 10 feet lower than the sidewalk, and these conditions had existed for two years. It was nighttime, and the arc light at the nearest intersection was not burning at the time and had been out of order for several days. Affirming judgment for the plaintiff the court said: "It is also found that the sidewalk was dark. It is true that the town had provided arc lights for the general vicinity, and

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manently injured and he has been unable to carry on his usual avocation, or to do work of any sort, all to his damage in the sum of ten thousand dollars ($10,000).

Wherefore plaintiff prays judgment against the defendants city of Rock Hill, and Holler & Hailey, in the sum of ten thousand dollars, and for the costs of this action.

Answer.

The defendants, the City of Rock Hill, answered and, in substance, alleged:

1. That the injuries, if any, were brought about by the negligence of plaintiff in not keeping a lookout for other vehicles that had a right on said street.

2. That the injuries, if any were brought about by plaintiff attempting to cross from one street into that of another at a high and reckless rate of speed, and in front of an automobile he had seen, and he assumed the necessary risks attendant on such acts.

3. That it denies all other allegations, except it admits it is incorporated, and owns and operates the electric light plant.

Demurrer of the City of Rock Hill and Holler and Hailey.

The defendants above named demur to the complaint upon the following grounds:

that these lights and those from nearby stores and elsewhere must have been an aid to the appellee [plaintiff] in discerning the general course of the sidewalk, and yet the street light, at the street intersection towards which appellee was walking, was not giving forth any light at the time, and it is found that said light had not been working properly at times for several days, so that there not only existed the danger at the side, but some degree of darkness entered into the problem of whether, in the absence of a barrier, the way as maintained was ordinarily safe for public travel. In these circumstances, to say nothing of the conditions of the sidewalk itself, we can by no means say that appellant was not negligent.'' Town of Newcastle v. Grubbs, 171 Ind. 482, 86 N. E. 757 (1908).

c. Fire hydrant.

Plaintiff, while a traveler on the sidewalk of a public street, stumbled over a fire hydrant, injuring her left arm. At P avenue, which was 316 feet from the hydrant, there was a high-powered electric street light, and at W street, which was 468 feet from the hydrant, there was another such light. On account of the presence of a tree near this hydrant and the distance from the street lights it was so dark that a person walking along the sidewalk could not see it. Affirming judgment of nonsuit, the court held that it was not an absolute duty imposed on the municipal corporation to light its streets, and when it did so the placing of the lights was left largely to its discretion; that the exercise of this discretion would not be interfered with unless it was grossly abused or was oppressive; and that in this case there had been no such abuse. Rollins v. City of Winston-Salem, 176 N. C. 411, 97 S. E. 211 (1918).

5. Falling on steps in subway.

Plaintiff, while a traveler in an underground passageway in the defendant city, was injured by reason of falling near the bottom of a flight of stairs. The passage was duly laid out and maintained as a public way, and was so arranged as to provide for three electric lights over the stairs, but on this particular night these had not been lighted. Affirming judgment for the defendant the court

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That there is a defect of parties or that there is a misjoinder of parties, as appears on the face of the complaint, in the following particulars:

That by the third allegation of the complaint it is alleged that the plaintiff was injured by being run into, wilfully, wantonly and recklessly by the servant and agent of the defendants Holler & Hailey and by the fifth allegation of the complaint alleges that the said injuries were caused by the failure of the defendant the city of Rock Hill to properly light its street; thereby charging each of the defendants with a separate and distinct violation and invasion of the rights of the plaintiff and under such circumstances there should be two separate and distinct complaints.

That the complaint fails to allege any joint or concurrent negligence by the defendants.

Wherefore the defendants pray that the complaint be dismissed with costs.

The opinion of the court was delivered by MR. JUSTICE GAGE.

Action for tort to the person. Verdict for the plaintiff against the City of Rock Hill for $3,500. Appeal by the city.

The accident happened on this wise: The plaintiff, a young man

said: "Whatever may be the measure of duty of a municipality to erect and maintain barriers and lights to warn and to guard against defects and obstructions in public ways, it is settled in this commonwealth that the mere failure to provide and maintain proper lights in its streets is not negligence, under the highway act, even if the way unlighted be dangerous." Hill v. City of Boston, 231 Mass. 372, 121 N. E. 24 (1918).

6. Collision with bicycle.

Plaintiff, after dark, was walking on a pathway at the side of a road, on the outskirts of defendant city, in a neighborhood sparsely settled, unfenced and adjacent to a cornfield, when he was run into by a boy riding upon an unlighted bicycle, and was knocked to the ground, receiving an injury. There were two arc lights of about 2,000-candlepower located a little over 300 feet from the scene of the accident, and an incandescent light 190 feet distant, which lights were maintained under a contract with a private corporation. There was no claim that these lights were not burning at the time. The defendant excepted to the submission to the jury of the question whether the street was sufficiently lighted to make it reasonably safe for public travel. Reversing judgment for the plaintiff the court, holding that the exception was a good one, said that, "In establishing street lights a municipality exercises a quasi-judicial or governmental function, and that error in the exercise of this function is not negligence." The court then distinguished this case from the cases in which municipalities have been held liable where there was some excavation, defect, or obstruction in the street, or something unusual, rendering it unsafe, and where in the nighttime lights or barriers were essential for the protection of travelers. Andrews v. City of Elmira, 128 N. Y. App. Div. 699, 113 N. Y. Supp. 711 (1908).

B. Walking from sidewalk into driveway.

1. Falling over carriage block.

Plaintiff, about 9 o'clock in the evening, coming out of a house and walking rapidly across a sidewalk for the purpose of approaching a wagon which was standing in the street, fell over a stepping stone or carriage

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26 years old, was riding on a bicycle in the very early morning going to his work in a cotton mill. He was going north on Railroad avenue in the city of Rock Hill, a community of some 10,000 souls. When he reached a point where the avenue is crossed by White street, he turned west to go along White street. Just then an auto car owned by Holler & Hailey, and driven by one Romedy, was running in the avenue and going south. Well-nigh in the center of the two ways the car ran into the bicycle and seriously injured the rider of it.

The only act of negligence charged against the city was its failure to light the street at and near the place of the accident. The acts of negligence charged against the other defendants are now irrelevant, since the jury has acquitted them by its verdict.

The place of the accident was on a much-frequented thoroughfare

step, which was on the sidewalk near the curb, broke his leg, and was subsequently compelled to submit to its amputation. He brought action against the defendant District of Columbia, relying mainly on D. C. Rev. Stat. § 233, directing the proper authorities to increase, as the public good might require, the number of street lamps in the city of Washington, and to do any and all things pertaining to the well lighting of the city. Affirming judgment on a directed verdict for the defendant, the court said: "The plaintiff in error can claim nothing from the general duty of the city under the statute to light the streets. The exercise of such duty was necessarily a matter of judgment and discretion, depending upon considerations which this record does not exhibit." Wolff v. District of Columbia, 196 U. S. 152, 49 L. Ed. 426, 17 Am. Neg. Cas. 439, 1 Ann. Cas. 967, 25 Sup. Ct. 192 (1905).

2. Tripping on wire along parking.

Plaintiff, in the evening, running to catch a car, was injured by falling over a wire or string, upheld by stakes at right angles, along the curb line of two intersecting streets, for the apparent purpose of protecting a grass plot between the sidewalks and roadways. It was in the business district, much traveled, and the public had been used to walking across the grass plot. There was no light within 80 feet of the place and no warning of any kind to the public. The court reversed judgment sustaining a demurrer to plaintiff's complaint, on the ground that under these circumstances the question of defendant's negligence in making the street reasonably safe should have gone to the jury, but said: "We do not attach any importance to the allegation that there were no lights to light the locality except as it might be a factor in determining reasonable care as to the alleged obstruction itself, as a city is under no legal duty to light any locality, nor does negligence arise as a matter of law from the mere fact of its absence." Shreve v. City of Ft. Wayne, 176 Ind. 347, 96 N. E. 7 (1911).

3. Falling into hole.

Plaintiff fell into a hole 4 feet long, located between the street and the sidewalk, and was injured. The facts given were meagre, but it seems that the street was not lighted. Affirming judgment for the plaintiff, the court

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leading from the railroad passenger station south to the city's main street, and it was within a block of the station.

There is no need to consider in order all the 14 exceptions; they do not make nearly so many issues. About some of the issues we shall not say much, because issues of like character have long since been settled. Of such are the exceptions which charge that the damages are excessive, and that the accident was caused by the negligence of the plaintiff. We find in the record no occasion to review the judgment on those grounds. And the same is true with reference to the exception that the Court did not explain to the jury what section 3053 of the Code of Laws meant. The language of that section is plain enough. It was read to the jury, and that was sufficient. A jury is often "confused in words." The Court also made it plain to

held that in the absence of any statutory requirement a municipal corporation was under no obligation to light its streets with lamps; and from the exercise of its discretion in regard to whether it would do so or not, no liability would arise. But if a municipality allowed a street to remain out of repair, or in a dangerous condition, the fact of the absence of lights or of safeguards of any character at the place might be considered, along with all the other evidence, in determining whether there was negligence in failing to keep the street in a reasonably safe condition for passage. City of Greensboro v. Robinson, 19 Ga. App. 199, 91 S. E. 244 (1917).

C. Collision of hand cart and buggy.

About 9 o'clock p. m. plaintiff, pursuing his regular occupation, was taking the U. S. mail in a hand car from the post office to the railroad station in the defendant town, when he was run into by a horse and buggy, driven by a third person, and seriously injured. An ordinance prohibited carts of any kind on the sidewalk and plaintiff was at the time of the injury on the driveway. The city had a contract with a power company, which was made a party defendant, to light the streets. The arrangement was just being entered upon, and while some of the lights were in operation, all of them had not been placed. The nearest light to the place of the accident was 75 feet; but the effect was very much destroyed by the intervening buildings. A light was put on the street in question the night following the injury. Affirming judgment of nonsuit, the court held that the power company, which could place the lights only as directed by the city, was necessarily without fault; and said, regarding the liability of the town: "Our cases hold that the absence of lights in a town, even when power has been conferred upon the authorities to light the streets, is not negligence per se, but is only a relevant circumstance as to whether the streets, at a given place, are in a reasonably safe condition." Brady v. City of Randleman, 159 N. C. 434, 74 S. E. 811 (1912).

II. Injury to vehicle or occupant.

A. Collision with other vehicle.

While plaintiff was driving a horse along a street of the defendant town, one S, who was also driving a horse and vehicle in a careless and reckless

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the jury that the city is not ordinarily liable in damages for tort; that its liability in a case like this rests on the words of the statute which prescribes its duty and makes it responsible for a neglect to perform the duty.

There is no force either in the exception that the accident was caused solely by the negligence of Holler & Hailey's driver, nor in the exception that the acquittal of those defendants amounts in law to an acquittal of the city.

The delict charged against the city was of a totally different character from that charged against Holler & Hailey. The two delicts spring from different sources, and there was no sort of relationship betwixt the city and Holler & Hailey. The jury, therefore, might

manner along said street in the opposite direction and upon the wrong side, ran the shafts of his vehicle into the plaintiff's horse, causing the injury complained of. The alleged negligence of the town, contributing to the injury, was its failure to reasonably light the same, using lights of low power, placed too far apart at the extreme outer edge of the street, and in permitting the trunks of large trees and their branches to so obstruct the light that a traveler passing along would become blinded by alternately passing from the light into the shadows created by the trees. Plaintiff contended that these acts created a nuisance under the Code providing that cities and towns should cause the streets to be kept open and in repair and free from nuisance. Affirming judgment for the defendant, the court held that plaintiff's contention could not be maintained. Plaintiff further contended that the defendant, though not bound to light the streets, yet, having undertaken to do so, was liable in providing an inefficient system. The court held that the exercise of the power given to a city or town to light its streets rests in the discretion of the corporation, and that the conferring of such power does not give rise to absolute obligation, either as to the extent or the method of lighting to be adopted; that it was not for the courts to say how the lights should be distributed or how any particular street should be lighted. Blain v. Town of Montezuma, 150 Iowa 141, 32 L. R. A. (N. S.) 542, Ann. Cas. 1912 D 430, 129 N. W. 808 (1911).

B. Striking obstacles.

1. Bridge girder.

The defendant city had constructed a bridge, forming the roadway over certain railway tracks. The bridge was 40 feet wide and was supported by three trusses, each surmounted by a steel girder 2½ feet in width, resting at each end on a granite block extending about one foot above the roadbed, and curving upward to the height of about 8 feet midway between the ends of the trusses. One of these trusses was at either side of the bridge and the other was in the middle, dividing the roadbed into two carriage ways each about 15 feet wide. Plaintiff was passing along this way, and the bridge was so obscured by steam from an engine that, although the lights of his car, ordinarily showing the way 1,000 feet ahead, were burning brightly, he

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well have found from the evidence that one delict was proven and the other delict was not proven.

It is true the sixth paragraph of the complaint does allege the conclusion that the tort was joint, but the fourth and fifth paragraphs of the complaint allege circumstances which show that the torts were altogether several. The city was charged with maintaining a defective street. The other defendants were charged with operating an auto with a reckless speed, without lights and without signal.

The appellants say again that a nonsuit ought to have been granted: (1) Because, if there was no electric light aflame at the locus, yet there is no evidence that such a condition was caused by the city's negligence; and (2) because there is no proof that the city mismanaged the lighting plant.

could not see the girders and collided with the center one. There were no lights on the bridge, and this action was brought to recover the expenses of repairing the automobile, on the theory that it was the duty of the city to light this bridge at night in order to give notice of the existence of the obstruction to those lawfully using the highway. The court upheld this theory, saying: "We are of the opinion that in the circumstances such duty did devolve upon the city"; but it affirmed judgment for the defendant city on the ground that the failure of the city to light the bridge was not the proximate cause of the accident, it appearing that, even if the bridge had been lighted, the chauffeur, because of the thick cloud of steam, would not have been able to see the obstruction and to avoid colliding therewith; and that the city could not anticipate the peculiar action of the steam. Gaines v. City of New York, 215 N. Y. 533, L. R. A. 1917 C 203, Ann. Cas. 1916 A 259, 109 N. E. 594 (1915), aff'g 156 N. Y. App. Div. 789, 142 N. Y. Supp. 401 (1913).

2. Trolley pole.

A street railway, having been authorized by the defendant city to use a street, placed a trolley pole of metal in the middle thereof. M, a milk dealer and plaintiff's husband, while driving a milk wagon on this street, struck the base of the trolley pole, thus upsetting the wagon and throwing him to the ground, whereby he received injuries from which he died. The morning was very dark, and there was no artificial light on the pole nor in the vicinity of the pole. Action was brought by the wife against the city, charging negligence in failing to provide "means whereby such structural obstruction should be exposed or made conspicuous by proper light." Reversing judgment for the defendant on a directed verdict the court said: "Care, under the circumstances, required the company, and on its default, the city, to give notice of the presence of the pole to those who might be using the street at night. It was a question for the company, subject to the approval of the city, to determine what was necessary for this purpose. The only obligation resting upon either of them was that they took reasonable precaution to accomplish the purpose intended. This might have been done by a light on the pole itself, or by lights in the immediate vicinity of the pole, or in

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It was admitted in the record that the city owned the electric light plant. There was testimony tending to prove that an electric lamp was suspended at the crossing of the two aforementioned streets, and that the lamps had been unlighted for at least five nights before the event. Considering the place and all the circumstances, a jury might reasonably infer that the city had failed to exercise ordinary care in the premises.

We come now to a consideration of the appellant's last postulate, and that is the city was under no duty to light the locus, and a failure to do so did not constitute a "defect in a street," and was not a "mismanagement of anything under control of the corporation." It would be a fruitless task to recite the many divergent conclusions which the courts of the many states have reached about a city's lia-

other ways that could be suggested. The failure, however, to observe any precaution to protect people using the street during the night became a question of negligence which should have been submitted to the jury." McKim v. City of Philadelphia, 217 Pa. 243, 19 L. R. A. (N. S.) 506, 66 Atl. 340 (1907).

C. Driving into ditch.

Plaintiff was returning from a professional call to his home about 9 o'clock p. m. On reaching L street from a street intersecting it, the livery horse he was driving, instead of turning into and following L street, walked upon the sidewalk bordering it, throwing the buggy into a ditch, greatly bruising and injuring the plaintiff. Action was brought charging the defendant city with negligence in failing to provide a guard-rail at the edge of the pavement next to the ditch, and in failing to light its streets. Affirming judgment for defendant on demurrer, the court held that the city owes the duty to make the sidewalk safe for the use of pedestrians only, and that "a city or town is not required to light its streets." Dudley v. Town of Smithland, 174 Ky. 248, 192 S. W. 21 (1917).

D. Driving into dangerous stream.

The defendant city, instead of erecting a bridge over a stream, passable on foot in ordinary conditions, but which during heavy rainfalls became a swift, high and dangerous current, macadamized the street on each side of and crossing the stream. G was returning from the country in a buggy during the night and attempted to cross. During the day there had been a heavy rainfall that made the river dangerous; G was caught in the current and drowned. His administrator brought suit, charging negligence of the city in failing to have the street so lighted near the river that travelers in the night might be able to discover whether it was passable or not. Affirming judgment for the defendant the court held that: "A city is under no duty to light its streets; it may, if it chooses to do so, leave them unlighted, and cannot be made liable in damages to a traveler who is injured solely because of its failure to light them." The court said that if there were defects or unsafe places in a street, the city was under a duty to exercise ordinary care to warn the traveling public by lights or other reasonably sufficient means in the nighttime, and

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bility for torts of the character which the instant case illustrates. When many of the decisions were made there were no electric lamps capable of instant ignition over the total area of a city by the sudden movement of a lever; there were no bicycles; and there were no ponderous, perilous and swift-moving cars driven by licensed and unlicensed persons, and propelled by their own engines along the country's highways, by day and by night. These circumstances might call for the lighting of much-traveled highways in thickly settled communities. Duties spring out of obligation and circumstance. The first is unchanging law, and the second is ever-changing facts. The failure to so light might under the circumstances render the way "defective."

A subterraneous roadway might be constructed and maintained in

that for failure it would be liable, and then continued: "But where there are no defects or unsafe places in the streets, and they are in a reasonably safe condition for public travel, the city has a broad discretion as to the number and character of lights that it will establish, and cannot be made liable in damages for the failure to furnish such number and quality of lights as would better illuminate the streets than those provided." Gee's Adm'r v. City of Hopkinsville, 154 Ky. 263, 46 L. R. A. (N. S.) 229, 157 S. W. 30 (1913).

E. Driving through fence at end of street.

About midnight an automobile containing plaintiff's intestate and eight other persons crashed through a fence which extended across the westerly end of J avenue in the defendant city, falling over a sheer declivity to a depth of between 20 and 30 feet just beyond the fence, and landing on the tracks of a railroad, where the automobile and the party which had occupied it were run down by a passing train and the plaintiff's intestate was killed. This fence was close to the end of the declivity and converted this part of the street into a cul-de-sac. There were no lights in the immediate vicinity save one 126 feet away. There were small maple trees on each side of this light, the branches and foliage of which somewhat obscured it. At a distance of 282 feet there was another light, and there were others further on. A new bridge extended diagonally across the H river, and was brilliantly lighted, and the lights on the draw were so directly in front of the traveler coming down J avenue that they might easily have been mistaken for lights that appeared to be placed along a direct continuation of J avenue. Action was brought against the city, charging negligence in that it failed to properly light and guard the street at the point of this declivity. Reversing the judgment dismissing the complaint, the court held that the question whether the city had provided sufficient light to enable a traveler at night to discern the guard-rail and fence, and to be aware of the danger in time to avert the accident, was one of fact which should have been submitted to a jury. The court said: "If this cul-de-sac was likely to be a dangerous place in the nighttime to any class of wayfarers who might be misled into thinking that it would be a continuation of

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faultless fashion; but, unless it was lighted, it would be defective, it would be "lacking in some particular which is essential to the completeness of" a way. Black's Law Dic. 343. A roadway above ground, if subject to the same perils as one under ground, would be in like need of light; and, if the need was not supplied, the roadway would be defective. And beyond all peradventure, when the lighting plant belonged to the city, and the city saw the need of a lamp at the locus in question, and put the lamp there, and lighted it on occasion, then a negligent failure to light it on the instant occasion would be a "mismanagement" of the lamp.

The case is well within that of Irvine v. Greenwood, 89 S. C. 520, 72 S. E. 228, 36 L. R. A. (N. S.) 363.

Our judgment is that the judgment of the circuit court is affirmed.

the highway, it should have been so well lighted as to give fair warning that it was merely a cul-de-sac, or so well guarded as to prevent entrance to the point of danger." Corcoran v. City of New York, 188 N. Y. 131, 80 N. E. 660 (1907).

F. Driving over low wall at end of street.

Plaintiff's intestate, while lawfully driving an automobile on B street, a public highway in the city of which defendants were mayor and councilmen, ran into a dock, was thrown into the water, by reason of which he became sick and died. At the point where the accident occurred there was a stone wall, the coping of which was about 6 inches above the ground. There was no guard and no light on this wall, and there was testimony that the coping could not be seen at night "until you got right on top of it." There were two arc lights attached to poles, one across B street and another about 175 feet distant, but there was a conflict in the testimony as to whether the arc lights furnished sufficient light and warning to enable travelers or strangers passing at night along B street to see that this street ended at the dock. The trial court withdrew the case from the jury and held that as a matter of law there was no evidence legally sufficient to prove any negligence on the part of the defendant. Upon appeal, reversing judgment for the defendant, the court held that this was error, and that the question of defendants' negligence in failing to furnish light and warning was for the jury. State to Use of Biggs v. Mayor and City Council of Baltimore City, — Md. —, 99 Atl. 860 (1917).

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NEW YORK CENTRAL R. CO. v. BIANC.

AMERICAN KNIFE CO. et al. v. SWEETING.

CLARK KNITTING CO., INC., et al. v. VAUGHN.

[Supreme Court of the United States, November 10, 1919.]

250 U. S. 596, 63 L. Ed. 1161, 40 Sup. Ct. 44, aff'g 226 N. Y. 199, 123 N. E. 82.

1. **Workmen's Compensation—Due process of law—Basis of compensation.**
The due process of law clause of the Fourteenth Amendment to the Federal Constitution does not require the states to base compulsory compensation for injuries to employees solely upon loss of earning power.

2. **Workmen's Compensation—Federal Constitution—State question—Mode of measuring award.**
If a state recognizes or establishes a right of action for compensation to injured workmen upon grounds not arbitrary nor fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law or according to some prescribed scale reasonably adapted to produce a fair result is for the state itself to determine.

3. **Workmen's compensation—Federal Constitution—Amount of compensation—Physical impairment not immediately affecting earning capacity.**
There is no reason, under the Federal Constitution, why a state, in ascertaining the amount of compensation to be paid for injury to an employee, may not take into consideration any substantial physical impairment attributable to the injury whether it immediately affects earning capacity or not.

4. **Workmen's Compensation—New York Law—Constitutionality—Allowance for serious disfigurement of face or head.**
It was not unreasonable, arbitrary, nor contrary to fundamental right to

NOTE.

Disfigurement as ground for compensation under workmen's compensation acts.

Cross-references. Disfigurement as ground for compensation under workmen's compensation acts, earlier cases, see 5 N. C. C. A. 858-865, 16 N. C. C. A. 481-484.

In Sweeting v. American Knife Co., 226 N. Y. 199, 123 N. E. 82 (1919), which was affirmed by the reported case, it was held that it was not necessary that there should have been a finding that claimant's disfigurement would result in diminished earning power. Nor was it necessary that the extent of compensation for disfigurement be determined by a jury, as the award was not a redress for a tort but an allotment to an insured workman of his proportion of a fund maintained for his insurance. And the fact that the statute gave the commission some discretion in fixing the amount did not render it invalid.

While claimant was engaged in piling kegs upon an icy floor he slipped and strained himself, resulting in orchitis, and eventually in the necessity for removal of the left testicle. An award was made for the injury as a permanent partial disability under a section of the statute providing: "In all other cases of permanent partial disability, including any disfigurement which may impair the future

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embody in the New York Workmen's Compensation Law, the provision, inserted by the amendment of 1916 (Laws 1916, ch. 622), for a special allowance of compensation for a serious disfigurement of the face or head.

5. **Workmen's compensation—New York Law—Constitutionality—Amount of allowance for serious disfigurement of face or head.**

The allowance, prescribed by the 1916 amendment to the New York Workmen's Compensation Law (Laws 1916, ch. 622), of not more than $3,500 for serious disfigurement of the face or head does not exceed the constitutional limitations on state power.

6. **Workmen's compensation—Federal Constitution—Award for serious disfigurement of face or head—Matters for determination of state.**

Whether an award to an employee of compensation for a serious disfigurement of the face or head should be made in combination with or independently of the compensation allowed for the mere inability to work, and whether the compensation should be paid in a single sum or in instalments are matters of detail for the state to determine.

McReynolds, J., dissenting.

Error to the Court of Appeals of New York to review judgments affirming orders of the supreme court, appellate division, sustaining awards under the New York Workmen's Compensation Law. Affirmed.

For plaintiff in error, No. 374—Robert E. Whalen (Frank V. Whiting, on the brief).

For plaintiffs in error, Nos. 375, 376—William H. Foster.

usefulness or opportunity of the injured employee, compensation in lieu of all other compensation shall be paid when and in the amount determined by the Industrial Board," etc. The award was contested on the ground that there was no evidence that the injury resulted in any permanent disability for work or in any impairment of the future usefulness of the employee. The evidence showed that after the operation applicant resumed work for the same employer, that his wages were increased several times, that he continued to work as long as the employer had work for him, and then obtained employment elsewhere at his maximum wage, and that, notwithstanding the injury, his earning capacity and every physical function remained unimpaired. The court held that the fact of disability and resulting diminution of earning power must be found as a matter of fact, and that such finding must be sustained by the evidence, saying: "We must keep in mind the fact that the act does not give compensation for loss of a member, such as the loss of a limb, but for the loss of earning capacity actually caused by the loss of the limb." The award was reversed, with directions to the board to modify its findings and award in accordance with the opinion. Centlivre Beverage Co. v. Ross, — Ind. App. —, 125 N. E. 220 (1919).

Stubbs v. Industrial Commission, 289 Ill. 525, 124 N. E. 527 (1919), is a second appeal, the first decision being abstracted in 16 N. C. C. A. 481-482, note, where the facts of the injury are given. That case was reversed because the board exceeded its powers in considering other disabilities in determining whether claimant was entitled to an award for disfigurement and the amount he was entitled to.

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For State Industrial Commission—E. C. Aiken, Deputy Attorney General (Charles D. Newton, Attorney General, on the brief).

MR. JUSTICE PITNEY delivered the opinion of the court.

The Workmen's Compensation Law of the State of New York (c. 816, Laws 1913, as amended and re-enacted by c. 41, Laws 1914; Cons. Laws, c. 67), which was sustained by this court against attacks based upon the Fourteenth Amendment in New York Central R. R. Co. v. White, 243 U. S. 188 [61 L. Ed. 667, 13 N. C. C. A. 943, Ann. Cas. 1917 D 629], was amended by Laws 1916, c. 622, among other things by inserting in the 15th section, which contains the schedule of compensation for cases of disability, a clause reading as follows: "In case of an injury resulting in serious facial or head disfigurement the commission may, in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars."

The present writs of error bring up for review three judgments of the Court of Appeals of that State, affirming orders of the Supreme Court, Appellate Division, Third Judicial Department, in which awards based upon this amendment were sustained. The opinion of

After the case was remanded and further testimony heard, the commission entered an award in the same sum, although the finding and award specified that it was for serious and permanent disfigurement only. This appeal was taken, plaintiff in error contending the order was not in accordance with the mandate of the court. The court said that, as the amount of the award was within the limit fixed by the statute for serious and permanent disfigurement, the question arose as to whether there was any evidence of such disfigurement upon which the finding could be based. It was pointed out that upon the former appeal the court had said that, while the proof of disfigurement and that it affected the ability of claimant to procure employment was not very clear, it tended to establish that proposition, and the court would not be authorized to reverse the judgment on the ground that there was no proof of permanent disfigurement, and held that, as the cause was up on the same record, with additional evidence, the former decision on that point was conclusive, and would operate as res adjudicata. As to the amount of the award the court held that as the award of $11.55 a week for 50 weeks did not exceed the statutory limit of $3,500, the question of the amount was not subject to review, and the fact that it was for the same amount as the former award did not, of itself, establish that it was not the result of a consideration of the evidence, in the absence of proof that such evidence was not considered. The judgment of the circuit court affirming the finding and award of the commission was affirmed.

In the Arizona Employers' Liability Cases, 250 U. S. 400, 39 Sup. Ct. 553,

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the court of appeals, applicable to all of the cases, is reported under the title of Matter of Sweeting v. American Knife Co., 226 N. Y. 199.

In each case the commission found accidental injuries sustained by an employee in a hazardous occupation, arising out of and in the course of the employment, and, as a result of the injury, some serious facial or head disfigurement, or both. In each case an award was made on account of such disfigurement irrespective of the allowance of compensation according to the schedule based upon the average wage of the injured employee and the character and duration of the disability.

The sole contention here is that the amendment of 1916, as thus carried into effect, deprives the respective plaintiffs in error of property without due process of law, in contravention of the Fourteenth Amendment.

The argument is that an award for disfigurement, made wholly independent of claimant's inability to work, is not based upon impairment of earning power; that only such impairment can justify imposing upon an employer without fault compulsory payment by way of compensation to an injured workman; and hence that the "disfigurement clause" is not a reasonable exercise of the police power, but is arbitrary and oppressive.

In view of our recent decisions sustaining state laws imposing upon

63 L. Ed. 1058 (1919), several cases arising under the Arizona act were passed upon by the Supreme Court of the United States, with respect to certain constitutional questions. In one of these, viz.: Inspiration Consolidated Copper Co. v. Mendez, 19 Ariz. 151, 166 Pac. 278, 1183 (1918), Holmes, J., in a concurring opinion, discussed the provision relative to compensation for disfigurement as follows: "I pass, therefore, to the other objection urged and most strongly pressed. It is that the damages are governed by the rules governing in action of tort—that is, as we have said, that they may include disfigurement and bodily or mental pain. Natural observations are made on the tendencies of juries when such elements are allowed. But if it is proper to allow them of course no objection can be founded on the supposed foibles of the tribunal that the Constitution of the United States and states have established. Why then, is it not proper to allow them? It is said that the pain cannot be shifted to another. Neither can the loss of a leg. But one can be paid for as well as the other. It is said that these elements do not constitute an economic loss, in the sense of diminished power to produce. They may. * * * But whether they do or not they are as much part of the workman's loss as the loss of a limb. The legislature may have reasoned thus. If a business is unsuccessful it means that the public does not care enough for it to make it pay. If it is successful the public pays its expenses and something more. It is reasonable that the public should pay the whole cost of producing what it wants and a part of that cost is the pain and mutilation incident to pro-

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employers in the hazardous industries responsibility in one form or another for the consequences of injuries received by employees in the course of the employment in the absence of fault on the employer's part (New York Central R. R. Co. v. White, 243 U. S. 188 [61 L. Ed. 667, 13 N. C. C. A. 943, Ann. Cas. 1917 D 629]; Mountain Timber Co. v. Washington, 243 U. S. 219 [61 L. Ed. 685, 13 N. C. C. A. 927, Ann. Cas. 1917 D 642]; Arizona Employers' Liability Cases, ante, 400 [250 U. S. 400]), little need now be said.

Even were impairment of earning power the sole justification for imposing compulsory payment of workmen's compensation upon the employer in such cases, it would be sufficient answer to the present contention to say that a serious disfigurement of the face or head reasonably may be regarded as having a direct relation to the injured person's earning power, irrespective of its effect upon his mere capacity for work.

Under ordinary conditions of life, a serious and unnatural disfigurement of the face or head very probably may have a harmful effect upon the ability of the injured person to obtain or retain employment. Laying aside exceptional cases, which we must assume will be fairly dealt with in the proper and equitable administration of the act, such a disfigurement may render one repulsive or offensive to the sight, displeasing, or at least less pleasing, to employer,

duction. By throwing that loss upon the employer in the first instance we throw it upon the public in the long run and that is just. If a legislature should reason in this way and act accordingly it seems to me, that it is within constitutional bounds. * * * It is said that the liability is unlimited, but this is not true. It is limited to a conscientious valuation of the loss suffered."

In proceedings under the Illinios act it appeared that claimant, while working in a well or caisson, about 90 feet below the surface of the earth, was burned about the head, neck, face, arms, and hands. His nose was scarred on both sides and its size diminished. The upper and lower lips were also scarred in such manner as to alter the shape of his mouth. As a result of the burns, his face and head were seriously disfigured. He was allowed compensation, under section 8, paragraph (c), for serious and permanent disfigurement, $11.56 a week, or one-half his weekly wage, for 77 weeks, and also $6 a week for 314 weeks for permanent partial incapacity. The circuit court confirmed the award. Affirming the award, the court, after discussing that part of section 8, paragraph (c), which was added by the amendment of 1915, to the effect that when the disfigurement is to the hand, head, or face as the result of an injury, for which compensation is not payable under paragraphs (d), (e) or (f) of this section, compensation for disfigurement may be had under this paragraph, said: "The reasonable and natural construction of the act as now amended is that compensation may be awarded if injuries result in permanent partial incapacity, as provided for in paragraphs (d), (e)

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to fellow employees, and to patrons or customers. See Ball v. Wm. Hunt & Sons, Ltd., [1912] App. Cas. 496.

But we cannot concede that impairment of earning power is the sole ground upon which compulsory compensation to injured workmen legitimately may be based. Unquestionably it is a rational basis, and it is adopted for the generality of cases by the New York law. But the court of appeals has construed the 1916 amendment as permitting an allowance for facial or head disfigurement although it does not impair the claimant's earning capacity. Matter of Erickson v. Preuss, 223 N. Y. 365, 368; and see opinion of Judge Cardozo in the present case, 226 N. Y. 199, 200. In view of this, and there being no specific finding of such impairment in these cases, it is proper to say that in our opinion the "due process of law" clause of the Fourteenth Amendment does not require the states to base compulsory compensation solely upon loss of earning power.

The New York law as at first enacted, the Washington, and the Arizona laws presented for our consideration three different methods adopted for the purpose of imposing upon the industry the burden of making some compensation for the human wastage attributable to the hazards of the work. We were unable to find that any of these ran counter to the "due process" clause. Nor does that provision debar a state from adopting other methods, or a composite of differ-

and (f), but if there are also other injuries—not those compensated by paragraphs (d), (e) and (f)—resulting in permanent disfigurement to the hands, head, or face, they may also be compensated for under the second proviso of paragraph (c), section 8. This being so, there was no error in the Industrial Commission allowing compensation to Hallerin [the injured] both for disfigurement to the head and face and for permanent partial incapacity resulting from other injuries." Wells Bros. Co. v. Industrial Commission, 258 Ill. 647, 121 N. E. 256 (1918).

In Smith-Lohr Coal Min. Co. v. Industrial Commission, — Ill. —, 126 N. E. 164 (1920), a case arising under the Illinois act, section 8, paragraph (c) relative to compensation for hand, face or head disfigurement was before the court for construction. This section, in substance, provides that an employee should be entitled to compensation for serious hand, head or facial disfigurement, in amount to be fixed by agreement or arbitration, which amount should not exceed one quarter of the amount of compensation which would have been payable as a death benefit under paragraph (a) of section 7, if the employee had died, leaving heirs surviving: "Provided, that no compensation shall be payable under this paragraph where compensation is payable under paragraphs (d), (e) or (f) of this section: And, provided, further, that when the disfigurement is to the hand, head, or face as a result of an injury, for which injury compensation is not payable under paragraphs (d), (e) or (f) of this section, compensation for such disfigurement may be had under this paragraph." The facts in the case were not

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ent methods, provided the result be not inconsistent with fundamental rights. As was stated in the Arizona Case, ante, 429 [250 U. S. 429]: "If a state recognizes or establishes a right of action for compensation to injured workmen upon grounds not arbitrary or fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law, or according to some prescribed scale reasonably adapted to produce a fair result, is for the state itself to determine." And we see no constitutional reason why a state may not, in ascertaining the amount of such compensation in particular cases, take into consideration any substantial physical impairment attributable to the injury, whether it immediately affects earning capacity or not.

For the reasons thus outlined, it was not unreasonable, arbitrary, or contrary to fundamental right to embody in the New York Workmen's Compensation Law a provision for a special allowance of compensation for a serious disfigurement of the face or head. Nor is there any ground for declaring that the allowance prescribed by the 1916 amendment exceeds the constitutional limitations upon state power.

Whether an award for such disfigurement should be made in combination with or independent of the compensation allowed for the mere inability to work is a matter of detail for the state to deter-

disputed, and were as follows: Applicant, while working in the defendant's mine, was struck in the forehead by a lump of coal, which fractured his skull, requiring a surgical operation to remove part of the skull. This was the only injury and resulted in a scar, slightly discolored, disfiguring the forehead. The only question was whether applicant was entitled to compensation for the injury and also the disfigurement. The commission and the circuit court decided that he was entitled to both. The award was in addition to necessary medical, surgical and hospital services, $9.17 a week, for 23½ weeks for temporary total disability; also compensation at the rate of $9.17 a week for a period of 95 weeks, commencing at the termination of the temporary total disability period, for disfigurement; and compensation at the rate of $3.39 a week during a further period of 297½ weeks, commencing at the termination of the period during which compensation was to be paid for disfigurement, for a permanent partial loss of earning power. Reversing the award, the court distinguished the case of Wells Bros. Co. v. Industrial Commission, ante, on the ground that in that case there were injuries to other parts of the body which resulted in disability, while in this case there was but one injury. The court said: "In this case there was but one injury, which was compensated for by the awards for temporary total incapacity and permanent partial incapacity, and Miklautsch [the injured employee] was not entitled to further compensation for disfigurement resulting from the same injury. To construe paragraph (c) otherwise would make it contradictory in its terms by provid-

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mine. The same is true of the question whether the compensation should be paid in a single sum or in instalments. Arizona Employers' Liability Cases, ante, 400, 429 [250 U. S. 400, 429].

Judgments affirmed.

MR. JUSTICE McREYNOLDS dissents.

ing that no compensation shall be payable for disfigurement where compensation is payable under paragraphs (d), (e) or (f), but such compensation may be awarded. The General Assembly, of course, did not intend any such result.''

R. L. S.

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YAZOO & MISSISSIPPI VALLEY R. CO. v. DEES.

[Supreme Court of Mississippi, February 9, 1920.]

— Miss. —, 83 So. 613.

1. **Master and servant—Injuries to servant—Assumed risks—Ordinary risks.**
It is probably a universal rule that the servant merely by entering the service of the master assumes the ordinary risks of the service, and, if he is injured solely because of them, he cannot recover.

CASE NOTE.

Assumption of risk of injury through defects of track, roadbed or right of way generally, under Federal Employers' Liability Act.

I. Clearance beside or over tracks, 642-656.
  A. Bridges and like structures, 642-646.
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    2. Conductor, 642-643.
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    2. Stumbling over pipe, 663-664.
    3. Foot catching between ties and switch rod, 664-665.
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III. Rock falling from roof of tunnel, 668.
IV. Rusty switch, 668.
V. Inadequate refuge on bridge, 668-669.
VI. Obstacles on track, 669-671.
  A. Car standing at foot of grade, 669-670.
  B. Cow, 670-671.
VII. Inadequate light, 671-673.
  A. Turntable, 671-673.
  B. Loading platform, 673.

Cross-references.. Risks assumed under Federal Employers' Liability Act, see 8 N. C. C. A. 834-871; instructions as to assumption of risk under Federal Employers' Liability Act, see 7 N. C. C. A. 685-700; fall or cave-in of embankment as an assumed risk, see 7 N. C. C. A. 352-363; absence

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2. Master and servant—Injuries to servant—Assumed risks—Negligence of master—Necessity of knowledge and of appreciation of danger.

At common law and under the Federal Employers' Liability Act, risks created by the master's negligence are not assumed by the servant unless with an actual or constructive knowledge thereof and appreciation of the danger therefrom he voluntarily enters or continues in the employment of the master.

3. Federal Employers' Liability Act—Injuries to yard engine foreman—Assumption of risk—Unlighted switch lamp.

In an action under the Federal Employers' Liability Act against a railroad company by its yard engine foreman when, in the nighttime, he fell over a yard switch stand, the lamp on which was not burning, held that plaintiff assumed the risk of the lamp's going out without fault on the part of de-

of guard rail or failure to elevate outside rail on curve causing derailment, as negligence rendering master liable, see 11 N. C. C. A. 981-990; liability to railroad employees for injuries caused by wires over railroad track, see 11 N. C. C. A. 1072-1086; sufficiency of clearance between locomotive and roundhouse entrance as affecting question of negligence of master, see 12 N. C. C. A. 1050-1069; liability of railroad company for injuries to employees struck by bridge while riding on trains, see 11 N. C. C. A. 1036-1055; liability of railroad company for injuries to employees coming into contact with obstructions near tracks, see 14 N. C. C. A. 1-47.

I. Clearance beside or over tracks.

A. Bridges and like structures.

1. Engineer.

The plaintiff, an engineer, was at the time of the accident looking out of the window of his cab to ascertain the cause for the escape of water through the waste pipe of his engine. While in such a position, he was struck on the head by an abutment of a certain viaduct which was built too close to the track. The plaintiff had passed the viaduct in question nearly every day for 3 years, knew of the danger of extending his body too far from the cab when passing, and had even spoken of it to the fireman. The defendant pleaded assumption of risk and the court directed a verdict for the defendant, from which the plaintiff appealed. The court, in affirming the judgment entered upon the verdict, held that the plaintiff assumed the risk of the defendant's negligence in constructing the abutment too close to the track. As the court pointed out, a servant assumed all those risks not incident to his employment which grew out of the negligence of the master, where he knew of such additional risks, or as a reasonably prudent man, should have known of them, and then continued in the service without complaint and without promise of repair. Taylor v. Chicago, R. I. & P. Ry. Co., — Iowa —, 170 N. W. 388 (1919).

2. Conductor.

The plaintiff, when hurt, was acting as "yard conductor," and was engaged in moving a train of freight cars from one point to another in the defendant's yards. It was between 8 and 9 o'clock of a dark, foggy evening. As the train moved under a certain bridge the plaintiff, who had previously thrown himself flat on his back across the top of the car upon being warned of the approach to a bridge by the usual "tell tales" guarding it, was struck and thrown to the ground. It appeared that this car was higher than the 15 feet al-

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fendant, but that, since plaintiff claimed and the jury believed that the lamp went out because defendant's employee in charge thereof had negligently failed to keep it filled with oil, the question of whether or not the plaintiff assumed the risk of its unlighted condition could not arise unless he had, before he was injured, either actual or constructive knowledge of such condition.

4. Federal Employers' Liability Act—Injuries to yard engine foreman—Assumption of risk—Unlighted switch lamp—Question for jury.

In an action under the Federal Employers' Liabilty Act against a railroad company by its yard engine foreman for personal injuries sustained when, in the nighttime, he fell over a yard switch stand, the lamp on which was not burning, where the plaintiff claimed that the lamp had gone out because the defendant's employee in charge thereof had negligently failed to keep it filled

lowed by the company's rules to be run over this portion of the track. Inspectors were ordered to set aside all cars like the one in question, but such had not been done in the instant case though the car had been in the yard for a period of two weeks. The plaintiff, before the train started, passed along it, observing the cars included, the tags on them, and their couplings, and with his lantern might have seen the difference in height between the car upon which he was riding at the time of the accident and the one following it, had he directed his attention to the matter. It did not appear that the plaintiff knew the limit of height which had been fixed for cars to be included in the train or was actually aware of the dangerous height of the car. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that it was not error to refuse the ruling requested by the defendant that, upon all of the evidence, the danger from the bridge was a risk incident to the employment, obvious to him if he had exercised ordinary care, and therefore assumed by him. The court said: "If the failure to exclude the car in question from the train, or the omission to caution him regarding its height, were due to negligence on the part of his fellow-employees, the defendant cannot say, under the act, that the risk of injury from these causes was assumed." Portland Terminal Co. v. Jarvis, 141 C. C. A. 562, 227 Fed. 8, 11 N. C. C. A. 1036 (1915).

3. Brakeman.

The plaintiff, a brakeman, just previous to the accident, had been directed by the engineer to alight from the cab and, while the train was in motion, run along the side of the cars and release the air brakes. The train was at the time on a grade and the brakes were creeping as the result of too much air pressure upon them. It was consequently necessary that the brakes be released in order that the train might be taken up the grade without difficulty. The engineer, however, in giving such instructions to the plaintiff, did not warn him that the train was approaching a central girder, into which the plaintiff ran, and as a result fell under the moving cars. The casualty occurred about one o'clock in the morning, and the night was dark, starless, and somewhat misty. The plaintiff had been over the route seven times, and on three of the trains had passed the bridge in question in daylight. A verdict resulted in favor of the plaintiff, and the defendant excepted to the ruling of the trial court in not directing a verdict in its favor. The court, in overruling such exceptions and the defendant's motion for a new trial, held that the question of assumption of risk was properly sub-

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with oil, held that, under the evidence, the question whether plaintiff had, before he was injured, either actual or constructive knowledge of the fact that the lamp was out was for the jury.

5. **Federal Employers' Liability Act—Injuries to yard engine foreman—Unlighted switch lamp—Duty of railroad company to keep switch lamps lit.**

In an action under the Federal Employers' Liability Act against a railroad company by its yard engine foreman for personal injuries sustained when, in the nighttime, he fell over a yard switch stand, the lamp on which was not burning, where plaintiff claimed that the lamp had gone out because the defendant's employee in charge thereof had negligently failed to keep it filled with oil, held that defendant's placing of lights on its switch stands, whatever its primary purpose in so doing may have been, was in effect an invitation

mitted to the jury. "The prime question," said the court, "was whether the plaintiff knew or ought to have known the danger, and, knowing the danger, appreciated or ought to have appreciated it. This it was to determine upon the evidence and such inferences as might properly be drawn from it. It was a question upon which fair-minded men might differ." Norton v. Maine Cent. R. Co., 116 Me. 147, 100 Atl. 598 (1917).

Plaintiff brought an action under the Federal Employers' Liability Act against the defendant railway company for negligently causing the death of her husband, alleging that deceased was a freight brakeman in the employ of the defendant railway company, engaged in interstate commerce; that his death was caused by his head coming in contact with an overhead bridge, negligently maintained by the defendant. Specifically, the negligence charge was (1) constructing and maintaining over its tracks a bridge with insufficient clearance; and (2) operating a train under such bridge, without having given the decedent timely and sufficient warning of such dangers. On the trial, however, the first ground of negligence was abandoned, and the case was submitted upon the second ground only. There resulted a verdict and judgment for the plaintiff on which defendant appealed. It appeared that on the run for which decedent was employed there were seven overhead bridges constructed at different elevations. Four of these were so high that they were in no sense dangerous. Three of them, known respectively as the W bridge, S bridge and F bridge, were approached in the order named. The W bridge had a clearance of 15 feet 10 inches, that is to say, the distance between the top of the rails and the under surface of the bridge was 15 feet 10 inches. The S bridge had a like clearance, and the lowest part of the F or third bridge had a clearance of 19 feet 7 inches. There was evidence that the clearances of these bridges were such that a man could not stand upon a box car of ordinary height and escape being struck on the head by the bridges, and that the clearances of two of the bridges were such as not to permit a man to sit erect upon such a box car in passing under them without a like contact. Decedent was found, on the arrival of the train at the next station after passing all three of these bridges, lying upon the top of the tender, with a gash in his forehead and his neck broken, either dead or dying. There was no witness to his injury, and the court permitted the jury to infer the cause of death from his position upon the tender of a given height, considered in connection with his own height, in relation to the clearances of the bridges under which he had passed, as well as from the nature of his injuries. On the ap-

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to its employees to use such lights for the purpose of locating and avoiding the switch stands, a use for which they were suitable and to which from their very nature the defendant must have known its employees would put them, and therefore that the defendant was charged with the duty of exercising reasonable care to keep them burning so that its employees would not be misled by their absence in locating and avoiding the switch stands.

6. **Federal Employers' Liability Act—Injuries to yard engine foreman—Assumption of risk—Instruction to jury.**

An instruction requested by a railroad company, sued under the Federal Employers' Liability Act for personal injuries sustained by its yard engine foreman, is properly refused when it is sought thereby to charge the jury, when the law is to the contrary, that an employee assumes a risk created by

peal from the aforesaid judgment, defendant contended not only that there was a failure of definite proof as to the cause of the death, and a failure to show which of the three bridges caused the injuries resulting in death, but also that decedent had assumed the risk of injury from these sources, if he was so injured, and that for this last reason, if for no other, the court should have directed a verdict in favor of the defendant. With respect to this phase of the case, it was made to appear on behalf of plaintiff that the decedent had never before made this particular run, and had therefore never passed under these bridges. It was further shown that prior to starting upon this trip the conductor gave decedent some general instructions regarding his duties, and told him, among other things, to be on the lookout for overhead bridges, because some of them would not clear them standing up on the cars. The evidence was not such, however, as to require the jury to find that decedent had been told that many of these bridges would not clear him if he was sitting on the car or standing on the tender. On behalf of defendant, evidence was adduced tending to show that decedent had made this particular run before and was, therefore, aware of the several bridges, and furthermore, that he had been given specific direction to watch out for these particular bridges, and had been told that on certain of them he could not safely sit or stand upon the freight car while passing under them. Under these circumstances the court held, in affirming the judgment for defendant, that it was clearly a jury question whether there had been given sufficient warning of the danger to be encountered on this run, and whether the deceased was chargeable with knowledge of such danger. Philadelphia & R. R. Co. v. Marland, 152 C. C. A. 51, 239 Fed. 1, 15 N. C. C. A. 402 (1917).

The plaintiff's decedent, a head brakeman, was struck by the brace of a bridge and killed while leaning from the step of the engine to ascertain whether a certain box car near the engine had a hot box. The engine was leaking a great amount of steam at the time, and this, coupled with the fact that the deceased would naturally look in the direction opposite to the position of the bridge in ascertaining the condition of the hot box, combined to cause the accident. The side of the bridge upon which the deceased was killed was approximately two feet from the side of the engine, and was of the construction generally used. It appeared that the deceased had passed this particular point more than four hundred times in both daylight and darkness, and should have been familiar with the location of the bridge. From a verdict and judgment for the plaintiff in the sum of $8,000, the defendant appealed. The court reversed the

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his employer's negligence merely because he had as good an opportunity as his employer of knowing of its existence.

7. **Instructions—Refusal of request—Substance repeatedly given.**
There is no error in refusing an instruction when the substance thereof was given in charge to the jury over and over again for both sides.

8. **Federal Employers' Liability Act—Injuries to yard engine foreman—Unlighted switch lamp—Instruction to jury—Assumption of risk.**
In an action under the Federal Employers' Liability Act against a railroad company by its yard engine foreman for personal injuries sustained when, in the nighttime, he fell over a yard switch stand, the lamp on which was not burning, where plaintiff claimed that the lamp had gone out because the defendant's employee in charge thereof had negligently failed to keep it filled

judgment and remanded the case with directions to grant a new trial upon the issue of the defendant's negligence. "The plaintiff was entitled," said the court, "to have the jury pass upon the question as to whether there was an escape of more than the ordinary amount of steam, and whether that was the proximate cause of the injury. If the defendant was negligent, the question whether the employee would be held to have assumed the risk was one for the jury." Ball v. Northern Pac. R. Co., 102 Wash. 668, 173 Pac. 1029 (1918).

B. Timbers over tracks.

The plaintiff's decedent, an experienced yard brakeman, was employed in that capacity by the defendant railroad company in a certain yard. Among the industries served by that yard was that of a brewing company, which had a private switch running through its premises and connected with defendant's main line. Some time prior to the injury which caused the death of the decedent, the brewing company had carpenters in its employ place several pieces of timber of substantial size in a horizontal position across the switch track and at such a height that there was a clearance of between 3 and 4½ feet above the top of an ordinary box car. Decedent, riding upon a car which was being moved upon this switch track was struck by the overhanging timber, knocked from the car and, striking the ground, sustained a fracture of the skull which soon caused his death. An action having been brought by his administrator to recover damages for the death, the defendant contended not only that it had been guilty of no negligence, but also that the decedent, having worked in the yard for a considerable period of time, had been aware of the existence of this overhanging timber, and was chargeable with having assumed the risk of injury thereby. In support of this contention, defendant adduced the testimony of a fellow brakeman and the conductor of the yard crew, both of whom testified in effect that decedent had been employed by the defendant in the yard in question for a period of nearly one month prior to the accident in suit, and that both of them had called his attention to the presence of the overhanging timber and had warned him to be on guard against being struck thereby. On the other hand, there was testimony to the effect that decedent's employment with the defendant in this particular yard dated back to no more than 5 or 6 days prior to the injury, and tended to show likewise that he had never prior to the occasion of the injury been upon the switch track where the accident occurred. The jury returned a verdict for the plaintiff, and judgment having been entered and a writ of error

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with oil, held that the refusal of an instruction requested by the defendant was proper because of the erroneous charge therein that, if the plaintiff had been working in the yard in which the switch was located, and knew that the switch stand over which he fell was there, and had known it for years prior to the alleged accident, he assumed the risk of such danger, if any there was, from such unlighted switch, such charge being objectionable because, while plaintiff admitted knowing the location of all of the switches, he fell over the switch stand in the dark, not knowing that he was then in its vicinity, which fact would have been disclosed to him had the lamp been burning.

9. Instructions—Right of court to limit number.

Trial courts are required to, and should only, grant instructions sufficient in number and character to guide the jury in determining the issues involved

refused by the state supreme court, a writ of error was sued out in the United States Supreme Court, where the contentions made below were renewed. It had been admitted below and was conceded on further appeal that the action was governed by the Federal Employers' Liability Act. Objection was made principally on this appeal to the refusal of the trial court to charge the jury that if the decedent knew of the presence of the overhanging timber, and that it would not clear a man standing on the top of a box car, and with such knowledge continued in the service of the defendant company, where his duties required him from time to time to pass under such timber, then decedent should be held to have assumed the risk of being injured thereby and could not recover in this action. In affirming the judgment the court held that while the instruction requested was in no way objectionable if it conformed to the facts of the case, the refusal of the trial court to give such instruction could not be made the ground for a reversal in view of the finding of the jury that the decedent had not, prior to the accident, been aware of the existence of this timber. "The burden of proof of the assumption of risk," said the court, "was upon defendant, and unless the evidence tending to show it was clear and from unimpeached witnesses, and free from contradiction, the trial court could not be charged with error in refusing to take the question from the jury." Kanawha & M. R. Co. v. Kerse, 239 U. S. 576, 60 L. Ed. 448, 36 Sup. Ct. 174 (1916).

C. Buildings beside tracks.

1. Coal bin.

The plaintiff, a switchman, was crushed between the side of a coal car and the bin into which it had been unloaded. The track approaching the bin lay in the form of a sharp curve, so that the body of the car moved from its position directly over the track towards the inside of the curve, thus swinging the end of the car upon which the plaintiff was riding nearer to the bin. The plaintiff testified that he knew from experience that the car would swing in the manner described at the place of the accident, but did not have it in mind at the time. From a verdict and judgment for $10,000, the defendant appealed. The court, in reversing the judgment, held that as the plaintiff used the track and the facilities for switching at that point without protest or complaint, and as he knew the condition of the track and the tendency of the body of a car to move towards the center of the curve, he assumed the risk. "The situation was open to his inspection," said the court, "and the conditions which relate to this accident were simple and

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in the case on trial, and they have the right to limit the number of instructions to be considered by them accordingly.

10. Instructions—Number to which court may limit counsel.

The number of instructions to which the trial court limits counsel cannot be an arbitrary one applicable to all cases alike, but must depend in each case upon the number of issues therein involved.

11. Damages—Personal injuries—Excessiveness.

In an action under the Federal Employers' Liability Act against a railroad company for personal injuries sustained by its yard engine foreman, where plaintiff as a result of his injury was suffering from a double hernia which would be permanent unless relieved by an operation which might or might not

evident. He represented the appellant in everything connected with this service, and if a change was needed, it was his duty to suggest it, and, if he did not, to perform the duty which he had assumed to do at his own risk.'' Morris v. Pryor, 272 Mo. 350, 198 S. W. 817 (1917).

Plaintiff, employed by defendant as a brakeman upon a train operating in interstate commerce, was injured while attempting to place a coal car upon an elevated track leading to the defendant's coal chutes. His injury arose from the fact that the coal bins on this siding were placed in such close proximity to the track that there was no room between the sides of the cars and the engines and tenders and such coal bins for the safe passage between them of the body of a person riding upon the sides of such cars or tenders and engines. It was alleged that this construction was negligent, and that the plaintiff, while riding upon the side of the car being placed upon this siding, was injured by coming in contact with such coal bins, the engineer having negligently failed to stop the train when plaintiff, seeing his danger, gave the signal to stop. In appealing from a verdict and judgment for the plaintiff, the defendant contended, among other things, that the trial court had erroneously instructed the jury in respect of the issue of assumption of risk when it charged them that while plaintiff, on entering the employment of defendant as brakeman, assumed all the risks ordinarily incident to that particular position, and also assumed the risks which were known to him, or that he should discover in the discharge of his duty, he did not assume any risk or danger caused by the negligence of the defendant. In reversing the judgment, because of this and other errors, the supreme court held that the rule was too well settled to require the citation of authorities that under the common-law doctrine of assumed risk the plaintiff in a negligence suit did not assume any risks or dangers from the negligence of the defendant of which he had no knowledge; but that it was equally well settled that at common law the plaintiff did assume the risks and dangers caused by the negligence of the defendant of which he did have prior knowledge. There was evidence introduced, the court pointed out, to the effect that the plaintiff in this case had actual knowledge, long prior to the accident, of the alleged negligent construction of the coal bins and track. It followed that if the case was one governed by the common-law doctrine of assumed risk, the charge was erroneous, the court being further of opinion that the case was one governed exclusively by the Federal Employers' Liability Act. It was clear that the common-law doctrine of assumed risk applied, there being no evidence that defendant had

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be a success, and which, according to the evidence, would be attended with danger to life, and plaintiff was still suffering pain at intervals, and was compelled to wear a truss, and his capacity for work had been materially reduced, held that, while the verdict for $15,000 was large, it could not, on the evidence, be safely said that it was the result of passion, prejudice, or corruption on the part of the jury.

Action under the Federal Employers' Liability Act against a railroad company for personal injuries sustained by its yard engine foreman. Judgment for plaintiff affirmed.

violated any statute for the safety of employees. Chicago, R. I. & G. Ry. Co. v. De Bord, — Tex. —, 192 S. W. 767 (1917).

2. Freight house door.

The plaintiff's decedent, a freight conductor, was caught between the door post of a freight house and the doors of a refrigerator car which was wider than the ordinary car and killed. The freight house was so constructed that cars could be moved into it and be unloaded therein. The deceased was, at the time of the accident, superintending the placing of the cars in the freight house, and though he knew the doors of the car had been opened so that only a few inches leeway existed between the side of the car and the doorway of the freight house, he thoughtlessly stepped so near to the doors in an endeavor to see if the cars were being properly placed as to be caught by them. The deceased had been engaged in switching operations at the scene of the accident for a period of at least 6 years, and had seen many cars, like the one which caused the injury, pass through the door of the freight house. The trial court submitted the case to the jury under an instruction that the defense of assumption of risk was not available to the carrier in an action under the Federal Employers' Liability Act. This was alleged as error on appeal by the defendant from a verdict and judgment for the plaintiff. The court, in reversing the judgment, without granting a new trial, held that the defense of assumption of risk was still available under the Federal Employers' Liability Act, and that the deceased as a matter of law assumed the risk of the condition which resulted in his death. Miller v. Michigan Cent. R. Co., 185 Mich. 432, 152 N. W. 235 (1915).

3. Platform.

The plaintiff's decedent, a brakeman, was struck and killed by a platform projecting to within 8 inches of the side of the car upon which he was riding. He was riding upon the side of the car for the purpose of pulling the coupling pin and thereby causing the car to be "kicked in" upon a siding. The platform was part of a stockyard at that point, and being built when cars of less width were in use, the danger from the use of wider cars like the one in question did not exist. The deceased had worked on this particular run for three or four months, and several years before had worked on a train carrying live stock over the same road twice a week. From a verdict and judgment for the plaintiff in the sum of $11,000, the defendant appealed, contending the evidence showed that the deceased, from having been employed on the stock train

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For appellant—Hirsh, Dent & Landau, C. N. Burch and H. D. Minor.

For appellee—N. Vick Robbins and Anderson, Vollor & Kelly.

SMITH, C. J. This is an appeal from a judgment for damages alleged to have been sustained by the appellee while in the employ of the appellant by reason of its negligence.

In September, 1914, and for some years prior thereto, the appellee

and afterwards on the daily local train, must have been sufficiently familiar with the construction of the platform to know of its defects and assume the risk. The court in affirming the judgment held that the question of assumption of risk was properly left to the jury, since there was no sufficient proof that the deceased knew of the dangerous condition of the platform or should have been charged with notice of it. As the court pointed out, the employee did not assume the risk of the employer's negligence in not providing safe and suitable appliances with which to work, unless the defect was so patent and obvious as to be readily observed by him, and he continued to use it without objection. Henderson v. Union Pac. R. Co., 100 Neb. 734, 161 N. W. 267 (1917).

D. Mail crane.

The plaintiff's decedent, a locomotive engineer, was struck and killed by a mail crane extending over the track, while he was leaning out of his cab to more closely observe whether a certain driving pin was running hot. The crane in question was admittedly placed too near the track for the safety of employees. It further appeared, however, that the deceased had made 156 trips past the point in question during the preceding 6 months of his employment. From a verdict and judgment of $15,000 for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the question of assumption of risk was properly left to the jury, and that the Federal Employers' Liability Act left the defense of assumption of risk as it was at common law, as recognized and construed by the federal courts. The court pointed out that, while the deceased had passed the mail crane many times in the course of his duties, nevertheless, since it was a device separate and apart from the engine, with which he had nothing to do, there was nothing to show that he so clearly appreciated the fact that the mail crane was set too close to the track as to cause it to be declared, as a matter of law, that he assumed the risk. Southern Pac. Co. v. Berkshire, — Tex. Civ. App. —, 207 S. W. 323 (1919).

E. Stone in wall of cut.

The plaintiff's decedent, a locomotive engineer, was struck by a stone projecting from an embankment along the right of way and killed, while standing on the steps leading down from the gangway that formed the fore part of the tender. He had assumed such a position in order to watch a certain hot box, which was being treated by running water from the tank into the box. The distance from the outside of the tank to the bluff which struck the plaintiff was

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was in the appellant's employ as an engine foreman in the appellant's yard at Vicksburg, charged with the duty of "making up all trains * * * that had to be switched in the Vicksburg yards." There are 52 switch tracks in this yard, each controlled by a lever extending from the track to a switch stand about 6 feet therefrom. On the top of each of these stands is an oil lamp. These switch stands, including the lamps on the top thereof, are about 3 feet high. The lamps which burn oil are inspected each day by an employee of the appellant whose duty it is to keep them filled with oil

only about 20 inches. The hot box required constant attention, and it appeared that the deceased had assumed the customary position of an engineer examining a hot box at the time of the accident. From a verdict and judgment for the plaintiff in the sum of $2,500, the defendant appealed, contending that as the deceased had passed the point where the accident occurred a number of times, and knew the danger, he assumed the risk. The court, in affirming the judgment, held that the deceased did not assume the risk of injury from the negligent failure of the railroad to use ordinary care to furnish him a safe place to work, and that the question of whether the defendant was negligent in leaving the bluff along the right of way with only a clearance of about 20 inches was a question for the jury. Brown v. Missouri, K. & T. Ry. Co., — Mo. App. —, 212 S. W. 26 (1919).

F. Misplaced cars.

The plaintiff, a brakeman, was struck and injured by a coal car standing upon a sidetrack, as he stepped from the cab of the engine to throw a switch, that a car of the train might be set out upon the siding. The coal car had been set so close to the junction of the sidetrack with the main line that it was only two feet from the side of the cab at the point where the plaintiff alighted. It was early in the morning, and dark, and though the engine was equipped with an electric headlight, such light did not enable the plaintiff to see the car in question at the point where he stepped off. If the car had been left at the proper place upon the sidetrack, and beyond the point of clearance, the accident would never have happened. The court, in affirming a judgment for the plaintiff, held that the question of assumption of risk under the Federal Employers' Liability Act was properly submitted to the jury. Mills v. Roberts, — Ark. —, 206 S. W. 751 (1918).

The plaintiff, a locomotive fireman, was struck by a lighted "marker" projecting from the side of a caboose which had been set so close to the end of a track branching off from the one upon which his engine was approaching that when he suddenly put his head out of the cab window a collision occurred. The operatives in the switch tower had signaled the train of which the plaintiff was fireman to enter the yards, and the entire movement of their train and the track upon which it entered was controlled entirely from the switch tower. It was presumed that when such a signal to go ahead had been given, the track was clear of obstructions. The plaintiff did not know of the presence of the caboose upon the adjoining track or of the projection by which he was injured until the acci-

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and burning. Two of the opposite sides of each lamp are of green glass, and two are of red, so that on two sides the light therefrom appears green, and on the other two red, indicating according to the direction in which they are turned whether the switch is open or closed.

The appellee is an expert switchman, was familiar with the appellant's yard, and knew the location of each switch therein. On the early morning of September 14, 1917, while it was yet dark, he stepped off of a slowly moving car of an interstate train which his

dent happened. Negligence on the part of the defendant was alleged in permitting the caboose to stand too near the track upon which the train of the plaintiff approached and over which it had to move. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the question of assumption of risk was properly left to the jury. "It was for the jury to determine from this evidence," said the court, "as to plaintiff's previous knowledge of conditions in the yards, whether the inference was to be drawn therefrom that he knew of the risk, whether it was open and obvious, and whether he appreciated the danger incident thereto and voluntarily agreed to assume it. Upon neither authority nor reason can a servant be held to have assumed the risk of a dangerous and unusual condition, brought about by the negligence of the master, or his employees, of which he was ignorant and could not know of by the exercise of ordinary care." Chesapeake & O. R. Co. v. Meadows, 119 Va. 33, 13 N. C. C. A. 376, 89 S. E. 244 (1916).

The plaintiff's decedent, a switchman, was killed while passing between a car placed near the end of a switch track and another car moving out of an adjoining sidetrack which converged towards it. The two sidetracks converged at the place of the accident, and the stationary car had been placed so close to the end of the track upon which it was standing that insufficient room was left for a person to pass between the two cars. The deceased did not know that the car protruded to such a distance as to render it unsafe to pass between them. From a judgment for $6,000 in favor of the plaintiff, the defendant appealed. The court, in affirming the judgment, held that as the deceased did not know that the position of the car rendered his act of passing between them unsafe, it could not be said as a matter of law that he assumed the risk, but was guilty at the most of only contributory negligence, which could only reduce the amount of the recovery, and not completely bar it. Roberson v. St. Louis Merchants' Bridge Terminal Ry. Co., — Mo. App. —, 213 S. W. 873 (1919).

The deceased, a freight brakeman, at the time of the accident, was engaged with his foreman in changing two cars of his train from the main track onto a passing track and then onto a back track which opened off from the passing track. The two cars were pulled out on the passing track, and the rear car was left standing thereon at a point near the entrance to the back track, while the car next to the locomotive was being relocated on the back track. The deceased climbed on the car that was being relocated on the south side at the end next to the locomotive, and, pursuant to orders from his foreman,

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crew was then engaged in switching in order to signal the engineer, and, after taking about two steps, fell over the stand of switch No. 6, the lamp of which was not burning, and was injured. The appellee passed this switch stand a short time before he was injured, and the lamp thereon was then burning, though this fact seems not to have attracted his attention; the switch having been turned by another member of the crew.

The employee of the appellant in charge of the switch lamps testified that he inspected, filled, and lighted the lamp of switch No. 6

proceeded to uncouple the car from the locomotive. The car on the passing track had been left standing at a point so close to the entrance to such back track that there was but a 12-inch passing space between the two cars. While the deceased was uncoupling the said car as it was moving backwards, he was struck by the car left on the passing track, thrown under the wheels of the tender and injured so that he died a few minutes later. It appeared that the deceased was very inexperienced in railroad work, and did not know of the close proximity of the car on the passing track to the entrance of the back track, and that he had no warning of the danger he was about to encounter while attempting to ride the other car back. From a judgment for the plaintiff, the defendant appealed. The court reversed the judgment and instructed that a new trial be granted the defendant, but held that the deceased did not assume the risk of the condition which resulted in his death. Chicago & E. R. Co. v. Feightner, — Ind. App. —, 114 N. E. 659 (1916).

The plaintiff's decedent, at the time of the accident, was testing out an engine. He had driven it four or five miles down the southbound main line and was returning on the same track, running against the current of traffic. This was contrary to the rules of the company, but the testing of engines in this manner was a nightly occurrence. Another engine had been left on a crossover track by a fellow employee, so close to the track upon which the deceased was running that a collision occurred which resulted in the death of the plaintiff's decedent. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, said: "There is no evidence going to show that deceased knew beforehand that the engine on the crossover was or was likely to be too close to the track on which he was operating the engine in his charge, and, if there had been, his act was an act of contributory negligence, not an assumption of risk arising out of his contract of employment. Nor did his contract of employment involve him in any general assumption of risk from the negligence of coemployees, for otherwise the statute counted upon, and declaring, in effect, that the employee may recover upon showing that one of the co-operating causes of his injury was a negligent act or omission of an officer, agent, or other employee of the carrier, would be inoperative." Louisville & N. R. Co. v. Fleming, 194 Ala. 51, 69 So. 125 (1915).

G. Tracks too close.

1. Switch yard.

The plaintiff, a brakeman, was injured while upon the upper rounds of the side ladder of a moving freight car, by striking against the corner

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the day before the appellee was injured. One of the members of appellee's switch crew testified that he examined this lamp immediately after appellee fell over it, and that it had no oil in it. The appellee had a small lighted lantern at the time he was injured, but stated that he was not using it to locate the switch stand, but was intending to use it in signaling the engineer, and that his failure to see the switch stand was caused by the absence of the light which should have been burning thereon. There was evidence, and the appellee admitted, that these switch lamps would occasionally go out

of one of several freight cars which were standing together on another track. The plaintiff was going down the ladder in question to set a switch, and as he was in the act of descending, he glanced ahead and saw, some 35 feet away, among the cars standing on the next track, one which stood out further than the rest, which he thought would not clear him. He attempted to get back upon the roof of the car, but was hit by the projecting car and thrown to the ground. From a judgment for the plaintiff, the defendant excepted. The court, in affirming the judgment, held that the trial court properly refused to direct a verdict for the defendant, holding that the risk created by the failure of the defendant's servants to set the cars far enough in upon the track so that an accident would not occur created an extraordinary risk, which the deceased did not assume through not having known of and comprehended it. As the court said: "There was evidence tending to show that the risk was not obvious, and that the plaintiff had no knowledge of it, and that no instruction or caution regarding it had been given. If the plaintiff himself was negligent in any particular, this will not bar recovery, for it cannot be said that his negligence was the sole cause of his injury." Sanderson v. Boston & M. R. R., 91 Vt. 419, 101 Atl. 40 (1917).

The plaintiff, a switchman, was injured because of an alleged defective construction of the switch tracks too close together. From a judgment for the defendant, the plaintiff brought error. The court, in affirming the judgment, said: "A review of the record shows that, even if a jury could construe the testimony as to the condition of the tracks as proof that they were in a defective condition, and that, due to a failure to repair them, they were out of alignment, still knowledge of these defects must be imputed to the plaintiff, since there was no evidence that there had been any recent change in the tracks or their condition, and therefore it must be presumed that the tracks were in the same condition in which they had been ever since he had been at work. Consequently he must be held to have assumed all the risks which were due to these patent defects. In our previous ruling, we did not lose sight of the well-settled principle that the employee assumes the ordinary risk of his employment, and that certainly he is not to be relieved from dangers which are discoverable by the most casual observation. * * * A railroad yard where trains are made up necessarily has a great number of tracks and switches close to one another, and, when one enters the service of a railroad corporation in any work connected with the making up or movement of trains in a switch yard, he assumes the risk of that condition of

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without fault on the part of the appellant or of the person in charge thereof, and that when the going-out of a lamp attracted the attention of a member of the switching crew he would relight it both for his own protection and that of the appellant.

At the close of the evidence, the presiding judge announced that all of the issues involved in the case could be set forth in not exceeding eight instructions for each side, and that he would not consider a greater number if tendered him. He passed on eight instructions, in addition to a request for a peremptory instruction, tendered

things." Kirbo v. Southern R. Co., 18 Ga. App. 187, 89 S. E. 179 (1916).

2. Car ferry.

Suing as administrator, the plaintiff brought an action under the Federal Employers' Liability Act to recover damages for the death of his decedent, alleging that such decedent was employed by the defendant, an interstate carrier, as a brakeman in one of its yards, and that while decedent was so employed and engaged in interstate commerce, he met his death through the negligence of the defendant. It appeared that on the second day of the decedent's employment, while mounting a freight car being transferred from the wharf of the defendant to a barge moored at the wharf, he was killed by being crushed between that car and other cars already upon the barge. The evidence showed that there were four tracks on the barge, between the outside and the center tracks of which there was sufficient space for an employee to mount in safety cars moving between those tracks. There was also sufficient space between the center tracks for some distance from where they entered the barge from the wharf. But these tracks gradually converged until the space between them so diminished that cars being moved on one center track would almost touch those standing on the other center track. The roofs of the cars would sometimes touch. By reason of this proximity, it was charged that serious and deadly injury would be inflicted upon the servants and employees of the company if they should get caught between the cars. Plaintiff's decedent was so caught, and received injuries in this manner from which he died. Resisting this claim of liability, the defendant company not only pleaded not guilty as to negligence, but as special defenses, alleged that the decedent was guilty of contributory negligence, and he assumed, when he entered the employment of the company, the risk of being injured in the manner charged in the declaration. Upon the conclusion of the testimony, defendant demurred to the evidence, and plaintiff having joined in the demurrer, the pleading was submitted to the jury to say what damages the plaintiff should recover if judgment should be given for plaintiff upon the evidence, and responded with an assessment at $10,000. The trial court, however, sustained the demurrer to the evidence, and dismissed the action. This judgment was affirmed by the supreme court of appeals. Bringing the case before the Supreme Court of United States by writ of error, the plaintiff contended in part that as a matter of law, the common-law assumption of risk was not a defense in bar of such an action as this under the act of congress. Affirming the judgment, the court,

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him by the appellant, but declined over the appellant's objection to consider several other instructions tendered him by it, which instructions were afterwards embodied in a bill of exceptions.

The errors assigned bring under review: (1) The refusal of the appellant's request for a peremptory instruction; (2) the granting of the appellee's first and second instructions; (3) the refusal of the appellant's sixth, seventh, and eighth instructions; (4) the refusal of the court below to pass on more than eight instructions tendered by the appellant; (5) the amount of the verdict.

after considering the evidence, reached the conclusion that it could not say the decision of the trial court was clearly erroneous. Respecting the contention as to assumption of risk, the court held that the position taken by the plaintiff was untenable, citing Jacobs v. Southern R. Co., 241 U. S. 229, 60 L. Ed. 970, 36 Sup. Ct. 588, post. Baugham v. New York, P. & N. R. Co., 241 U. S. 237, 60 L. Ed. 977, 13 N. C. C. A. 138, 36 Sup. Ct. 592 (1916).

II. Condition of track or right of way.

A. Injury while mounting or leaving cars.

1. Ballast unusually coarse.

The plaintiff, a brakeman, fell from a moving car which he was attempting to board in the course of his duties, and as a result of one of the car wheels passing over his right leg it had to be amputated above the knee. The car which he attempted to board was moving on a passing track about 18 inches lower than the main track. The plaintiff was standing upon the main track just previous to the accident and had to descend the distance above mentioned in making his jump to the car. The ballast used at that point was of unusually large crushed rock, and there was also evidence to the effect that some of the ties of the passing track were defective, unballasted and broken, so that the rail joints would sink under a train and give a car passing over them a motion which made it difficult to hold onto the grab iron or ladder on which the plaintiff was compelled to climb at the time of the accident. A judgment on a directed verdict for the defendant having been given, the plaintiff took a nonsuit. From an order setting aside the judgment of nonsuit, made upon motion of the plaintiff, the defendant appealed. The court, in affirming the order and granting a new trial, held that the plaintiff assumed the risk of the difference in the grade of the two tracks, since he was intimately acquainted with such condition as a result of several years of service. The question, however, as to whether the defendant was negligent in its maintenance of the track at that point, in using such large rocks for ballast as to make the footing of trainmen insecure in mounting cars, and having the tracks so constructed as to produce violent and unusual movements of cars passing over them, and as to whether the plaintiff knew of such condition so as to have assumed the risk, the court held should have been submitted to the jury. Holloway v. Missouri, K. & T. Ry. Co., — Mo. —, 208 S. W. 27 (1918).

2. Slag beside track.

The plaintiff, a head brakeman, was riding on the front of the engine

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First. The ground on which the appellant sought to obtain a peremptory instruction is that the going out of the switch light was one of the ordinary risks of the service in which the appellee was engaged, and consequently was assumed by him when he entered the appellant's employ.

The risks which a servant may incur in any employment fall naturally into one or the other of two classes: First, the ordinary risks of the service, that is, those which are not created by the master's negligence and which remain after he has used due care

just previous to the accident. As the train slowed down to six or eight miles an hour, he alighted on the left or west side of the engine between the tracks. His purpose in so alighting, according to his testimony, was to inspect the under parts of the cars as they passed him, a thing which he was required to do by the rules of the railroad. In alighting, he jumped onto a loose piece of furnace slag about the size of a man's two fists. It rolled under him, pitching him head foremost, so that his right foot, going under the cars, was crushed and subsequently amputated. It appeared that the plaintiff knew that smaller pieces of coal were distributed along the tracks, but not pieces of the size in question, the defendant having taken steps to have all the larger pieces, such as that which caused the accident, removed. The plaintiff denied that he had any knowledge of the existence of the pieces of coal in question. From a verdict for $5,000, upon which judgment for $3,000 was entered, the defendant appealed. The court, in affirming the judgment, held that the question of assumption of risk was properly left to the jury, and that merely because the plaintiff knew that smaller pieces of slag were on the roadbed did not establish, as a matter of law, that he knew larger pieces were there, or that he thereby assumed the risk therefrom. The court pointed out, however, that the plaintiff would have assumed the risk as a matter of law, if he had known that there were similar pieces of slag on the roadbed to that which actually caused the injury, though he did not know of the presence of the particular piece of slag. Cincinnati, N. O. & T. P. R. Co. v. Thompson, 149 C. C. A. 211, 236 Fed. 1 (1916).

3. Pile of loose cinders.

Plaintiff, employed by the defendant railway company as fireman, received certain serious physical injuries while attempting to mount a moving locomotive. He charged that the proximate cause of his fall and injury was the negligence of the defendant in permitting the existence of a pile of loose cinders within a dangerous distance of the tracks of the company. It was shown that the injury occurred when plaintiff stumbled and slipped while climbing upon the engine from this pile of cinders. Defendant, while alleging contributory negligence on the part of the plaintiff, in attempting to mount the engine at the place and time in question, also alleged that the pile of cinders upon which plaintiff slipped had been allowed to accumulate in the same manner and in the same place as they were at the time of the accident for many years prior thereto, and that these facts were well known to the plaintiff, so that he assumed the risk of danger therefrom. The

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to remove them; and, second, the extraordinary risks or those which are created by the master's negligence.

It is probably a universal rule that the servant merely by entering the service of the master assumes the ordinary risks of the service, and if he is injured solely because of them he cannot recover. But at common law, and under the Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), which controls here, risks created by the master's negligence are not assumed by the servant unless with

evidence showed without dispute that, for 11 or 12 years, the ash pans of the engines to be cleaned were dumped upon the tracks and pulled out to one side thereof. Plaintiff admitted knowledge of the long-standing custom to pile cinders alongside of the tracks, but testified that he was not conscious of any danger to be apprehended therefrom, and that at the time of the accident he had quite forgotten it; that he was watching where he was going to step on the engine, and not noticing where he was stepping upon the ground. The case came before the Supreme Court of the United States on writ of error to the state court to review the refusal of that court to grant a writ of error to the circuit court to review a judgment in that court in favor of defendant, rendered on a second trial after the judgment of the court on the first trial had been reversed by the state court of appeals. Plaintiff complained upon this appeal, particularly on the following instructions: "The court instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff, or that he had been working for the Southern Railway [defendant] at Lawrenceville for more than a year, and that the cinders had been piled at the same place in the way described by the witnesses for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the act of congress approved April 22, 1908, permits this defense, and the jury should find their verdict for the defendant." This instruction, it was contended, became the law of the case by the decision of the supreme court of appeals, and precluded the instructions which plaintiff asked, and which otherwise would have been correct, it is insisted, and should have been given. In disposing of this case, and reaching the conclusion that the judgment below should have been affirmed, the court said: "The rulings of the trial court and supreme court of appeals upon the instruction given and those refused make the question here and represent the opposing contentions of the parties. The railway company contends that plaintiff's knowledge of the cinder pile and his conduct constituted assumption of risk and a complete defense to the action. The plaintiff, on the other hand, insists that such knowledge and conduct amounted, at the utmost, to no more than contributory negligence, and should not have barred recovery, though it might have reduced the amount of recovery. Indeed, plaintiff goes farther and contends that, whatever might have been the evidence respecting his knowledge or lack of knowledge of the danger, he did not assume the risk if the company was negligent; and, further, that employees' continuance in service with

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an actual or constructive knowledge thereof and appreciation of the danger therefrom he voluntarily enters or continues in the employment of the master. In the case at bar, the appellee assumed the risk of the switch lamps going out without fault on the part of the appellant; but his complaint here is, and the jury believed, that the lamp of the switch stand over which he fell went out because the appellant's employee in charge thereof negligently failed to keep it filled with oil, so that the question of whether or not the appellee

knowledge of a dangerous condition and without complaint does not bar recovery under the act of congress. He concedes, however, that he encounters in opposition to his contentions the ruling in Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062, L. R. A. 1915 C 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915 B 475, 8 N. C. C. A. 834, and therefore asks a review of that case, asserting that 'the considerations upon which the true construction of the act depends were not suggested to the court.' The argument to sustain the assertion and to present what he deems to be the true construction of the act is elaborate and involved. It would extend this opinion too much to answer it in detail. He does not express his contention in any pointed proposition. He makes it through a comparison of the sections of the act, and insists that to retain the common-law doctrine of the assumption of risk is to put the 4th section in conflict with the other sections. The basis of the contention is that the act was intended to be punitive of negligence, and does not cast on the employees of carriers the assumption of risk of any condition or situation caused by such negligence. This is manifest, it is insisted, from the provisions of the 3d section of the act, which provides that the contributory negligence of the employee 'shall not bar a recovery'; and of the 5th section, which precludes the carrier from exempting itself from liability. This purpose is executed, and can only be executed, it is urged, by construing the words of § 4 (which we shall presently quote) to apply to 'the ordinary risks inherent in the business, the unavoidable risks which are intrinsic notwithstanding the performance by the carrier of its personal duties. They do not include the "secondary and ulterior" risks arising from abnormal dangers due to the employer's negligence.' And further: 'The object of this section was not to adopt by implication the common-law defense of assumption of risk of such abnormal dangers. Its object was in express terms to exclude the defense which, before the passage of the act, was available to the carrier in determining what are the "risks of his employment" assumed by the employee.' These, then, are the considerations which plaintiff says were not submitted to the court in the Horton case, and which he urges to support his contention that assumption of risk has been abolished absolutely. We are unable to concur. The contention attributes to congress the utmost confusion of thought and language, and makes it express one meaning when it intended another. The language of § 4 demonstrates its meaning. It provides that in any action brought by an employee he 'shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed

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assumed the risk thereof cannot arise unless he had, before he was injured, either actual or constructive knowledge of the fact that the lamp was out, and whether he had this knowledge, construing the evidence most strongly for the appellant, was a question for the determination of the jury. The request by the appellee for a peremptory instruction was properly refused. Seaboard Air Line Railroad v. Horton, 233 U. S. 492, 8 N. C. C. A. 834, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915 C 1, Ann. Cas. 1915 B 475.

to the injury or death of such employee.' It is clear, therefore, that the assumption of risk as a defense is abolished only where the negligence of the carrier is in violation of some statute enacted for the safety of employees. In other cases, therefore, it is retained. And such is the ruling in the Horton case, made upon due consideration and analysis of the statute and those to which it referred. It was said: 'It seems to us that § 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action.' And there was a comparison made of § 4 with the other sections, and the relation and meaning of each determined, and the preservation by the statute of the distinction between assumption of risk and contributory negligence, which was pronounced 'simple' although 'sometimes overlooked.' Cases were cited in which the distinction was recognized and applied (p. 504). It is, however, contended that the conditions of the application of assumption of risk were not established, and that 'to charge a servant with assumption of risk the evidence (1) must show that he was "chargeable with knowledge of the material conditions which were the immediate cause of his injury," and (2) must establish his "appreciation of the dangers produced by the abnormal conditions."' The testimony of plaintiff is adduced to show that these conditions did not exist in his case. He admitted a knowledge of the 'material conditions,' and it would be going very far to say that a fireman of an engine who knew of the custom of depositing cinders between the tracks, knew of their existence, and who attempted to mount an engine with a vessel of water in his hands holding 'not over a gallon,' could be considered as not having appreciated the danger and assumed the risk of the situation because he had forgotten their existence at the time and did not notice them. We think his situation brought him within the rule of the cases. Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 102, 58 L. Ed. 521, 524, 34 Sup. Ct. Rep. 229. It is objected, however, that instruction A, 'viewed wholly with reference to common-law principles,' is erroneous in that it omitted to state as an element the appreciation by plaintiff of the danger of the situation as necessary to his assumption of risk. But that objection was not made at the trial. The objection made was general, that the instruction did 'not correctly state the common-law doctrine of assumption of risk.' It was therefore very indeterminate, and we cannot say that the court considered that it was directed to the omission to express or to bring into prominence the appreciation by plaintiff of the danger he incurred. The instruction was refused by the

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Second. The appellee's instruction No. 1 is as follows:

"The court instructs the jury for the plaintiff that if you believe from the testimony in this case that the defendant company negligently failed to have the switch light at No. 6 switch lighted on the morning of September 14, 1917, and further believe from the evidence that because of such failure on the part of the defendant to have such switch lamp lighted and as a proximate and direct result thereof plaintiff was injured, unless he knew of this condition, or by the use of ordinary diligence could have known of the danger before he was injured, then you will find for the plaintiff and assess his damages in such sum as you believe the evidence justifies, not to exceed the sum sued for."

trial court upon objection by plaintiff. It was considered by the supreme court of appeals, and plaintiff contended against it there only upon the ground that the assumption of risk was not available as a defense under the act of Congress. He made the contention there that he does here, and which we have already considered, that the act of congress precludes the defense of assumption of risk of any condition or situation caused by the negligence of a carrier. And this was the full extent of plaintiff's contention. Had he made the specific one now made, the supreme court of appeals would have dealt with it, for the opinion of the court shows a clear recognition of the elements necessary to the doctrine of assumption of risk, and the trial court as well must have understood them; and we cannot suppose that the court discerned in plaintiff's general objection the specification which he now contends was necessary, and which it was error to refuse." Jacobs v. Southern R. Co., 241 U. S. 229, 60 L. Ed. 970, 38 Sup. Ct. 588 (1916), aff'g 116 Va. 189, 81 S. E. 99 (1915).

4. Protruding tie.

The plaintiff, a yard switchman, in alighting from a moving car, was compelled to use the sill step. The step in question was not securely fastened and his foot slipped through it. Acting in the emergency, he put his right knee against the side of the car, pushed himself away from the car, and jumped backward, in order that he might not be thrown beneath it. In alighting, his left heel struck the end of a crosstie that extended from two to three inches above the ground, his body was twisted, and he was thrown upon the ground on his left side with great violence, sustaining the injuries in suit. The court allowed an amendment to the original complaint, which not only more fully described the track at the place where the injury occurred, but further charged negligence because of "its failure to fill in the space between the ties and make the surface level so as to remove the danger incident to the performance of such work in its yard." The amendment did not set forth that the defendant either knew or should have known of the defective condition of the track, or that the plaintiff did not know and should not have known by the exercise of ordinary care of such defective condition. From a judgment for the plaintiff, the defendant appealed. The court, in reversing the judgment, held that an employee entering the service of a railroad company in a switchyard built by the company not only assumed the risks arising from the way in which the yard was constructed, but also assumed the risks growing out of the condition of the tracks in such yard, in the absence of any allegation that the master knew, or

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The appellant's objection thereto is that it violates the rule "that the master's duty in respect to his instrumentalities is restricted to seeing that they are reasonably safe for the performance of the functions for which they are designed," for the reason that the lights were placed on the switch stand by the appellant, not for the purpose of enabling its employees to locate the switch stands, but for the purpose of indicating whether the switches were open or closed.

ought to have known by the use of due care on its part of the danger arising from the defects in the tracks, and that the servant did not know of such defects, and by the exercise of ordinary care could not have known thereof. Atlantic Coast Line R. Co. v. Kennedy, 20 Ga. App. 238, 92 S. E. 973 (1917).

5. Gully beside track.

The train of which the plaintiff was head brakeman had stopped upon a siding to allow a passenger train to pass. The plaintiff, as his duties required, was going along by the side of his train, inspecting the same and closing the doors of all the cars that should have been kept closed. He tried to close one car door from the ground, but was unable to do so. He thereupon climbed up into the car and found that a part of the contents, some machinery, was against the door keeping it from being closed. Being unable to remove it, he got out of the car by placing his hand upon the doorsill and jumping to the ground. In doing so, he alighted in a small gully that had been washed out of the track and which was covered by weeds and grass. A verdict and judgment for the plaintiff in the sum of $3,500 resulted, from which the defendant appealed. The court reversed the judgment and remanded the case, but held that the plaintiff did not assume the risk of jumping into the hole. "Plaintiff did not know the hole was there," said the court, "and he did not assume the risk of the defendant's negligence in causing or permitting such a hole to be on the right of way. Such hole was not one of the risks inherent in the business. Nor was it an incident likely to occur in the operation of defendant's railway. * * * And if defendant's negligence permitted it to be there, then it would seem that there would be no assumption of risk even under the federal rule, since plaintiff had no knowledge of the hole's existence." Winslow v. Missouri, K. & T. Ry. Co. (Mo. App.), 192 S. W. 121 (1916).

6. Piece of hose on ground.

The plaintiff was employed by the defendant to operate its turntable and wipe its engines. While standing on a ladder supported against the side of the engine, engaged in wiping an engine, he received a signal to go at once to the turntable. He descended the ladder, but, in stepping from the last rung to the ground, his right foot stepped on a piece of hose three of four inches in diameter, lying on the ground, whereby his ankle was turned and badly sprained. The plaintiff admitted that he had seen the hose lying there several different times on several different days. From a judgment for the plaintiff, the defendant appealed. The court reversed judgment and remanded the case, but held that under the Employers' Liability Act which left the rule of assumption of risk in force, except in

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One answer to this contention, assuming for the purpose of the argument that the use for which these lights were intended by the appellant is material, is that, while it may be that the primary purpose for which the lights were placed on the switch stands was to indicate whether the switches are open or closed, it appears also from the evidence that this was not the sole purpose they were intended to serve, but another was that the location of the switch

cases of the carrier's violation of a federal statute, the Missouri courts would apply the Missouri rule as to assumption of risk to the effect that risks arising from the employer's negligence were not assumed even though the employee knew of such negligence and the risks arising therefrom; in disregard of the federal rule which placed such risks upon the employee where he knew of them or should have so known. Cross v. Chicago, B. & Q. R. Co., 191 Mo. App. 202, 177 S. W. 1127 (1915).

B. Injury while passing near track.

1. Foot catching between rail and guardrail.

The plaintiff, a switchman, just previous to the accident had ridden upon a car that had been kicked down a sidetrack about a hundred yards. He set the brakes, finally dismounted and crossed to an adjoining track where other cars were to be switched in by the same engine. In attempting to cross the switch, his foot was caught between the guardrail and the stock rail. Before he could get it out, the front truck of the first car passed over it, cutting off part of it. The plaintiff testified that he saw the cars coming towards him about 15 miles an hour, that he knew of the existence and location of the guardrail, and with his 11 years' experience, was familiar with the yards where he worked. There was neither allegation nor evidence that the guardrail which caught the plaintiff's foot was defective. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in reversing the judgment, held that as every condition which had any bearing upon the injury was obvious and known to him, he must be held to have assumed the risk. Gaddy v. North Carolina R. Co., 175 N. C. 515, 95 S. E. 925 (1918).

2. Stumbling over pipe.

The plaintiff, a switch tender, while walking in a path along the side of the track in the course of his duties, stumbled over a piece of pipe negligently left there by the defendant, was thrown under a passing train, and was injured. Three toes and part of one foot had to be amputated. The plaintiff knew that pipe had been placed along side of the track, but all that he had observed had been placed in such a position as not to obstruct the path which the employees had used for 7 years in the exercise of their duties. From a verdict and judgment for the plaintiff in the sum of $18,500, the defendant appealed. The court, in affirming the judgment, said: "The burden was upon the appellant to prove that appellee knew the obstruction was in the path, and that he realized the danger thereof. The only proof was that appellee knew, in a general way, that the line of pipe was laid beyond the path. There is much evidence introduced to prove that he ought to

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stands might thereby be disclosed to the appellant's employees at work in the yard.

But the use for which these lights were intended by the appellant is not here controlling. The appellant's switching crews in the discharge of their duty must necessarily walk between the tracks in its yard, so that it was the duty of the appellant to exercise reasonable care to keep the space between these tracks reasonably safe for that purpose. These switch stands unmarked by lights would undoubtedly be a menace to the safety of these switchmen on dark

have known. For instance, that he passed within a few feet of the line of pipe repeatedly from 6 p. m. till 6 a. m.; that others noticed the line of pipe, and that appellee was an experienced employee. The most that can be said for the evidence upon this issue is that it was sufficient to be considered by the jury as it was. The evidence does not establish as a matter of law either that appellee did assume the risk or that he did not." Galveston, H. & S. A. Ry. Co. v. Butts, — Tex. Civ. App. —, 209 S. W. 419 (1919).

3. Foot catching between ties and switch rod.

The plaintiff, a baggage master on one of the defendant's passenger trains, usually acted as rear brakeman after his train had reached its destination and was backing into the yards to remain during the night. At the time of the accident, however, the train had been assigned to make an "extra run" from its regular destination on to a point a few miles away. A fast passenger train was due, and to allow it to pass, the train upon which the plaintiff worked, was ordered to a siding before proceeding on its additional run. The regular sidetrack was found to be of insufficient length to allow the main track to be cleared of the train, and as a result, the so-called "lead" track had to be used, which necessitated the opening of five switches. The fast passenger train was about due, and in order to clear the track as quickly as possible, the plaintiff ran ahead of the backing train to open the switches. After throwing switch No. 4, and in going directly across the "lead" track for the purpose of throwing the last switch, his feet caught in a hole or opening between one of the ties and the rod which ran across the track and below the rails, connecting switch No. 4 with the switch stand, and while held in that position, he was struck by the train and his right leg and the larger part of his left foot cut off. The only issue of negligence submitted to the jury was whether the defendant failed to keep the switch rod connecting the switch stand of switch No. 4 with the "lead" track, and the ties and ground between the switch stand and the rail in a reasonably safe condition. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, said: "Appellant further insists that the trial court erred in declining to submit to the jury its defense of assumed risk upon the part of the plaintiff. * * * An instruction, however, upon assumed risk, had no proper place in this case, because a servant does not assume the risk of accident and danger due to the failure of the master to exercise ordinary care in furnishing him with a reasonably safe place to do his work.

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nights, because of their liability to fall over them as did the appellee in the case at bar, though it may be that if they had never been marked by lights their presence between the tracks would only have added to the care which the switchmen must observe in walking between the tracks at night, as to which we are not now called upon to express an opinion, for the obstructions which the appellant placed between the tracks were not mere switch stands, but switch stands on which there were lights which it proposed to keep constantly burning and to avoid which less care was required on

A servant's assumption of the risks of his employment must be considered with reference to the employer's primary duty to furnish reasonably safe surroundings. * * * The negligent act of the company in failing to furnish the appellee a reasonably safe place to work being the basis of its liability, the court properly declined to submit to the jury the question of appellee's assumption of the risk attending that negligence." Chesapeake & O. R. Co. v. Shaw, 168 Ky. 537, 182 S. W. 653 (1916).

4. Stumbling over obstacle.

The plaintiff's decedent, a switchman, was engaged at the time of the accident in switching a certain car of his train upon a sidetrack. The car in question was to be uncoupled, while the train was slowly in motion, so that it would roll down the track, while the train itself would be stopped until the switch could be turned. The deceased gave the signal to the engineer that he had uncoupled the car, but instead of waiting for the train to stop before crossing in front of it to turn the switch, he started across the track in between the moving car and the rest of the train. The track was very defective at that point, and the deceased, after stumbling over some obstacles between the track, was run over and so severely injured that he died. From a judgment for the plaintiff, the defendant appealed. The court, in reversing the judgment, held that as the deceased crossed the track in front of the moving train, and with knowledge of the defects in the roadbed of the track, he must be held to have assumed the risk of voluntarily exposing himself to the peril involved. Charleston & W. C. Ry. Co. v. Sylvester, 17 Ga. App. 85, 86 S. E. 275 (1915).

C. Injury by derailment.

1. Locomotive.

a. Rough track.

The plaintiff's decedent, the foreman of a switching crew, was directed to take his engine to C., a station some distance away, for the purpose of having it washed and cleaned. The track to the point in question was very rough, uneven, and in bad order. The deceased was given instructions to proceed slowly at certain points of the journey where rough places were indicated, but on the return trip no such slow order was given. The engine had no pony trucks or pilot, but was nevertheless directed to take a car of water and nine cars of coal on the return trip. The engine was derailed as a result of the attempt to haul a load over the rough and uneven tracks, and as a result of the engine turning over, the deceased was so severely scalded that his death ensued shortly thereafter. The defendant, on appeal from a judgment for the plaintiff, alleged that the de-

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the part of its employees than would have been required of them to avoid unlighted switch stands. The lights were integral parts of the switch stands, and the appellant's employees would naturally associate one with the other and trust to the lights in locating and avoiding the switch stands. The placing of the lights on these switch stands by the appellant, whatever its primary purpose in so doing may have been, was in effect an invitation to its employees to use them for the purpose of locating and avoiding the switch stands,

ceased assumed the risk, and that the trial court erred in submitting the question to the jury. The court, in affirming the judgment, held that the question of assumption of risk was properly submitted to the jury. As the court pointed out: "It cannot be said that, merely because the deceased and the engineer on the switch engine had a slow order on the [outgoing] trip * * *, this fact imputed to the deceased's knowledge that there were rotten and broken ties and other defective conditions under the snow. * * * It seems to us that, when the train crew was directed to take the engine to Clinton, and were given a slow order by their superiors, * * * [the plaintiff] and other members of the crew had the right to assume that, although the track was in bad condition in the places indicated by the order, by complying with the order they could make the trip with safety and without any more hazard than is ordinarily incident to making a trip over good roadbed at the customary rate of speed." Kansas City, M. & O. Ry. Co. v. Roe, — Okla. —, 180 Pac. 371 (1919).

b. Inadequate ballast.

The plaintiff, a section hand, at the time of the accident was returning from work on a train provided by the defendant. There was insufficient room in the coach provided to hold all of the workmen, and the plaintiff was riding in the cab of the engine. While situated in such manner, the engine and coach left the track, turned over, and the plaintiff was severely injured. There was evidence that the roadbed at that point was insufficiently ballasted, that the ties were loose, and that the engineer drove the engine over this section of the track at a speed of from 40 to 50 miles an hour. From judgment for the plaintiff, which was affirmed by the appellate court, the defendant brought the case by certiorari to the state supreme court. In affirming the judgment, that court said: "So far as the contention that defendant in error assumed the risk is concerned, the danger arising from the operation of the train at an excessive rate of speed over a defective track was not one of the ordinary risks incident to his employment, and as there is no proof in the record tending to show that he knew of the dangerous condition of the track, and as he had no control over the operation of the engine, he did not assume the risk arising from these dangers." Roberts v. Cleveland, C., C. & St. L. R. Co., 279 Ill. 493, 117 N. E. 97 (1917).

2. Hand car.

a. Rough track.

The plaintiff, a section hand, was required to push the motor car, with which the crew was furnished to carry their tools to and from work, for some distance until the motor was started. He was then required to mount the car while in motion. At

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a use for which they were suitable and to which from their very nature the appellant must have known its employees would put them. It follows, therefore, that the appellant by placing the lights on the switch stands became charged with the duty of exercising reasonable care to keep them burning, so that its employees would not be misled by their absence in locating and avoiding the switch stands.

The appellee's instruction No. 2 is in accord with our views of

the time of the accident, the handles of the tools which were upon the car were round, and in mounting to the car his foot slipped upon them, with the result that he was thrown to the ground and severely injured. The track at that point was also rough and uneven, and the car struck a rough place and bounced as he attempted to step upon it, thereby contributing to the fall. The plaintiff had not been warned of the danger in getting on the car while in motion, and being unacquainted with the work and a foreigner, was ignorant of the danger. From a judgment for the plaintiff in the sum of $750, the defendant appealed. The court, in affirming the judgment, said: "We do not think we should, as a matter of law, hold the facts conclusively established that the appellee assumed the risk. Under the facts we cannot say that appellee knew of the danger from the negligence of the appellant, or that he must necessarily have known of such danger, and that he would have known that the manner of doing the work was not a reasonably safe one, especially when his foreman was present directing the work." Chicago, R. I. & G. Ry. Co. v. Cosio, — Tex. Civ. App. —, 182 S. W. 83 (1916).

b. Loose rails on trestle.

The plaintiff, a section hand, was at the time of the accident riding upon a hand car across a trestle of the defendant railroad. The trestle in question was old, dilapidated, and admittedly very much out of repair. It was part of a railroad feeder recently purchased by the defendant and a fill was being constructed about 50 feet away to take its place. While crossing the trestle, the car left the track, due to the rails not being straight or properly fastened, resulting in the plaintiff being thrown from the car and receiving the injuries in suit. The plaintiff, a farmer by vocation, with only the knowledge of railroads that farmers usually possess, had been working for the defendant in the ballasting of its track for about 5 months. He had been employed for the most part some miles away, and had in fact never worked upon the trestle or walked over it. The defendant contended that the plaintiff assumed the risk, as he knew the entire road was very much out of repair, and should have appreciated the risk in crossing the trestle. From a verdict and judgment for the plaintiff, the defendant appealed. The court in affirming the judgment, held that as the plaintiff did not know of the excessively unsafe condition of the trestle, he was not required to examine it to ascertain its condition, having the right to assume that the defendant would not send him to his work over a dangerous trestle. As to the contention that the condition was obvious and that the plaintiff must have observed it, and thereby assumed the risk, the court held that such was a question

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the law as hereinbefore set forth in discussing the appellant's request for a peremptory instruction, and is therefore correct.

Third. The appellant's instruction No. 6 was properly refused, one sufficient reason therefor being that it was sought thereby to charge the jury, when the law is to the contrary, that an employee assumes a risk created by his employer's negligence merely because he had as good an opportunity as his employer of knowing of its existence.

No error was committed in refusing the appellant's instruction No.

of fact for the jury, which had been properly found in favor of the plaintiff. Emerson v. Portland, E. & E. R. Co., 85 Ore. 229, 166 Pac. 946 (1917).

III. Rock falling from roof of tunnel.

The plaintiff's decedent, a laborer, was killed in the tunnel of the defendant railroad by the falling upon him of a large rock a few hours after he began work. The tunnel had previously been inspected, and the deceased was assured by his foreman that the place was safe. The deceased, however, was permitted to have no part in the work of inspection or preparation of the place where he was required to work, and the rock fell upon him out of the darkness from a place where he had been assured it was safe to work. From a verdict and judgment for $4,000, the defendant appealed. The court, in affirming the judgment for the plaintiff, held that the deceased did not assume the risk. Louisville & N. R. Co. v. Thomas' Adm'r, 170 Ky. 145, 185 S. W. 840 (1916).

IV. Rusty switch.

The plaintiff, a brakeman, had been ordered just previous to the accident to throw a certain jack switch, in order that his train might come in upon a siding. The engine had been cut loose from the train, and was coming back on the spur. The plaintiff ran ahead to throw the switch, but it stuck and could not be moved. He put out his foot to exert greater force upon it, and when it suddenly released, the block of the switch lever broke and fell upon his right foot, breaking the bones and wounding the tendons to such an extent that he was laid off from work for several months and his right foot permanently injured. It was complained as negligence that the switch was old, rusty, and not in good working order. The defendant contended that the plaintiff assumed the risk. From a judgment for the defendant on a directed verdict the plaintiff appealed. The court, in reversing the judgment and remanding the case for a new trial, held that the evidence did not show that the defects in the switch were so plain and obvious that the plaintiff, as a matter of law, assumed the risk. Ballenger v. Southern R. Co., — S. C. —, 90 S. E. 1019 (1916).

V. Inadequate refuge on bridge.

The plaintiff's decedent was employed as a night watchman to guard a certain bridge of the defendant railroad. The bridge was so constructed that a person standing even in one of the "safety stations" placed about 25 yards apart across the bridge would be struck by a passing train, unless he lowered his head and crowded back of the water barrels placed on such abutting platforms. The deceased had performed

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7, for the substance thereof was given in charge to the jury over and over again for both sides; that is, that a recovery by the appellee depended upon his having fallen over the switch stand because the lamp thereon was not lighted.

The appellant's instruction No. 8 was also properly refused because of the erroneous charge therein that—

> If the plaintiff "had been working in the yards where such switch was located and knew that such switch stand No. 6 was there and had known it

his work as switchman only two nights before the accident occurred, though he had passed the bridge in question several times a week on a hand car going to and from work over a period of some months. He was struck and killed by an extra engine passing over the bridge while standing in one of the safety stations, apparently in a safe position. From a verdict and judgment for the plaintiff in the sum of $7,500, the defendant appealed, contending that as the deceased had ample opportunity to observe the conditions under which he worked, and made no objection that the defendant had failed to provide him a safe place to take refuge from passing trains, he assumed the risk. The court, in affirming the judgment, said: "There was no evidence that he knew there was not sufficient space between the barrel and the steps of a passing locomotive or parts of the cars to make the place one of safety. He may not have had occasion to use a platform when trains were passing on a previous night, or he may have used it and not been hit. He cannot be presumed to have known the exact limit of safety in occupying a platform; knowledge of the exact width of the engines or cars or of the distance they extended beyond the rails cannot be imputed to him. He resorted to what the jury believed he had a right to assume was a place of refuge." Kreitzer v. Southern Pac. Co., — Cal. App. —, 177 Pac. 477 (1919).

VI. Obstacles on track.

A. Car standing at foot of grade.

A member of a switching crew employed by the defendant was killed when two cars upon which he was riding came into collision with a standing car loaded with scrap iron, and his administrator sued under the Federal Employers' Liability Act to recover damages for the benefit of the dependent beneficiaries. The track upon which the accident took place was one of a number of repair tracks in the yards of the defendant. The track in question had a downward grade of about one per cent for about 500 feet, and was level from that point for about an equal distance to its end. The car loaded with scrap iron, for some reason not disclosed, had been left on the grade, about 50 feet from the foot thereof. The work in which decedent was engaged at the time of the accident was the classification of a string of cars upon the various tracks of the yard. Immediately prior to the accident the decedent's foreman had directed the shifting of two cars of this string upon another track, and had personally followed them down that track, after instructing decedent to send the next two cars of the string down upon the repair track above described. By the rules of the defendant, cars were not supposed to be sent down the incline of this repair track loose, but were supposed to be shoved down by the engine and left where desired.

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for years prior to the alleged accident, then plaintiff assumed the risk of such danger, if any there was from said unlighted switch."

The appellee admitted knowing the location of all of the switches, but the trouble here is that he fell over the switch stand in the dark not knowing that he was then in its vicinity, which fact would have been disclosed to him had the lamp been burning.

Fourth. Trial courts are required to, and should only, grant instructions sufficient in number and character to guide the jury in

In this instance, however, the two cars intended for the repair track were kicked onto that track and sent down the grade at a considerable speed, the decedent riding thereon to set the brakes when they had come to the end of the track. At the time this work was going on it was about daybreak, and on account of the deficiency of light the position of the car loaded with scrap iron could not be distinguished from the point where the cars were started downgrade. The negligence relied upon as a basis for recovery was, first, the placing and leaving of the car loaded with scrap iron on the grade, and second, the failure to warn the decedent of the risk of injury by collision with such car, after it was seen that he was about to be in such a collision, so that he could make his escape therefrom. With respect to the first item of alleged negligence it was made to appear that it was the custom of the defendant, in placing cars on the repair tracks, to spot them as near the lower end of the tracks as possible, both in the interest of easy handling and to avoid such accidents as that in suit. It appeared, however, that the repair tracks were frequently full of cars, so that at times cars would be found standing where this particular car was placed. On this ground it was contended by defendant that the decedent should be held to have assumed the risk of injury from such a source, particularly as he was personally in charge of the kicking of the cars on which he rode down the incline; moreover, it was contended, he was guilty of contributory negligence in that he failed to use due care to see that the track was clear before having the cars kicked down the grade. In affirming a judgment for the plaintiff the court held, in respect to the claim above set out, that it could not be said as a matter of law that the decedent had assumed the risk of injury because of the negligent placing of the scrap iron car, and that the evidence warranted the inference evidently drawn by the jury that the negligent failure of the decedent to determine whether the track was clear was not the sole proximate cause of the accident. Cincinnati, N. O. & T. P. R. Co. v. McGuffey, 164 C. C. A. 137, 252 Fed. 25 (1918).

B. Cow.

The deceased was conductor of a work train used in picking up ties along the right of way. The train was at the time of the accident running backwards. As a result of striking a cow which was upon the track, the caboose was derailed and the deceased killed. The defendant sought to make out the defense of assumption of risk, first, upon the ground that the division superintendent had given oral instructions for trains not to be operated backwards, which, if obeyed in the present instance, would have resulted in the engine being derailed instead of the

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determining the issues involved in the case on trial, and they have the right to limit the number of instructions to be considered by them accordingly. Mabry v. State, 71 Miss. 716, 14 South. 267; Waldrop v. State, 98 Miss. 567, 54 South. 66. This number cannot be an arbitrary one applicable to all cases alike, but must depend in each case upon the number of issues therein involved. In the case at bar the five instructions granted the appellant fully covered all of the issues it was entitled to have submitted to the jury; con-

caboose in which the deceased was riding; second, upon the ground that the deceased knew the right of way was unfenced and that stock might come upon the track. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held (1) that as the division superintendent's orders with reference to backing trains had not been communicated to the deceased, and as the operation of trains in such manner under the conditions then existing was permitted by general custom and the defendant's general rules, the deceased assumed no risk of injury from the operation of the train in such a manner; (2) that though the deceased knew the right of way was unfenced, this fact did not preclude recovery as a matter of law because of assumption of risk, since it did not appear that he knew of the presence of cattle in the vicinity, or the likelihood of their entering upon the track, though he might with reasonable care have discovered such things, it not being sufficient to make out assumption of risk that he know of the things from which harm might come, but that he actually appreciate the danger from which he suffered. Alexander v. Great Northern R. Co., 51 Mont. 565, 154 Pac. 914 (1916).

VII. Inadequate light.

A. Turntable.

The plaintiff's decedent, a boiler washer, had been in the employ of the defendant railroad for about two years previous to his death, one year on the night shift and about one year on the day shift. He was required when quitting work at 7 p. m. in the evening to "register off" at the company clock. To reach this place, it was necessary for him to go through a portion of the yard where a turntable was installed. Upon leaving the engine house, on the night of the accident, the deceased fell into the pit in which the turntable was located, struck his head against the cement floor of the pit, fracturing his skull and breaking his neck, from which injuries he died the following day. The evidence was in conflict as to whether the turntable and tracks at that point were kept lighted. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the question of assumption of risk was properly left to the jury and pointed out that while the servant assumed, under the rule in the United States courts, all the ordinary risks of his employment which were known to him, or which could have been known to him with the exercise of ordinary care by a person of reasonable prudence and diligence under like circumstances, nevertheless, risks not naturally incident to the work, but which arose out of the negligence of the master, were not assumed by the servant until he became aware of the negligence, and the danger arising there-

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sequently, the court committed no error in declining to pass on the others tendered to it.

Fifth. The appellee, as a result of his injury, is suffering from a double hernia which will be permanent unless relieved by an operation which may or may not be a success, and which, according to the evidence, will be attended with danger to life. He is still suf-

from, unless the negligence and risk were so apparent that an ordinarily prudent person would under the circumstances have observed the one and appreciated the other. Lusk v. Bandy, — Okla. —, 184 Pac. 145 (1919).

The plaintiff was employed by the defendant to perform services about one of its roundhouses, including the work of putting out and building fires in engines, and assisting in placing engines on the turntable and turning them around. At the time of the accident, an engine of great weight had been placed on the turntable and the electric appliance provided for moving the table around was unable to perform its work. The plaintiff and three other men then took hold of a lever provided for the purpose of swinging the engine around by hand. Soon after this operation was started, the table began to turn in consequence of the working of the electric appliance which had not been shut off. At that time, the plaintiff was in a stooping position with his breast against the lever and his legs so extended that his feet were within about one foot of the pilot of the engine, which extended over the platform surrounding the turntable. When the table thus began to turn as a result of the application of the electric power, the lever suddenly pulled away from the plaintiff and caused one of his feet to so slip as to be caught under and dragged by the pilot until it came in contact with one of the rails of the track leading to the turntable, thereby causing his leg to be crushed. Though the plaintiff knew no one was in charge of the electric appliance, he did not know that the current had been left turned on. The plaintiff alleged negligence by the defendant in not having the place properly lighted, the electric appliance in proper working order, and the current shut off at the time the work of moving the table by hand commenced. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in reversing the judgment, said: "Plaintiff had been performing the same service for more than two years prior to the accident; and, without undertaking to set out the evidence, we think it sufficient to say it was conclusively shown by his own testimony that for several months prior to the accident there was the same absence of lights at the place where he was employed as existed on the night of the accident, that the length of the lever used to turn the turntable was the same during all of that time, and that the condition of the electrical appliance during the same period of time was in the same condition as it was on the night of the accident, all of which conditions and risks incident thereto in the performance of the duties of his employment were known to the plaintiff * * * when he undertook to assist in turning the table by pushing on the lever. Under such circumstances, he must be held to have assumed the risks of injury from those conditions, and the trial court erred in submitting any of those issues to the jury as a basis for a verdict in the plaintiff's favor." As to the assumption of risk in turning the table when he

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fering pain at intervals, is compelled to wear a truss with its accompanying inconvenience, and his capacity for work has been materially reduced. The verdict of $15,000, which is claimed by the appellant to be excessive, is large; but on the evidence we cannot safely say that it was the result of passion, prejudice, or corruption on the part of the jury.

Affirmed.

knew no one was at the electric appliance to cut off the power, such was not assumed, the court pointed out, for though the plaintiff knew no one was there, he did not know that the electric power was on at the time. Ft. Worth & D. C. Ry. Co. v. Miller, — Tex. Civ. App. —, 201 S. W. 1049 (1918).

B. Loading platform.

The plaintiff, a handler of freight in one of the freight houses of the defendant railroad, was requested to do some extra work on the evening of the accident, consisting in removing the running boards that bridged the space of about 30 inches between cars and closing the car doors. It was dark at the time, and the plaintiff requested a lantern from the foreman, who replied that none was available. The plaintiff then started upon the performance of the work mentioned above without any light, and without any assurance of safety or that any light would be furnished within a reasonable time. While removing one of the running boards from between two cars, the plaintiff fell in the space between the cars, as did the platform, the latter striking him on his arm, and causing the injuries in suit. The failure to furnish sufficient light was alleged as negligence. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in reversing the judgment, held that as a matter of law the plaintiff assumed the risk. As the court said: "He seems to have fully appreciated this danger, as also the danger of working about a space of this kind without a light. He says he requested a light, and was told that none was available, and he then went back and resumed his work, and, if it be true that at the time and place it was 'pitch dark,' this knowledge was better known to him than to his master. After being refused a light, he said he continued without a promise or assurance of safety, or without assurance that a light would be forthcoming within a reasonable time. * * * The rule is well settled that if the servant knows of the failure of the master to completely discharge his duty to exercise ordinary care to furnish a reasonably safe place in which to work, and sufficient servants or reasonably safe appliances with which to work, and if he appreciated its effect, or if the failure and its effect are obvious or plainly observable, and he continues in the employment without objection, he elects to assume the risk of them, and is precluded from a recovery." Delaware, J. & W. R. Co. v. Tomasco, — C. C. A. —, 256 Fed. 14 (1919).

O. L. C.

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BOND v. BALTIMORE & OHIO R. CO.

[Supreme Court of Appeals of West Virginia, September 17, 1918.]

— W. Va. —, 96 S. E. 932.

1. **Negligence—Rescue of another from danger—Right to effect.**
The right of a person to rescue another from danger of any kind, though voluntarily exercised, is as perfect and complete as any other personal right, and the fact that the danger springs from a negligent act of a third person does not in any way affect or impair the right of rescue or the moral obligation to exercise it.

2. **Negligence—Rescue of another from danger—Nature of right and obligation.**
Such right and obligation are analogous to those of prevention of crime and protection of others from criminal injury.

3. **Negligence—Rescue of another from danger—Error of judgment.**
As the right is usually exercised on occasions of emergency, the actor ordinarily finds it necessary to determine his course of conduct without time or opportunity for deliberation and mature consideration as to the danger to

CASE NOTE.

Liability of one negligently putting a person in peril, to one injured while attempting rescue.

I. Attempting to remove or warn person in peril, 675-688.
- A. Relative, 675-681.
  - 1. Infant child on track, 675-677.
    - a. Railroad, 675-676.
    - b. Street car, 676-677.
  - 2. Infant alighting from car with mother, 677-678.
  - 3. Infant child on dangerous crosswalk, 678-679.
  - 4. Mother walking on railroad track, 679-680.
  - 5. Father stepping in front of train, 680.
  - 6. Brother stepping in front of trolley car, 680-681.
- B. Co-employee, 681-683.
  - 1. Policeman periled by train, 681.
  - 2. Miner in danger from blast, 681-682.
  - 3. Well driller near revolving shaft, 682-683.
  - 4. Section crew in undisclosed danger, 683.
- C. Companion on journey, 683-685.
  - 1. Walking across track, 683-684.
  - 2. Automobile stalled on crossing, 684-685.
- D. Intoxicated acquaintance on car track, 685.
- E. Strange boys on car track, 685-687.
- F. Employee of defendant rescuing stranger, 687-688.
  - 1. Brakeman—Children stealing ride, 687.
  - 2. Switchman — Person between platform and track, 687-688.

II. Attempting to remove or control cause of peril, 688-699.
- A. Hand car on track of train, 688-692.
  - 1. Section foreman, 688-689.
  - 2. Section hand, 690-692.
- B. Runaway team, 692-694.
  - 1. Driver, 692-693.
  - 2. Relative of driver, 693.
  - 3. Stranger, 693-694.
- C. Runaway cars, 694-695.
  - 1. Railroad, 694-695.
  - 2. Loading tram, 695.
- D. Tipping locomotive crane, 696.

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himself, attending his effort, wherefore the law does not hold him responsible for a mere error of judgment.

4. Negligence—Rescue of another from danger—Proximate cause of injury sustained in effecting.

The proximate cause of an injury inflicted in the effectuation of a rescue, by means of the negligence causing the danger and necessitating the rescue, is the negligent act causing both the danger and the injury.

5. Negligence—Rescue of another from danger—Imputation to rescuer of antecedent negligence of person rescued.

In such case, the antecedent negligence of the person rescued is not imputable to the person effecting the rescue.

6. Damages—Personal injuries—Instructions authorizing allowance for mental suffering—When justified.

An injury severe enough to cause pain, require professional treatment, and inflict disability to perform labor for a week or two, justifies the giving of instructions authorizing an allowance for mental suffering in the assessment of damages.

7. Trial—Instructions—When refusal proper.

An instruction stating a hypothesis having no basis in the evidence is properly refused.

E. Falling stove pipe, 696-697.
F. Gas in mine, 697-698
G. Live wire, 698-699
III. Attempting to extinguish burning dress of child, 699.

Cross-references. Right to recover for injuries sustained while attempting to stop runaway horses, see 9 N. C. C. A. 890-893; attempting to stop runaway horse as negligence, see 16 N. C. C. A. 167-173; liability for personal injuries sustained while endeavoring to extinguish fire negligently started, see 9 N. C. C. A. 1046-1068.

I. Attempting to remove or warn person in peril.

A. Relative.

1. Infant child on track.

a. Railroad.

Plaintiff's intestate and her infant son were instantly killed at a crossing of the railroad of the defendant by being struck by one of its trains while she was attempting to save the life of the son who was coming on to the track in front of the approaching train. The train at the time was running more than 10 miles an hour in violation of a city ordinance. Affirming judgment of $1,665.35 for the plaintiff, the court held that whether the speed of the train in violation of the city ordinance was the proximate cause of the injury, and whether the mother was guilty of contributory negligence in risking her own life in the attempt to save her child, were questions of fact for the jury. "The law has so high a regard for human life," quoted the court, "that it will not impute negligence to an effort to preserve it, unless under such circumstances as to constitute rashness in the judgment of prudent persons." Speaking of the attempt of the mother, the court said: "Her conduct is not to be judged solely in the light of subsequent events." The court then indicated that if she believed she could save her child, it was not negligence to make an attempt to do so, although she believed that possibly she might fail and receive an injury herself. Mullikin v. Cleveland, C., C. & St. L. Ry. Co., 164 Ill. App. 37 (1911).

In Alemento v. Bessemer & L. E. R. Co., 255 Pa. 588, 100 Atl. 464 (1917),

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8. Appeal and error—Harmless error—Instruction given.

Though it is technically erroneous to give an instruction embodying applicable law in abstract form, it is not reversible error nor ground for a new trial.

[Headnotes by the Court.]

9. Negligence—Rescue of another from danger—Intending passenger crossing railroad track—Action against railroad company by rescuer for injuries sustained—Evidence of defendant's negligence.

In an action against a railroad company for personal injuries sustained by plaintiff in rescuing an intending passenger who was in danger of being run down by defendant's train which she intended to board as she crossed the track from the station to the boarding platform, where it appeared that the engineer was keeping a lookout on his side of the engine but there was no evidence of a lookout on the other side by the fireman, held that the failure to maintain an adequate lookout covering the entire track, while running into the station, under the circumstances shown, was evidence of negligence.

10. Carriers—Intending passenger crossing railroad tracks—When guilty of negligence.

An intending passenger who, in crossing from the railroad station to the boarding platform, would have been run down by the train which she intended to board and which was coming in at a low rate of speed had it not been for her rescue by a third person, was guilty of negligence where the train was visible for a distance of 540 feet from the place where she crossed the tracks.

plaintiff brought action to recover damages alleged to have been sustained by him in the act of rescuing his little child from the tracks of the defendant company upon which a train was approaching. Defendant, at the time of the accident, was running its regular passenger car, and in place of the usual locomotive a motorcar was utilized. Plaintiff was engaged in playing or watching a game of ball near the tracks of defendant company, saw his little girl 3 years of age preceding or walking between the tracks at a point about 50 yards distant from where he was standing, and at the same time saw the approaching train of defendant. He ran towards the track and succeeded in throwing or pushing the girl from the track, but in doing so he himself was struck by the motorcar and injured. The child, who was 3 years of age, was a trespasser on the tracks of the defendant. Negligence was alleged on the part of defendant in failing to discover the dangerous position of the child. The case was submitted to the jury, and a verdict for plaintiff for $1,770.83 was returned and judgment entered thereon. Upon motion for defendant for judgment, notwithstanding the verdict, the court denied the motion and filed an opinion in which it was said: "The plaintiff in this case, observing his child in a place of imminent peril and using ordinary care under the circumstances, had a right to go upon the tracks of the defendant company to the rescue of the child, and the case therefore involves the relation of the defendant company to the child upon its tracks which occasioned the accident to plaintiff." On appeal from an order denying judgment non obstante veredicto, the judgment was affirmed by an equally divided court.

b. Street car.

Plaintiff's wife was standing upon the sidewalk across the street from her home conversing with a neighbor, when her two-year-old child, coming out of the home and seeing its mother across the street, started in her direction. A street car of defendant company was approaching and some persons on the street cried out in alarm. Upon hearing this, and seeing her child, plaintiff's wife ran into the street in great ex-

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11. Carriers—Intending passenger crossing railroad track—Last clear chance.
The fact that an intending passenger who, in crossing from the railroad station to the boarding platform, would have been run down by the train which she intended to board and which was coming in at a low rate of speed had it not been for her rescue by a third person, was guilty of negligence, did not absolve the railroad company from liability for its subsequent negligence.

12. Negligence—Rescue of another from danger—Intending passenger crossing railroad track—Action by rescuer against railroad company for personal injuries sustained—Jury question—Last clear chance.
In an action against a railroad company for personal injuries sustained by plaintiff in rescuing an intending passenger who was in danger of being run down by defendant's train which she intended to board as she negligently crossed the track from the station to the boarding platform, held that there was evidence of defendant's last chance to prevent injury amply sufficient to warrant submission to the jury of the issue as to its existence.

13. Negligence—Rescue of another from danger—Rescuer's right to recover for injuries sustained.
A person injured in effecting the rescue of another from danger occasioned by the negligence of a third person is not precluded from right of recovery on the ground of his own immunity from danger or his voluntary incurrence of risk; if his intervention was not a rash nor clearly imprudent act, under the circumstances, he might recover.

citement and frenzy of fear to rescue it. A neighbor snatched the child from the passing car and the mother was knocked down in the street and run over, receiving injuries from which she died. The accident occurred in a crowded portion of the city termed the "Ghetto," and no gong of warning had been sounded. There was conflicting evidence as to the speed of the car, but it tended to establish that with due care the accident might have been avoided. The company contended that there had been contributory negligence on the part of the plaintiff's wife in running, wilfully and wantonly, directly in front of a moving street car. Affirming judgment for $5,000 for plaintiff, the court, holding that under such circumstances it would be unreasonable to require deliberate judgment on the mother's part, quoted approvingly as follows: "To require one so situated to stop and weigh the danger to himself, of an attempt to rescue another, and compare it with that overhanging the person to be rescued, would be in effect to deny the right of rescue altogether if the danger was imminent. The attendant circumstances must be regarded; the alarm, the excitement and confusion usually present on such occasions. * * * And the doctrine that one who, under those or similar circumstances, springs to the rescue of another, thereby encountering even greater danger to himself, is guilty of negligence per se, is neither supported by principle nor authority." Sherman v. United Rys. Co. of St. Louis, — Mo. App. —, 214 S. W. 223 (1919).

2. Infant alighting from car with mother.

Plaintiff, who was a passenger on defendant's street car, went to the rear platform to alight with her little son, who had been sitting on her lap. With her right hand she held the left hand of the boy and attended to his exit from the car, and while she was in the act of leaving the car, with one foot on the step and the other on the platform, and while the boy was still clinging to her hand, the conductor gave the signal and the car started, dragging the boy along. Thereupon she, of her own volition, jumped from the car to the ground, the boy falling to the

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14. Negligence—Rescue of another from danger—Contributory negligence on part of rescuer.

A voluntary incurrence of risk in effecting the rescue of another from danger occasioned by the negligence of a third person does not constitute contributory negligence unless the act of intervention was performed under such circumstances as would make it rash or reckless in the estimation of ordinarily prudent persons.

15. Negligence—Rescue of another from danger—Rescuer's right of recovery for injuries sustained—Effect of contributory negligence of person rescued.

Contributory negligence on the part of a person rescued from danger occasioned by the negligence of a third person does not preclude the rescuer's right of recovery from such third person for injuries sustained in the rescue.

16. Negligence—Rescue of another from danger—Rescuer's right of recovery for injuries sustained.

Where a rescuer has himself brought about the danger to the person rescued, or the negligence of such person is imputable to him, he cannot recover for injuries sustained in the rescue.

[Additional Headnotes by Publishers' Editorial Staff.]

Writ of error to review a judgment in favor of the plaintiff in an

pavement, she being whirled around and receiving the injuries complained of. Affirming judgment of $1,000 for the plaintiff, the court held that the jury were justified in finding that the defendant was negligent and the plaintiff not guilty of contributory negligence, saying: "Naturally the child clung to its mother and the mother to the child. To have shaken herself loose from the child after the car started and remained upon the car would have been to subject her child, in all probability, to injury. She was, by the starting of the car under the circumstances, placed in a position of being compelled to choose between two alternatives, subjecting her child to injury, or running the risk of injury to herself in attempting to alight from the car after it had been negligently started. She chose to alight and save her child. In doing so we think she acted reasonably and without negligence." Smith v. Chicago City Ry. Co., 169 Ill. App. 570 (1912).

3. Infant child on dangerous crosswalk.

A plank sidewalk in front of plaintiff's residence, in defendant city, was in good condition. Between it and the roadway there was a space of about 8 feet in width which was not filled to the level of the curb and walk, it being about 3 feet deep. Two planks, each 10 inches wide, extended across this excavation. There was no street crossing at that point, and plaintiff was familiar with the situation. Accompanied by her 3-year-old child, she crossed the street from her home over these planks to the walk on the other side, along which she passed to a grocery. Starting back, she intended again to cross these planks when her child let go her hand and started over the planks alone. Endeavoring to overtake the child, she lost her balance and fell off the planks to the ground below, receiving the injuries complained of. Affirming judgment for defendant on a directed verdict, the court held that a pedestrian who knew that a certain part of the street was in a dangerous condition, and notwithstanding this knowledge persisted in passing over it, when another and safer way was convenient, did so at his peril; and that while the general rule was,

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action for personal injuries sustained in rescuing a third person from danger, occasioned by the defendant's negligence. Affirmed.

For plaintiff in error—W. S. Stuart, H. L. Hammond and McClintic, Mathews & Campbell.

For defendant in error—J. Ramsey.

The following are the pleadings in the action:

Declaration.

Benjamin Bond, plaintiff, complains of the Baltimore & Ohio Railroad Company, a corporation, defendant, which has been duly summoned to answer the plaintiff of a plea of trespass on the case, for this, that heretofore, to wit, on the ..... day of April, 1916, and for a long time previous thereto, the said defendant was the owner, proprietor and operator of a railroad called and known as "The Baltimore and Ohio Railroad," extending from the city of Grafton, West Virginia, through the said county of Doddridge, in said

that one who exposed himself to danger in an attempt to save the life of another, was not guilty of contributory negligence, yet where the party injured was guilty of negligence in bringing about the perilous situation, that negligence would prevent recovery. White v. City of Chicago, 120 Ill. App. 607 (1905).

4. Mother walking on railroad track.

Plaintiff was at a flag station on the defendant's road. No resident agent was employed, those desiring to board trains being invited to stand near the track and wave some object across it as a signal to the engineer to stop. Plaintiff, mistaking a freight train for a passenger train, signaled, and while so doing saw her mother walking along the public highway towards the railroad crossing 20 yards east of the station, and thinking her mother had not seen the approaching train, shouted to her and continued on the track, trying by her signals to stop the train, which being a freight train did not stop, and struck and killed the mother. The plaintiff was either struck by the lifeless body being hurled against her or, not having gone quite out of the way, was struck by the overhanging parts of the engine, causing the injuries complained of. Affirming judgment for the defendant, the court held that the defendant could not be charged with negligence as it was not bound to stop its train or slacken its speed when seeing a person approaching a crossing, and that at the time of the attempted acts of rescue the mother was not in peril, saying: "The attempted rescue consisted in signaling the train and shouting to her mother while she was walking along the road, not in peril, but in a place of safety. It would seem that the mother's peril arose when she deliberately stepped from her place of safety in the public road upon the track in front of a rapidly moving train, when it was too late to save her or to save the plaintiff. According to the authorities, as already seen, the mother must have been at the time of the attempted rescue in a place of imminent danger caused by the negligence of the defendant in order to excuse the contributory negligence of the plaintiff." Wright v. Atlantic Coast Line R. Co.,

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state, to the city of Parkersburg, in said state, and which passed through the town of West Union, in said county of Doddridge, and of certain locomotives, engines, tenders, railroad cars and carriages used by the said defendant on the said railroad for the carriage and conveyance of passengers, goods and chattels on and along and upon said railroad from the said city of Grafton to the said city of Parkersburg, and to the various points on and along said railroad between said two cities; and the said defendant being such owner, proprietor and operator of the said railroad and locomotives, engines, tenders, railroad cars and carriages, which were then and there, to wit, on the ..... day of April, 1916, at the said county of Doddridge, owned and operated by the said defendant under the care and management of certain servants and employees of the said defendant, and passing and running on and along the said railroad of the defendant from the said city of Grafton towards and into the station of said defendant in the said town of West Union, in said county of Doddridge, on the day and year last aforesaid, on the said defendant's said railroad, at the said station of West Union, the said defendant, by its servants and employees, so carelessly, negligently and improperly behaved and conducted itself in and about the management, control and direction of the said locomotives, engines, tenders, railroad cars and carriages, that the same, by and through the default, carelessness, negligence and improper conduct of the said defendant, by and through its said servants and employees, with great force and violence, were driven and struck against the said plaintiff whereby plaintiff's right knee was dislocated and severely bruised and wounded, and he was otherwise bruised, wounded and injured; in consequence

110 Va. 670, 25 L. R. A. (N. S.) 972, 19 Ann. Cas. 439, 66 S. E. 848 (1910).

5. Father stepping in front of train.

Plaintiff's husband and his father were walking along the roadbed of defendant railway company, in the space about 9 feet wide between two tracks. A train was approaching, and the father, who was slightly in advance of the son, for some unaccountable reason, when the engine was only from 12 to 60 feet away, stepped on to the track in front of the engine. Plaintiff's husband attempted to rescue his father, and both of them were struck by the engine and killed. Reversing judgment of $1,900 for the plaintiff the court held, that in order to establish responsibility on the part of the company, it was necessary for the plaintiff to show that the company was at fault in placing the father in peril, and that a refusal to so instruct the jury was error. Ingram v. Jackson, 206 Ill. App. 466 (1917).

6. Brother stepping in front of trolley car.

Plaintiff's intestate, a boy 14 years old, and his brother 5 years old, on their way home from Sunday school over the tracks of the defendant, the younger slightly in advance of the older, who, noticing that a trolley car of the defendant was upon them, pushed the younger from the tracks, saving him, while he himself was killed. The defendant, upon appeal, objected to an instruction of the trial court charging the jury that, if deceased was killed in endangering his own life to save his brother, he was not guilty of negligence, but omitting the qualification, that the action must have been compatible with a reasonable regard for his own safety. Reversing judgment for the plaintiff, the court held that such in struction, without the qualification, was erroneous, but could not be taken advantage of on appeal, it not having been objected to at the trial. The court further held that if the deceased's own negligence contributed to placing himself and his brother in a dangerous situation, the fact that he then suddenly attempted to save his brother would not absolve him from contributory negligence. "The most that can be inferred from this

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of which plaintiff became sick, sore, lame and disabled from following his usual occupation, and was so much injured as to be able to do nothing for a long space of time, to wit, for the space of four months, and he also expended divers sums of money for medical treatment and nursing and servant's attendance during the time of his said disability and ailment, amounting in the aggregate to the sum of seventy-five dollars; and so plaintiff says and avers that by reason of the wrong and injury hereinbefore complained of, he has been injured and hath sustained damages to the amount of one thousand and five hundred dollars; and he therefore brings this suit.

Second Count.

And for this, also, that the said defendant, before and at the time of the committing of the grievances hereinbefore mentioned, to wit, on the ..... day of April, 1916, was the owner, proprietor and operator of a certain railroad, to wit, of a railroad called and known as "the Baltimore and Ohio Railroad," extending from the city of Grafton, West Virginia, through the said county of Doddridge, in said state, to the city of Parkersburg in said state, and which passed through the town of West Union in said county of Doddridge, and of certain locomotives, engines, tenders, railroad cars and carriages, under the care and management of certain servants and employees of the said defendant; nevertheless, the said defendant, by its servants and employees, so carelessly, negligently and improperly behaved and conducted itself in and about the management, control and direction of the said locomotives, engines, tenders, railroad cars and carriages, that the same, by and through the default,

testimony," says the court, "is that the deceased, when he found that both he and his little brother were in a position of danger, sacrificed his own safety to save his brother, but it justifies no inference that the deceased was drawn into a position of danger by the attempt to save his brother." Miller v. Union R. Co. of New York City, 191 N. Y. 77, 83 N. E. 583 (1908).

B. Coemployee.

1. Policeman perilled by train.

Plaintiff and H, who were night policemen, went upon the tracks of the defendant at a crossing after the gates were down. A freight train was passing, and assuming that the gates had gone down for it, and that the noise they heard came from that train, walked on towards another track after the freight had passed, heedless of the approach of a fast passenger train. H, who was walking slightly in advance, was struck and instantly killed, and plaintiff, attempting to snatch him from the path of the train, was struck by overhanging parts of the engine and received the injury complained of. Reversing judgment for the plaintiff and dismissing his complaint, the court held, the gates being down, the defendant was not guilty of negligence; and that the plaintiff was guilty of contributory negligence as a matter of law. The court pointed out that the plaintiff, with his companion, courted danger by walking on to the tracks when the gates were down; that there was no word of admonishment to H of his danger, and when it was too late plaintiff made a vain effort to save him. There having been no negligence on the part of the defendant, the court declared that even had the plaintiff made a strong case of voluntary risk to save another, there could have been no liability. Nelson v. Lake Shore & M. S. R. Co., 185 N. Y. App. Div. 174, 172 N. Y. Supp. 766 (1918).

2. Miner in danger from blast.

Plaintiff and one M were fellow laborers in the iron mine of the defendant. Their labor consisted, by means of dynamite with a fuse attached thereto, in blasting iron ore. Two fuses were lighted, and plaintiff

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carelessness, negligence and improper conduct of the said servants and employees of the said defendant, then and there, at the county of Doddridge aforesaid, and at the town of West Union, is [in] said county, with great force and violence, were driven and struck against the said plaintiff, by means whereof, the said plaintiff's right knee was dislocated and severely bruised, wounded and injured, and said plaintiff was otherwise bruised, wounded and injured; in consequence of which he became sick, sore, lame and disabled from following his usual occupation, and was so much injured as to be able to do nothing for a long space of time, to wit, for the space of four months, and he also expended divers sums of money for medical treatment and nursing and servants' attendance during the time of his said disability and ailment, amounting in the aggregate [to] the sum [of] seventy-five dollars; and so plaintiff says and avers that by reason of the wrongs and injuries hereinbefore complained of, he has been injured and hath sustained damages to the amount of one thousand five hundred dollars; and therefore brings this suit.

Third Count.

And for this, also, that the said defendant, before and at the time of the committing of the grievances hereinafter complained of, to wit, on the ..... day of April, 1916, was the owner, proprietor and operator of a certain railroad called and known as "the Baltimore and Ohio Railroad," extending from the city of Grafton through the county of Doddridge, state of West Vir-

called to M to go to a place of safety, lest the blast come while they were exposed to danger, and plaintiff started immediately. Having proceeded some distance, and perceiving that M was still standing near the lighted fuse, apparently ignorant of the danger confronting him, plaintiff again called to him and returned to where M was standing for the purpose of rescuing him, when the charge of dynamite exploded, killing M and seriously injuring plaintiff. M was inexperienced in the work and unfamiliar with the dangerous character thereof, and the defendant had set him to work without previously warning and instructing him of the danger. There was a verdict for the plaintiff, and affirming the order denying motion of defendant for judgment or a new trial, the court held that the question whether a person, attempted to be rescued, was placed in a position of peril by the negligence of another, in failing to warn and instruct as to danger, and whether the rescuer's act in attempting the rescue was so reckless and rash as to constitute contributory negligence, or assumption of risk, were issues of fact for the jury; and that a person who voluntarily attempts to rescue one whose life is imperiled by the negligence of another, may recover, if injured, from the negligent person, if the act of attempted rescue was not one of extreme recklessness. Perpich v. Leetonia Min. Co., 118 Minn. 508, 137 N. W. 12 (1912).

3. **Well driller near revolving shaft.**

Plaintiff was employed drilling a well for the defendants. H, a fellow employee, had taken a seat on an idler pipe in front of a rapidly revolving line shaft of the well drilling rig. Plaintiff, thinking H was in danger, attempted to push him off the pipe, and while so doing his hand was rolled around the line shaft with H's coat, which was caught therein, and plaintiff sustained the injuries complained of. There was no evidence to show that the defendant had been negligent in the construction or maintenance of the well drilling rig or idler pipe, or that H was performing a duty for the defendant when he seated himself thereon. Reversing judgment for the plaintiff and rendering judgment for the defendant, the court held, that the injury under the circumstances could not have been anticipated by the defendants or their agents, and that they were not guilty

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ginia, to the city of Parkersburg, in said state, and which passed through the town of West Union, in said county of Doddridge, and of certain locomotives, engines, tenders, railroad cars and carriages, under the care and management of certain servants and employees of said defendant; that the said defendant, before and on the ..... day of April, 1916, was also the owner, proprietor and operator of a certain railroad station, depot, ticket office and waiting room in the town of West Union, in said county of Doddridge, situated and located on the side of the railroad of said defendant opposite to that where passengers of said defendant were required and compelled to enter and board the railroad cars and carriages of said defendant, and that passengers of the said defendant, as well as attendants of said passengers, were required and compelled to cross the railroad tracks of said defendant in traveling from the ticket office and waiting room to the point where they might and could enter and board the railroad cars and carriages of the said defendant, at the said station at West Union; that on the ..... day of April, 1916, at the said town of West Union, in said county of Doddridge, while plaintiff, in company with others and especially with one Doris Smith, who had purchased from said defendant a ticket for passage over said railroad to the said city of Parkersburg, were attempting to cross the railroad tracks of said defendant from said ticket office and waiting room to the place where all passengers of said defendant were required and compelled to enter and board the railroad cars and carriages of the said defendant, and especially to the place where the said

of negligence; and that in an action by a servant to recover on account of injuries sustained in an effort to save the life of a fellow-servant, the person whose rescue was attempted must be in a position of peril from the negligence of the defendant. Jos. and Simon Linz Realty Co. v. McDonald, — Tex. Civ. App. —, 133 S. W. 535 (1910).

4. Section crew in undisclosed danger.

The plaintiff, in the employ of the defendant, was in charge of nine box cars, with between 50 and 60 Italian workers in them. The men slept and ate in these cars and were moved in them from place to place. When approaching a coal bumper, which defendant had constructed near the tracks, plaintiff's attention was called to a noise made by some one hallooing, and to the rolling of the cars in which he and the workmen were confined, and in order to discover the cause of the alarm, he put his head out of the side of the box car, and was struck on the head by the weight of one of the coal chutes of the bumper, receiving injuries for which suit was brought. This side door was the only way of egress and observation from the car, and it was shown that the chute was dangerously near the track, nine inches nearer than the minimum distance of the ordinary chute. Reversing judgment of nonsuit, the court held that the proximate cause of the injury was the unnecessary proximity of the chute to the track; and that the plaintiff was not guilty of contributory negligence in putting his head out of the car. The court said: "On the question of the nice judgment which is to be exercised by an employee in the attempt to save either himself or his fellow workmen, or those under his control, from peril, the courts all agree that his action at such time cannot be too closely scanned, or his judgment too nicely weighed." The court added that under the circumstances it was the imperative duty of the plaintiff to make the observation and examination. Smith v. Spokane Falls & N. R. Co., 52 Wash. 350, 100 Pac. 747 (1909).

C. Companion on journey.

1. Walking across track.

Plaintiff, with a comrade, was walking, at night, along the tracks of the defendant, in a thickly settled com-

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Doris Smith, passenger of said defendant, was required and compelled to enter and board the railroad cars and carriages of the said defendant in order that she might take passage to the point of her destination, to wit, the city of Parkersburg; nevertheless, the said defendant, by its servants and employees, so carelessly, negligently and improperly behaved and conducted itself in and about the management, control and direction of the said locomotives, engines, tenders, railroad cars and carriages, that the same, by and through the defendant, carelessness, negligence and improper conduct of the said servants and employees of the said defendant, then and there, at the county of Doddridge aforesaid, and at the said town of West Union, with great force and violence, were driven and struck against the said plaintiff, by means whereof the said plaintiff's right knee was dislocated and bruised, wounded and injured, and said plaintiff was otherwise bruised, wounded and injured; in consequence of which he became sick, sore, lame and disabled from following his usual occupation, and was so much injured as to be able to do nothing for a long space of time, to wit, for the space of four months, and he also expended divers sums of money for medical treatment and nursing and servant's attendance during the time of his said disability and ailment, amounting in the aggregate to the sum of seventy-five dollars; and so plaintiff says and avers that by reason of the wrongs and injuries hereinbefore complained of, he has been injured and hath sustained damages to the amount of one thousand five hundred dollars; and he therefore brings this suit.

munity where people were much accustomed to use the tracks. The comrade sat down on a crosstie to rest, and plaintiff stood near the ties, across the track, when an engine and tender of the defendant company approached, the tender being in front as it was moving. No signal was given, though the train had passed signal posts near by and the light coming from the tender was faint. Realizing that it was a train, plaintiff called to his companion, and then jumped across the track to pull him off, and in the effort to save him they were struck, the comrade being killed and the plaintiff seriously injured. Affirming judgment for the plaintiff, the court held it was not error under these circumstances to submit the question of plaintiff's contributory negligence to the jury; that the plaintiff had a right to rely upon lights and on signals ordinarily required at the signal post, and that failure to give them was negligence on the part of the company; that the deceased comrade was guilty of contributory negligence, but that his negligence did not affect the right of plaintiff, who had extended his help to save human life without rashness, considering the emergency presented. Norris v. Atlantic Coast Line R. Co., 152 N. C. 505, 27 L. R. A. (N. S.) 1069, 67 S. E. 1017 (1910).

2. Automobile stalled on crossing.

Plaintiff's intestate, in company with S, an elderly woman, and others, was out sightseeing in the car and as guest of M. Unawares, they approached the tracks of defendant railroad company. They were strangers in the vicinity and there was nothing in sight to indicate the proximity of the track except a sign placed on a high bank 25 feet above the surface of the crossing. Due to the height of the sign and the fact that the top of the car was up, the occupants did not see it, nor did they become aware of the railroad track until M stopped his car thereon with a view of ascertaining the condition of the road. The roadbed of the railway was visible to a distance of 200 feet, and no cars were in sight then, but immediately thereafter, attracted by the cries of some men, they looked and saw the front car of a train backing down upon them at a speed of four or five miles an hour. No warning by bell or whistle was given and air brakes were not attached. M attempted to start his

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And thereupon the plaintiff says that by reason of the premises and the matters and things in the first, second and third counts mentioned, an action has accrued to him to have and demand of and from the said defendant, for and by reason of the said grievances, wrongs and injuries in said counts mentioned, damages to the amount of one thousand five hundred dollars. And therefore he sues.

Demurrer overruled; general issue pleaded.

POFFENBARGER, P. Whether a person, injured in rescuing another from danger occasioned by the negligence of the defendant, is precluded from right of recovery by his knowledge of the danger incident to his attempt to effect the rescue is an inquiry raised on this writ of error to a judgment for $500 in favor of a person bearing such relations to the defendant and a third party, one Doris Smith. Other grounds relied upon for reversal are denial of proof of negligence and alleged errors in rulings upon instructions.

auto but killed the engine, whereupon, saying his engine was dead, he told the members of his party to jump, which advice all of them except Mrs. S acted upon. In attempting to get Mrs. S out of the car plaintiff's intestate was struck by the approaching flat car, and both he and she received injuries causing their deaths. Defendant contended that this act constituted contributory negligence. Affirming judgment for the plaintiff the court said: "While concededly deceased could have escaped except for his efforts to save the life of Mrs. Scherrer, it is not claimed that he acted with a recklessness unwarranted by the judgment of a prudent man, and it is only in such case that one, in attempting to rescue another placed in peril by the negligent act of a third person, can be said to be guilty of contributory negligence." McClure v. Southern Pac. Co., — Cal. App. —, 183 Pac. 248 (1919).

D. Intoxicated acquaintance on car track.

W, an acquaintance of the plaintiff, was intoxicated and lying on the defendant's street car track. Plaintiff, seeing W's condition, and knowing a street car was coming, went to him and tried to pull him off the track, and in so doing both were hit by a street car and severely injured. It was night, but the track was straight and light, and a person keeping a lookout could have seen 75 or 100 feet in front of the car. The car was running 15 miles an hour contrary to city ordinance prescribing a limit of 12 miles. The motorman did not see W or plaintiff on the track, but was standing in a half turned position talking to some one. Affirming judgment for the defendant, the court held that the plaintiff rescuer stood in the same position as the intoxicated man, who had been guilty of contributory negligence, and that the negligence of the latter must be attributed to the rescuer, so that no recovery could be had against the street car company, though its servants were also guilty of negligence. Scates v. Rapid Transit Ry. Co., — Tex. Civ. App. —, 171 S. W. 503 (1914).

E. Strange boys on car track.

In Toner v. Pennsylvania R. Co., — Pa. —, 18 N. C. C. A. 778, 106 Atl. 797 (1919), defendant appealed from a judgment entered on the verdict of

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While Doris Smith was leisurely crossing a side track and the main track of the defendant's railroad at its West Union station, in the customary and designed method of reaching the platform from which she intended to board one of its trains, after having purchased a ticket entitling her to carriage on said train, the station and platform being on opposite sides of the tracks, the train came in at a comparatively low rate of speed and would have run her down and probably killed her, but for the assistance rendered her by the plaintiff, according to the testimony of himself and other witnesses. He says he stepped down on the track, grabbed her, and threw her towards the platform, and was then struck by the pilot beam of the engine. Two other witnesses agree that the engine struck him, but not that he stepped off of the platform. They say he reached from the platform and caught her. Others say the engine struck the girl only and knocked her against him, in con-

a jury in a negligence case, and assigned as errors only the refusal of its points for binding instructions and pleaded dismissal of its motion for judgment non obstante veredicto, so that the single question was whether there was sufficient evidence to carry the case to the jury, assuming that all the facts and inferences favorable to the plaintiff were decided in his favor, and all those antagonistic to him rejected. It appeared that defendant had freight tracks in a public highway in the city of Philadelphia, and for many years boys of the neighborhood, with the knowledge of defendant's employees, had been in the habit of playing on the tracks the same as the rest of the street, and that the city was solidly built up for many squares every way from the point where the accident happened. One evening while plaintiff was walking along the footway of the avenue he saw two boys 8 or 10 years old playing on the tracks, with cars of defendant backing down upon them, without lights in the rear, without warning, and without a trainman on the nearest approaching car, though all of those things were required by the rules of defendant. Seeing the imminent danger of the boys, he called to them, and, when they did not hear him or seem to heed him, rushed on the tracks, threw one boy in one direction and the other in the other, saving them from injury, but receiving the injuries for which this suit was brought. The trial judge charged the jury that if defendant, by its negligence, put the two boys in serious danger of life or limb, knowing children were in the habit of playing on the tracks, and plaintiff received the injury of which he complains in an endeavor to rescue the boys from the danger in which they were placed by defendant's negligence, and the risk which plaintiff took did not appear so hazardous as to be condemned by the judgment of a prudent person, he might recover; but if any of those elements were missing, the verdict should be for the defendant. As this charge was in exact accord with the former decision in Corbin v. City of Philadelphia, 195 Pa. 461, 7 Am. Neg. Rep. 563, 49 L. R. A. 715, 78 Am. St. Rep. 825, 45 Atl. 1070 (1900), defendant asked the court to reconsider the conclusion which was there announced. The court said, however, that further con-

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sequence of which he fell and his knee was injured by contact with a clinker in the cinder platform. The train was in sight when the girl started across the tracks, but she seems not to have seen or heard it. When she got to the main track and, then seeing the train, quickened her pace, it was within six or eight feet of her, and within a foot or two of her, when the engineer discovered her and the plaintiff grabbed her. The engineer was on the right-hand side of his engine, keeping a lookout; but the girl was approaching from the left hand side and beyond his view partly because of a slight curve in the track. He had his engine under reasonable control and stopped it by means of the emergency brake within a short distance, he says, about its length, but, other witnesses say several feet more than that. He did not discover her until the engine was almost upon her. There was no evidence of a lookout on the other side by the fireman, and neither he nor Miss Smith

sideration had only confirmed the court's opinion that what was there said was founded on both reason and authority, and that hence they reaffirmed it. The court also found that defendant was negligent so far as regarded the two boys, and the judgment of the court below was affirmed.

F. Employee of defendant rescuing stranger.

1. Brakeman—Children stealing ride.

Plaintiff's intestate, W, was a brakeman on one of defendant's trains. While the train was going at a rate of speed estimated at from 7 to 13 miles an hour, W noticed several children running alongside the train, some hanging on to the brass rods and others hanging on to other parts of the car. After several warnings by shouting, W climbed down the ladder at the front end of one of the cars, the ladder being on the end and not on the side of the car, put his foot in the stirrup, which was on the outside of the car, turned his face towards the rear of the train, the children being back of the car he was on, waved his hand at them, and leaned outward and downward as if about to alight. While in that position he came in contact with a fence post, which was standing beside the track, 18 inches from the side of the car, was thrown to the ground and sustained the injuries which caused his death. Reversing judgment for the plaintiff, holding the deceased guilty of contributory negligence, the court announced the following principles: "To justify such exposure for the purpose of saving life, however, it is necessary, first, that there be imminent danger to the person or persons sought to be saved; and second, that the method attempted be not rash or reckless in the judgment of prudent persons." The court then pointed out that while the proceeding of the children was far from safe, they were not in imminent danger. Wilson v. New York, N. H. & H. R. Co., 29 R. I. 146, 69 Atl. 364 (1908).

2. Switchman—Person between platform and track.

Defendant railroad company was engaged in switching in one of its yards. A stranger was standing at a nearby freight house between its

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testified in the case. The train could have been seen from a distance of 540 feet from the point at which she crossed the space between the tracks, about 250 feet from the waiting room of the station, and about 150 feet from the platform.

Failure to maintain an adequate lookout covering the entire track, while running into the station, under the circumstances shown, was evidence of negligence. McGuire v. N. & W. Ry. Co., 70 W. Va. 538, 74 S. E. 859; Schoonover v. B. & O. Railroad Co., 69 W. Va. 560, 73 S. E. 266, L. R. A. 1917 F 1, Ann. Cas. 1913 B 964. This rule seems to be general, and it is especially applicable here, in view of the necessity for the crossing of the tracks, by passengers, to obtain access to the cars from the platform, known to the servants and employees of the defendant company. If such a lookout had been maintained, the perilous situation of Miss Smith would have been discovered in ample time to have prevented danger to her, by stop-

platform and the track upon which the switching was being done. Deceased, a switchman, realizing the danger of the stranger's being caught between the cars and platform, or being run down, called to him, and when he did not heed the warning, rushed forward, shoving him away, thereby saving him, he himself being caught between the platform and cars and killed. A fellow switchman saw the action of the deceased, and could have given a signal to the engineer to stop, but he failed to do so. Affirming judgment for the plaintiff in the sum of $15,000, the court held that the instruction, objected to by the defendant, charging the jury that, if the fellow brakeman saw decedent's efforts, and realized that the person sought to be rescued was exposed to danger, and could by ordinary care have caused the train to be stopped before reaching him, and if decedent realized the danger of the third person and attempted to rescue him, and in so doing was killed, and his act was not reckless, a verdict should be rendered for the plaintiff, properly submitted the issues. Texas & N. O. R. Co. v. Scarborough (Tex. Civ. App.), 104 S. W. 408 (1907), aff'd 101 Tex. 436, 108 S. W. 804 (1908).

II. Attempting to remove or control cause of peril.

A. Hand car on track of train.

1. Section foreman.

While plaintiff's intestate, G, a section foreman, was attempting with one of his crew to remove from the track a motor car on which he and the crew had been traveling down the track, he was seriously injured, and later died, by reason of being struck by a passenger train of the company of which defendant was the receiver. At the time and place of the injury there was a very dense and unprecedented fog, the crew of the train failed to ring the bell or sound the whistle, the headlight was not burning, and the train was running at a speed of from 40 to 45 miles an hour. The defendant contended that, it having been a duty of the deceased to keep a lookout for trains, and having voluntarily risked his life when he might have avoided the injury, as did others of his crew, who stepped away, he was guilty of con-

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ping or checking the train. For some reason, she had evidently failed to observe it, until it was almost upon her. Of course, she was guilty of negligence. She should have seen the train and hurried across or abstained from crossing; but this fact does not absolve the defendant from liability for its subsequent negligence. Schoonover v. B. & O. Railroad Co., cited; Riedel v. Wheeling Traction Co., 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. (N. S.) 1123. There was evidence of its last chance to prevent injury, amply sufficient to warrant submission to the jury, of the issue as to its existence.

As to the relation between the negligent act and the person injured, this court seems to have acquiesced in the weight of authority. A person injured in effecting the rescue of another from danger occasioned by the negligence of a third party is not precluded from right of recovery, on the ground of his own immunity from danger, or his voluntary incurrence of risk. If his intervention was not a

tributory negligence. Affirming judgment of $8,750 for the plaintiff, the court held that the question whether defendant was negligent, and if so, whether it or the intervening negligence of the decedent was the proximate cause of the injury, was a mixed question of law and fact, to be determined primarily by the jury; that the action of the foreman under the circumstances was not negligence per se, the law having so high a regard for human life that it would not impute negligence to an effort to preserve it, unless made under circumstances constituting rashness in the judgment of prudent persons. Dickinson v. Granbery, — Okla. —, 174 Pac. 776 (1918).

Plaintiff's husband, B, a section foreman, was proceeding with his crew of six men down the defendant's tracks on a hand car, when one of the crew discovered a passenger train coming. The train was late, and was running at the rate of 45 or 50 miles an hour. The hand car was stopped as quickly as possible, and B and his crew jumped off and attempted to remove it from the tracks. They succeeded in removing two wheels when, the engine being close, all the men except B ran and were not injured; he, endeavoring to remove the car alone, was struck by the engine and killed. No whistle had been blown and no attempt made to stop the train. It was one of the duties of B to keep a lookout for trains as he was proceeding down the track with the crew. Defendant charged contributory negligence in that B had voluntarily exposed himself to danger and that he had failed to keep a lookout as was his duty. Affirming judgment for the plaintiff, the court held that it was not contributory negligence for a party to expose himself to risk in endeavoring to save the lives of others, provided his conduct is not rash and reckless. Regarding the plaintiff's failure of duty the court held, keeping in mind the distinction between condition and cause, that where a party's own negligence caused such a condition that the negligence of others was about to injure innocent third parties, that person was not guilty of contributory negligence if he ran risks to save the lives of the imperiled third parties. Gulf, C. & S. F. R. Co. v. Brooks, 63 Tex. Civ. App. 231, 132 S. W. 95 (1910).

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rash or clearly imprudent act, under the circumstances, he may recover. Walters v. Appalachian Power Co., 75 W. Va. 676, 684, 13 N. C. C. A. 99, 84 S. E. 617; Schwartz v. Shull, 45 W. Va. 405, 414, 31 S. E. 914. An overwhelming weight of authority denies that voluntary incurrence of risk in effecting a rescue from danger occasioned by negligence amounts to contributory negligence, unless the act of intervention was performed under such circumstances as would make it rash or reckless in the estimation of ordinarily prudent persons. Eckert v. L. I. Railroad Co., 43 N. Y. 502, 12 Am. Neg. Cas. 397n, 3 Am. Rep. 721; Peyton v. T. & P. Railway Co., 41 La. Ann. 861, 15 Am. Neg. Cas. 245n, 6 South. 690, 17 Am. St. Rep. 430; Donahoe v. Wabash, etc., Ry. Co., 83 Mo. 560, 53 Am. Rep. 594; Corbin v. City of Philadelphia, 195 Pa. 461, 7 Am. Neg. Rep. 563, 45 Atl. 1070, 49 L. R. A. 715, 78 Am. St. Rep. 825; Schroeder v. C. & A. Railroad Co., 108 Mo. 322, 16 Am. Neg. Cas. 502n, 18 S.

2. Section hand.

Plaintiff was working as a laborer with a crew stringing wires on poles of the defendant company. He was isolated from the crew placing material to be used in wiring on a hand car. A train was approaching within a mile of the hand car, when the foreman ordered him to get the car off the track. He ran immediately to the car, shoved it a short distance, then jumped upon it, and ran it to a switch, which was 16 feet from where the car had stood. Just before he reached the switch, a fellow employee came to his assistance. The switch being closed and locked, the two men lifted the front wheels over the rails, and pulled the car partly on to the siding, then ran around behind the car and shoved it on to the switch; but before they had entirely cleared the main track the train was upon them, struck the rear end of the hand car and knocked the plaintiff senseless. There was evidence that the engineer could have seen the hand car at a distance of 4,000 feet, and that had he applied the brakes he might have come to a dead stop within 700 feet. The defendant contended that the plaintiff was guilty of negligence in failing to follow the suggestion of the fellow employee, who had advised lifting or throwing the car off the track instead of taking it to the switch. Affirming judgment of $4,000 for the plaintiff, the court held the company negligent in failing to avail itself of the last clear chance to avoid the accident, and that plaintiff was not guilty of contributory negligence, saying: "Perhaps many human lives depended upon the accomplishment, in a limited time, of what the plaintiff and Ike Johnson [fellow employee] were risking their lives to accomplish. A lack of judgment, under such circumstances, cannot be regarded as negligence on their part." Jones v. Mackay Telegraph Cable Co., 137 La. 121, 68 So. 379 (1915).

Plaintiff, a section hand employed upon defendant's railway, together with his foreman and two other section hands, was in charge of a hand car, and the foreman went forward in a southerly direction to a point where he could see around a curve for the purpose of looking for approaching trains, and told plaintiff and the other section hand to remain

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W. 1094, 18 L. R. A. 827; Pennsylvania Co. v. Langendorf, 48 Ohio St. 316, 28 N. E. 172, 13 L. R. A. 190, 29 Am. St. Rep. 553; Pittsburgh, etc., Co. v. Lynch, 69 Ohio St. 123, 15 Am. Neg. Rep. 169, 68 N. E. 703, 63 L. R. A. 504, 100 Am. St. Rep. 658; L. & N. Railroad Co. v. Orr, 121 Ala. 489, 26 South. 35; Maryland Steel Co. v. Marney, 88 Md. 482, 5 Am. Neg. Rep. 159, 42 Atl. 60, 42 L. R. A. 842, 71 Am. St. Rep. 441; Connell v. Prescott, 20 Ont. App. Rep. (Can.) 49; Condiff v. Kansas City, Ft. S. & G. Railroad Co., 45 Kan. 256, 15 Am. Neg. Cas. 130n, 25 Pac. 562; Central Railroad Co. v. Crosby, 74 Ga. 737, 58 Am. Rep. 463; Spooner v. Railway Co., 115 N. Y. 22, 12 Am. Neg. Cas. 313n, 21 N. E. 696; Gibney v. State, 137 N. Y. 1, 33 N. E. 142, 19 L. R. A. 365, 33 Am. St. Rep. 690; Linnehan v. Sampson, 126 Mass. 506, 1 Am. Neg. Cas. 17, 30 Am. Rep. 692; West Chicago St. Ry. Co. v. Liderman, 187 Ill. 463, 58 N. E. 367, 52 L. R. A. 655, 79 Am. St. Rep. 226; Wright v. Atlantic, etc., R. Co.,

on the car and watch for his signal. The foreman took a position upon some high ground where he could see in both directions, and plaintiff and the other section hand were watching him for signals, when they discovered a passenger train approaching from the north, and, while hastening to get the hand car off the track, plaintiff fell upon the track and was injured, plaintiff testifying that they undertook to remove the hand car from the track to save the lives of passengers upon the train. Plaintiff recovered judgment and defendant appealed. The trial court, in instructing the jury upon the question of contributory negligence on the part of plaintiff, and after instructing them generally upon contributory negligence in failing to look north for the purpose of ascertaining whether a train was approaching from that direction, or in failing otherwise to exercise the care and caution which a person of ordinary prudence should have exercised in like circumstances to avoid injury to himself, said: "But the law does not attribute contributory negligence to one who risked his life for the purpose of saving the life of other persons, provided the life of such other person or persons was not put in jeopardy by some act of negligence on the part of said person so risking his life to save the life of others; but an effort to save or protect property will not, of itself, relieve from imputation of negligence one who would otherwise be guilty of contributory negligence. If, therefore, you believe from the evidence that the plaintiff remained on the railroad track of defendant, and thereby placed himself in a dangerous position, for the purpose merely to assist in saving a hand car, or for any purpose other than saving human life, his act, if the same would otherwise constitute contributory negligence, would not thereby be excused. * * * And if you believe that the plaintiff remained on or near the track of the defendant under circumstances which would otherwise have rendered him guilty of contributory negligence, still if his object and purpose in so remaining was to save the lives of the passengers or other persons on board an approaching train, then his conduct would not have rendered him guilty of contributory negligence unless, under all the circumstances, his conduct was rash and reckless." It

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110 Va. 670, 66 S. E. 848, 25 L. R. A. (N. S.) 972, 19 Ann. Cas. 439; Adamson v. N. & W. Ry. Co., 111 Va. 556, 69 S. E. 1055; Southern R. Co. v. Baptist, 114 Va. 723, 77 S. E. 477; Perpich v. Leetonia Min. Co., 118 Minn. 508, 137 N. W. 12; Shearman & Redfield, Neg. § 85b; Elliott, Railroads, § 1265h; Thompson, Neg. §§ 138, 198, 199, 1780, and 1831. These authorities further hold that contributory negligence on the part of the person rescued does not preclude right of recovery on the part of the rescuer. If, however, the latter has himself brought about the danger to the person rescued, or the negligence of such person is imputable to him, he cannot recover. Atlantic, etc., Ry. Co. v. Leach, 91 Ga. 419, 17 S. E. 619, 44 Am. St. Rep. 47; West Chicago St. Ry. Co. v. Liderman, 187 Ill. 463, 58 N. E. 367, 52 L. R. A. 655, 79 Am. St. Rep. 226; De Mahy v. M. L. & T. R. & S. S. Co., 45 La. Ann. 1329, 9 Am. Neg. Cas. 398n, 14 South. 61.

was contended by defendant that these qualifications were erroneous because they were so worded as to undoubtedly emphasize the plaintiff's contention that he was not guilty of contributory negligence because his object in removing the car was to save life. The court held, however, that while the instruction in question was perhaps not happily worded, and it did not wish to be understood as affirmatively approving its precise form, nevertheless, when considered as a whole, together with other sections of the court's charge, the court thought it apparent that the trial court was making the effort to carefully and solicitously guard the defendant's rights, and that it was improbable that the jury was improperly influenced thereby, or that defendant was in any way prejudicially affected. Judgment for plaintiff was affirmed. Chicago, R. I. & G. Ry. Co. v. Mitchum, — Tex. Civ. App. —, 214 S. W. 699 (1919).

B. Runaway team.

1. Driver.

Plaintiff, a teamster, while attempting to restrain plunging horses, driven by another teamster of defendant railroad company's freight depot, in its yards, to receive freight, was injured. They were then in an open space about 40 feet wide adapted by defendant for use as a driveway in unloading cars standing on adjacent tracks. The horses had been frightened by the approach of a train of the defendant with more than usual noise. The engineer could have seen the frightened horses which the plaintiff was trying to restrain. There was evidence that the engine had almost stopped before plaintiff went across the track to assist, so that proper care would have disclosed the situation to the trainmen; but the train was suddenly started without warning, striking the plaintiff. Overruling the exceptions of the defendant to a verdict for the plaintiff, the court held that a finding of negligence on the part of the defendant was justified; and that it was for the jury to determine whether the plaintiff had been guilty of contributory negligence. "There is a great body of authority in other courts for the proposition," said the court, "that it may not be negligence for one not acting rashly or recklessly to expose

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There are a few decisions, and some judicial expressions in dissenting opinions, to the contrary. Northern Railroad Co. v. Anderson, 25 U. C. C. (Can.) 301; Blair v. Grand Rapids Co., 60 Mich. 124, 4 Am. Neg. Cas. 48, 16 Am. Neg. Cas. 146, 26 N. W. 855; Mitchell, J., in Corbin v. Philadelphia, 195 Pa. 461, 7 Am. Neg. Rep. 563, 45 Atl. 1070, 49 L. R. A. 715, 78 Am. St. Rep. 825. They deny any basis for the rule in legal principle or logic. If there is any right of intervention, under circumstances making it possible without danger on the part of the rescuer, such right is certainly not denied or destroyed by conditions that would not preclude the exercise of other rights. The right of one person to render another assistance, when the latter is in danger from any cause, under conditions rendering it safe to do so, is as clear as his right to perform any other lawful act. Voluntariness does not vitiate or impair it, nor detract from it in any sense. That quality is inherent

himself voluntarily to great danger, even to the risk of life and limb, in order to rescue another from a like peril, and that such a voluntary exposure is not to be regarded as rash or reckless if there appears to be a fair chance of success, whether the person in danger is or is not a child or an aged or decrepit person, and even though the person attempting the rescue knows that it involves great hazard to himself without a certainty of accomplishing the intended rescue." Dixon v. New York, N. H. & H. R. Co., 207 Mass. 126, 92 N. E. 1030 (1910).

2. Relative of driver.

Plaintiff's father-in-law was driving a horse, and was approaching the crossing of the defendant railroad at a distance of 40 feet, when a train came in sight 100 yards away, by reason of which the horse became unmanageable and kept moving in the direction of the track. Plaintiff went forward and seized the bridle. A considerable struggle ensued, the horse finally reaching the track, crossing it by leaping over the pilot of the engine, but the plaintiff, being thrown against the side of the engine, sustaining severe injury. The fireman saw the struggle at a distance of 140 feet, and it was shown that the engine might have been stopped at a distance of 100 feet, and also that had the plaintiff attempted to extricate himself from the horse he might have been seriously injured thereby. Affirming judgment for the plaintiff, the court said: "Persons are held justified in assuming greater risks in the protection of human life than would be sustained under other circumstances. Sentiments of humanity applaud the act, the law commends it, and, if not extremely rash and reckless, awards the rescuer redress for injuries received, without weighing with technical precision the rules of contributory negligence or assumption of risk." Southern R. Co. v. Baptist, 114 Va. 723, 77 S. E. 477 (1913).

3. Stranger.

Defendant left his horse and buggy standing upon a public highway without securely fastening the horse. Some children close by were playing "horse," and one of them clucked in the usual manner for starting a horse, whereupon the horse of the defendant ran away. It had gone several

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in most of our acts. We walk abroad for mere exercise, often unnecessary, or to gratify idle curiosity, as we have clear right to do, and, if injured by somebody's negligence in the exercise of such rights, we may recover. There is a moral obligation, as well as legal right, to effect rescues from all sorts of danger, when it is practicable to do so. That the danger is occasioned by a negligent act does not affect either the obligation or the right. Hence it cannot logically affect the consequences of wrongful injury in the exercise thereof.

In almost every instance of rescue, there is an emergency calling for quick determination of the course of action and leaving practically no time for deliberation. When this happens in the exercise of other rights, the law makes due allowance for it and does not hold the injured party responsible for his error of judgment as to his course of conduct. Washington v. B. & O. Railroad Co.,

blocks and was coming down a residence street, when plaintiff's intestate, who was standing in front of an apartment of which he was janitor, ran out into the street, the horse being then about 200 feet away, and as it passed he grabbed for its head; but the horse shied, knocking him down, inflicting injuries so that he died the following day. The street was clear and there was no evidence that any one was in danger from the runaway horse. Affirming judgment of the appellate court, reversing judgment of $4,500 for the plaintiff, the court held that there being nothing in the evidence to show that any one was in danger, or that plaintiff's intestate had any occasion to believe that any one was in danger, or that he did incur the risk to save human life, he was not relieved from the charge of contributory negligence. Devine v. Pfaelzer, 277 Ill. 255, 16 N. C. C. A. 167, L. R. A. 1917 C 1080, 115 N. E. 126 (1917), aff'g 195 Ill. App. 221 (1915).

C. Runaway cars.

1. Railroad.

Plaintiff was an experienced switchman in the employ of a railroad other than defendant. Defendant's train of 15 freight cars, by reason of a defective coupling, broke away from the engine pushing it. Plaintiff being close by, stepped from the side of the road on to the footboard of the engine, and signaled the engineer to increase his speed so as to overtake the train and allow plaintiff to readjust the coupling. The engineer failed to increase the speed promptly, so that the engine did not overtake the detached cars until they had run into another train, whereby plaintiff was injured by reason of the engine and cars pressing together. The track upon which the cars were going was not used for passenger service, and passenger trains were not at that time due at the depot near by. Defendant demurred to the testimony, and urged that the evidence failed to disclose that any person was in imminent peril at the time plaintiff boarded the moving train. Reversing judgment for the plaintiff, the court held that the demurrer to the evidence should have been sustained, saying: "Some one must be actually in peril before the rescuer is authorized to act. At the broadest, the situation must be such

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17 W. Va. 190; Haney v. Pittsburgh, etc., R. Co., 38 W. Va. 570, 17 Am. Neg. Cas. 891, 18 S. E. 748; Woodell v. West Va. Imp. Co., 38 W. Va. 23, 17 Am. Neg. Cas. 871, 17 S. E. 386; Dimmey v. Wheeling, etc., Co., 27 W. Va. 32, 55 Am. Rep. 292, 7 Am. Neg. Cas. 111; Boggess v. Chesapeake, etc., Co., 37 W. Va. 297, 7 Am. Neg. Cas. 134, 16 S. E. 525, 23 L. R. A. 777; Normile v. Wheeling Traction Co., 57 W. Va. 132, 49 S. E. 1030, 68 L. R. A. 901; Warth v. County Court, 71 W. Va. 184, 76 S. E. 420; Roberts v. Baltimore & O. R. Co., 72 W. Va. 370, 78 S. E. 357. The lawful right of rescue necessarily falls within the same principle. A person exercising it is generally confronted by an emergency born of the negligence of the defendant in the action and suffers injury from the same cause. Here, as in other cases, allowance is made for erroneous judgment under circumstances excluding time and opportunity for deliberation, and recovery permitted, if the act of intervention was not rash or imprudent.

as to clearly convince the rescuer that human life or limb is in peril." The court also held that a person voluntarily placing himself, for the protection of property merely, in a position of danger, is negligent so as to preclude his recovery from an injury so received. Eversole v. Wabash R. Co., 249 Mo. 523, 155 S. W. 419 (1913).

2. Loading tram.

Plaintiff was an employee of a contractor loading a vessel for the defendant lumber company. Tram cars running on tracks similar to those of a railroad were used in the operation. The track ended near the anchored vessel, and there was a gradual incline of about 15 inches towards the dock for about 60 feet. Plaintiff observed one of these cars, loaded, coming down this incline at a considerable speed. Fearing that the car might run off the end of the track and destroy property or injure or kill some one, he gathered a plank and endeavored to stop the car by placing it in front of the hind wheel. After his third attempt the front wheel ran off a short rail at this point; the car turned, tipping the load, which fell on the plaintiff, crushing and breaking both his legs and otherwise bruising his body. The car was running down the incline without warning, contrary to the usual custom, and the load was not bound in the usual way. The sequel proved that had the car been allowed to run to the end of the rails no harm would have come to any one. Affirming judgment for the plaintiff on condition that the amount of damages be reduced from $15,000 to $10,215, the court held that notwithstanding that the plaintiff's acts might not have been essential to protect property or persons from harm, the question of whether his act constituted contributory negligence was a proper one for the jury. "He was entitled to act upon appearances," said the court, "and, if his conduct was that of a reasonably prudent person under the circumstances, he is not to be charged with contributory negligence even though he may have been deceived thereby." Thoresen v. St. Paul & Tacoma Lumber Co., 73 Wash. 99, 131 Pac. 645, 132 Pac. 860 (1913).

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The right of intervention finds support also in the principle of analogy. Negligence is wrongful, but not necessarily nor ordinarily criminal; but wrong and crime bear a close relation in principle. Any citizen has a perfect legal right to interpose for prevention of the commission of crime and protection of others threatened with criminal injury. It is his duty to prevent the perpetration of a felony, and his killing of the felon, as a necessary means of doing so, when it cannot otherwise be prevented, is justifiable. He may also justifiably take life in the protection of another from death or serious bodily injury, under the law of self-defense. If a person intending to kill his personal enemy mistakenly attack his friend, he is guilty of assault with intent to kill. McGehee v. State, 62 Miss. 772, 52 Am. Rep. 209; State v. Briggs, 58 W. Va. 291, 52 S. E. 218. In negligence, the intent is immaterial, but the element of civil wrong is present in it as well as in crime, and the actor is responsible for his wrongful acts re-

D. Tipping locomotive crane.

Plaintiff's husband, S, had been put in charge of a locomotive crane by the defendant. The crane had been in defective condition, and, after due complaint, defendant had failed properly to repair the same. S, having a heavy load to deposit from the crane, was operating it upon an elevated track. The boom was swung around, and he waited for three fellow employees, who were working on the surface below the track upon which the crane was being operated, to arrange some blocks over which the load was to be deposited. At this point, the load commenced to slip, and S, apparently fearing that he might injure the workingmen below, pulled the lever back quickly, stopping the load suddenly. This upset the crane, and in the fall which ensued S was killed. Reversing judgment non obstante veredicto for the defendant, and directing that judgment for $8,337.50 be entered for the plaintiff, the court held that the deceased was not guilty of contributory negligence; that at the time of the accident he, having acted in a sudden emergency to save the lives of others, was not to be charged with the consequences of errors of judgment resulting from the excitement and confusion of the moment. Smith v. Standard Steel Car Co., 262 Pa. 550, 106 Atl. 102 (1919).

E. Falling stove pipe.

Plaintiff was employed as a scrub woman in defendant's offices, which were heated by a coal stove, having the ordinary pipe running into the wall. Plaintiff, at the request of some of the employees, had built a fire in this stove, when a joint and elbow of the pipe came down, leaving part of the pipe standing in an upright position, emitting flames of fire, by reason whereof the defendant's property and the lives of some 40 office employees were endangered. Plaintiff picked up the stove pipe which had fallen, got upon a chair in an attempt to replace it, but failing, knocked the remaining stove pipe down. In so doing she fell from the chair and against a desk to the floor and was severely injured. Affirming judgment for the plaintiff, the court

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sulting in injury. If criminally responsible for injuries intended for one person and falling upon another, why may a man not be consistently held liable civilly for a wrongful act which threatened one person but actually fell upon another, though the act be merely negligent and void of intent to inflict injury? Right of action for an injury suffered in effecting a rescue from danger occasioned by negligence, when the act of intervention was not reckless, seems to have solid support in legal principle as well as the weight of authority.

Plaintiff's instruction No. 3, telling the jury the negligence of Doris Smith was not imputable to the plaintiff, is fully sustained by the conclusion just stated, and the court properly overruled the objection to it and gave it.

Two other instructions given were excepted to because they authorized inclusion of compensation for mental suffering in the

held that the defendant's failure to secure the pipe properly was negligence; and that where a party attempts to prevent an injury to persons, which would naturally result from the negligent act of another party, and is injured, the second party's negligent act, which necessitated the doing of the act by the injured person, will be considered as the proximate cause of the injury. Williams v. United States Incandescent Lamp Co., 173 Mo. App. 87, 157 S. W. 130 (1913).

F. Gas in mine.

Gases had accumulated in the passageways to the mine of the defendant. Fans had been installed to clear away the gas, but they had not been running a sufficient time to accomplish this, and debris hindered the unobstructed circulation of the air. Thereafter a fire started in the interior of the mine and some of the men sent to subdue it were overcome by gases generated by this fire. Plaintiff's husband, B, entered the mine to aid in their rescue and was overcome by gas and died. The complaint alleged that death was caused by "gases other than those generated and developed by said fire," but the evidence proved that death was in fact the result of gases developed by the fire. There was no allegation that the fire had been the result of the defendant's negligence, though the negligence of defendant in allowing prior gas to remain in the passageway was conceded. Defendant moved for a directed verdict on the ground that the proofs of the complaint were in variance with its allegations. The motion was sustained, and affirming judgment for the defendant, the court held that as the evidence did not support the cause of action alleged, the plaintiff must fail, though the evidence shows negligence in other respects, and that, although one who, acting with reasonable prudence, voluntarily exposes himself to danger for the purpose of protecting the person of another, may recover for the consequent injuries he receives, he must show negligence of the party from whom he seeks to recover towards the person sought to be rescued or to himself after the beginning of the attempted rescue. Bracey v. Northwestern Imp. Co., 41 Mont. 338, 137 Am. St. Rep. 738, 109 Pac. 706 (1910).

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assessment of the damages. Plaintiff's injuries were not serious. One of his knees was sprained and bruised, and he was disabled for a week or two. Such an injury may have carried a degree of pain and mental suffering. The instructions left it to the jury to say whether it did or not, and, if any, to determine the degree thereof. There was some evidence of it, and that justified the giving of the instructions.

Plaintiff's instruction No. 2 was objected to because it was abstract in form and imposed duty upon the defendant toward passengers, in the absence of an allegation that the plaintiff was a passenger. It is technically erroneous to give an instruction in the abstract, but not cause for reversal, if the law propounded by it is applicable to the case. Parker v. Building & Loan Ass'n, 55 W. Va. 134, 46 S. E. 811. The reference to passengers in the instruction was justified by the allegation that Doris Smith and others present

An explosion occurred in defendant's mine, and all of the employees got out except two shot firers. Thereafter an assistant mine manager and another employee entered the mine for the purpose of ascertaining the cause of the explosion, and went a little beyond the main parting, and found that the doors were closed and that there was bad air there, when they returned to the party and out of the mine by way of the escapement shaft. In the meantime a director of the mine sent deceased and another employee into the mine to bring out the assistant manager and the other employee, but upon learning that the assistant manager and the other employee had returned from the mine, he got the deceased employee on a telephone at the parting, and informed him that the employees he was sent after had returned from the mine, and he was given positive orders to return immediately. He disregarded the order and went on, saying that he was going to see if he could not save the two shot firers, when both he and his companion were overcome by the air, the companion managing to get out, but deceased dying from the effect of the bad air. It was sought to hold the defendant liable upon the ground that it had violated a statute in sending deceased into the mine before it was clear of the bad air, but it was held that the violation of the statute was not the proximate cause of the death of deceased, because he had received positive orders to return from the mine at a time when he could safely have done so. In thus holding, the court said: "While his actions and good intentions were highly commendable as an heroic effort to save the lives of his companions, nevertheless his death is one for which there can be no recovery in this case. As we view the matter, his act bars his recovery as completely and as effectually as if he had deliberately suicided at the parting by the use of a deadly weapon directly after the reception by him of the order to leave the mine. His death is very unfortunate, and, however much to be regretted, it is simply a death for which appellee is not responsible in damages." Randall v. Crescent Coal Co., 280 Ill. 517, 117 N. E. 773 (1917), aff'g 203 Ill. App. 534 (1916).

G. Live wire.

A stationary engineer engaged in

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were passengers and that the negligence consisted or want or care in the running of the train to the passenger station. The nature of the place and the character of the people generally assembled there imposed the omitted duty, and the plaintiff, whether a passenger or not, was within its protection; it being general in its nature and not dependent upon a peculiar personal relation of the injured party.

Defendant's instruction No. 5 was properly refused for lack of evidence to sustain the theory it propounded. It is an admitted fact that Doris Smith was not seen by anybody on the engine until it was almost upon her. Relative duties dependent upon a different state of facts were not involved for that reason. As the engineer did not know she was on the track, he could not have been deemed to have assumed that she would get off.

For the reasons stated, the judgment will be affirmed.

operating a steam crane was killed by a shock received from an electric wire, which he picked up after it had been broken by coming in contact with the crane, and it was held that the negligence of the employer in requiring him to operate the crane so near electric wires as to bring it in contact with the wires was not the proximate cause of his death, where the wire was obviously a live wire, and there was no emergency or danger to others requiring him to pick it up, and he picked it up against the warning of his fellow employee. Klomp v. Chicago, M. & St. P. Ry. Co., 210 Ill. App. 375 (1918).

III. Attempting to extinguish burning dress of child.

A motorman on one of defendant's street cars, while operating the car, removed from it a charcoal stove used for heating purposes because it was smoking, and placed it in the street in front of plaintiff's home and near the car track. While the child of the plaintiff was playing around this stove, her clothing caught fire, and she ran into the kitchen, where her mother was at work, and in attempting to extinguish the flames with her hands, the mother received the burn and injuries complained of in this action by the husband. Affirming judgment for $150 for the plaintiff, the court held that the act of the motorman in placing the stove was the proximate and efficient cause of the mother's injuries, and that the mother was not guilty of contributory negligence in putting out the fire in that manner, namely, with her hands. "'The law,'" says the court, "has so high a 'regard for human life it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of a prudent person.'" Wichita Falls Traction Co. v. Hibbs, — Tex. Civ. App. —, 211 S. W. 287 (1919).

F. A. D.

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MYER v. CENTRAL STATES LIFE INSURANCE CO.

[Supreme Court of Nebraska, July 2, 1919.]

— Neb. —, 173 N. W. 578.

1. **Insurance—Life—Failure to deliver policy during lifetime of applicant—Sufficiency of evidence.**
In an action against an insurance company for negligence in delaying action on an application for life insurance, in failing to notify the applicant of the delay or of the occasion for it, and in failing to deliver a policy during his lifetime, the evidence summarized in the opinion held insufficient to sustain a judgment in favor of plaintiff.

[Headnote by the Court.]

2. **Insurance—Life—Necessity of meeting of minds of parties.**
Life insurance is a contract, and the meeting of the minds of the parties is essential to the execution of a policy.

3. **Insurance—Life—Failure to deliver policy during lifetime of applicant—Right of court to fix arbitrary period for performance by insurer.**
In an action against an insurance company for failure to deliver a policy of life insurance during the lifetime of the applicant therefor, etc., held that, in construing the conduct of the parties in relation to time, courts are not at liberty to fix an arbitrary period.

4. **Insurance—Life—Failure to deliver policy during lifetime of applicant—Relation of examining physician to insurer—Liability of insurer for physician's mistake.**
In an action against an insurance company for failure to deliver a policy of life insurance during the lifetime of the applicant therefor, etc., held that the relation of the examining physician to the defendant was that of an independent contractor, and that as such his mistake resulting from the use of a scientific instrument and causing delay was not chargeable to defendant.

5. **Insurance—Life—Failure to deliver policy during lifetime of applicant—Evidence of negligence—Failure to give notice to applicant.**
In an action against an insurance company for failure to deliver a policy of life insurance during the lifetime of the applicant therefor, etc., held that defendant's failure to give notice to the applicant of the report of excessive blood pressure was not evidence of negligence.

CASE NOTE.

Liability of insurance company or its agent for negligent failure to issue insurance policy.

I. Fire, 700-705.
A. Original policy, 700-704.
1. Failure to forward application, 700-703.
2. Failure to secure valid policy, 703-704.
B. Renewal, 704-705.
II. Life, 705-706.

I. Fire.

A. Original policy.

1. Failure to forward application.

Plaintiff and defendant's agent orally agreed upon the issuance of a policy of insurance on plaintiff's dwelling house. The agent, having received the data and the premium, prepared the application and himself signed the plaintiff's name thereto, countersigning his own. The agent had customarily prepared the applica-

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6. Insurance—Life—Failure to deliver policy during lifetime of applicant—Evidence of negligence—Issuance and registration of policy.

In an action against an insurance company for failure to deliver a policy of life insurance during the lifetime of the applicant therefor, etc., held that the issuance of the policy and its registration by the state insurance department in order to hasten delivery upon a subsequent approval of the application did not tend to prove negligence.

[Additional Headnotes by Publishers' Editorial Staff.]

Action against an insurance company for its failure to issue a policy of life insurance during the lifetime of the applicant therefor, etc. Judgment for plaintiff. Reversed and dismissed.

For appellant—E. M. Grossman and A. M. Post.

For appellee—Reeder & Lightner.

ROSE, J. This is an action to recover $2,000 in damages for alleged negligence of the Central States Life Insurance Company, defendant, in delaying action on an application for life insurance, in failing to notify the applicant of such delay, or of the occasion for it, and in failing to deliver a policy during his lifetime, the application having been made March 8, 1916, and the applicant having been thrown from a horse and killed April 3, 1916. In the application the estate of the applicant is designated as beneficiary. Plaintiff is the father of the decedent and is the administrator of his estate. Defendant denied negligence and pleaded that the applicant died pending a proper, but an unfinished, inquiry into his insurability. A jury was waived, and the trial court rendered a judgment in favor of plaintiff for the full amount of his claim. Defendant has appealed.

tions himself for policies in this manner and the company had accepted such applications and issued policies thereon. The agent, who had also promised to take care of the policy for plaintiff by depositing it in his safe, failed to forward the application and the premium, and no policy was ever issued. The dwelling was destroyed by fire 7 months after application was made, and this action was brought against the company for negligent failure of its agent to forward the application. Affirming judgment for plaintiff in part, the court held that the defendant company was liable. Modifying the judgment as to the amount of recovery, the court held that the measure of damages must be the actual loss, and not the amount of the policy. It was further held that this action could be brought within the 2-year period of limitation prescribed by statute, and need not be brought within the period that the policy would have prescribed if issued; this action being not on the policy, but

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As a ground of reversal it is urged that the record contains no evidence of actionable negligence. Plaintiff relies on the following facts and conclusions: When the application was made, March 8, 1916, defendant's soliciting agent told the applicant that the insurance would be in force upon his passing a successful physical examination. The local physician employed by defendant made an examination on that date and assured the applicant that he had successfully passed it. The first year's premium was then adjusted by the giving of a note for $32.86. The application and the report of the physical examination were received by defendant at the home office in St. Louis, March 13, 1916. The report, owing to a defective instrument used by the examining physician, erroneously indicated an excessive blood pressure. March 15, 1916, defendant, without avail, wrote to the examining physician for a re-examination of blood pressure and repeated the request March 27, 1916. The soliciting agent was advised of the delay March 28, 1916, but notice of the facts mentioned was not given to the applicant. In the ordinary course of business the policy would have been delivered by March 22, 1916. It was in fact issued March 17, 1916, and registered by the insurance department of Missouri at Jefferson City, March 18, 1916, notwithstanding the requests for a re-examination. The applicant was in good health when examined, and his blood pressure was normal. He was a young man of good character, and, from

for negligence. Johnson v. Farmers' Ins. Co., — Iowa —, 168 N. W. 264 (1918).

Plaintiff delivered to the defendant's soliciting agent an application for the insurance of a school building, together with $20 in payment of the premium. The agent, who had authority to take applications, receive premiums, and forward applications for policies to the company for acceptance or rejection, stated that the policy would be issued, but neglected to transmit the application. The policy consequently was never issued, and the school building was later destroyed by fire. The application provided that no liability should attach until the approval and issuance of a policy by the insurer. Reversing judgment of $500 for the plaintiff and dismissing the action, the court held that the soliciting agent, with only limited authority, could not bind the company by stating that the policy would be issued; that the assured could not assume or presume that the special agent, with only limited authority, could bind his principal by any statements he made concerning his own authority; and that the assured must be held to have had knowledge of the nature of the authority of the agent. The court indicated that under the stipulation in the application, even if it had been promptly transmitted and received, and due to a delay, the policy had not been issued, there would have been no liability on the part of the company, under the doctrine that mere delay in passing upon an application could not be construed as accepting such application and consent-

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the standpoint of underwriting, he was a good financial and moral risk. Except for his death the policy issued March 17, 1916, would eventually have been delivered, and the premiums would have matured annually from that date. He never received his policy. The use of the defective instrument in testing the blood pressure, the delay in passing on the application, and the want of notice resulted in the applicant's failure to procure insurance. The foregoing is a brief summary of plaintiff's case. Is the evidence sufficient to sustain the judgment in favor of plaintiff?

Life insurance is a contract. The meeting of the minds of the parties is essential to the execution of a policy. Honest, trustworthy underwriting requires serious inquiry into the moral character, habits, family history, financial standing, and physical condition of an applicant for life insurance. Scientific knowledge and professional skill are necessary to an intelligent inquiry. The insurer in soliciting a risk and the applicant in seeking indemnity contemplate an investigation commensurate with the hazard involved. For this purpose a reasonable time is necessary. Difference in conditions may vary the time required for examination and investigation. In construing the conduct of the parties in relation to time, courts are not at liberty to fix an arbitrary period. For the purpose of considering an application the insurer by contract may protect itself against accident, misinformation, and unforeseen incidents caus-

ing to be bound for the insurance sought by it, nor could a cause of action for negligence be grounded upon such delay. National Union Fire Ins. Co. v. School Dist. No. 55, 122 Ark. 179, L. R. A. 1916 D 238, 182 S. W. 547 (1916).

2. Failure to secure valid policy.

Defendants were insurance brokers who had been employed by the plaintiff, a manufacturing company, to secure good insurance on its buildings, fixtures, rugs, yarns and other materials of manufacture. Defendants had been so employed for several years, when the president of the plaintiff company called on the defendants and stated that the plaintiff company had put a mortgage on "the property," and that he desired some of the policies to be delivered to the mortgagee as collateral. He said nothing as to the character of the mortgage nor did he ask for any advice. His demand was complied with and the mortgagee's attorney accepted them as collateral. Later the president again told the defendants that he had incumbered the property with another mortgage. These mortgages covered the "entire plant," including the personalty. A provision of the policies provided that they should be void if the property insured was personalty and should become incumbered by a chattel mortgage. Affirming judgment non obstante veredicto, the court held that the statements of the plaintiff's president did not advise defendants that the mortgages covered personal property, so as to affect the validity of the policies, and

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ing temporary delays. In the present case defendant's receipt for the premium note permitted delivery of a policy within 60 days. To this applicant acceded, and he was killed before expiration of that period. The investigation of the applicant's insurability was pursued by defendant in good faith. Two days after the report of the examining physician had been received at the home office of defendant in St. Louis he was requested to re-examine the applicant's blood pressure and was cautioned in relation to the instrument used in making the test. The request was renewed 10 days later, and the soliciting agent was notified of the delay with a view to promptness in passing on the application. The defective instrument did not belong to defendant, but was the individual property of the examining physician, whose authority did not extend beyond his duties in that capacity. The competency or fitness of the examining physician is not questioned. There is nothing to indicate that he did not act honestly and in good faith. On the part of defendant there was no negligence in selecting him. In performing his duties the examining physician used his own instruments and exercised his own professional skill and independent judgment. His relation to defendant was that of an independent contractor. As such the mistake resulting from the use of a scientific instrument is not chargeable to defendant. Notice to applicant that the report of the physical examination indi-

the defendants were not chargeable with negligence in permitting the policies to stand or renewing the same when they expired. The court, in the course of the opinion, said that if defendants had been asked to give counsel or advice, and had then not used due care and diligence in giving such counsel or advice, they would have been liable. Fries-Breslin Co. v. Bergen, 99 C. C. A. 384, 176 Fed. 76 (1909), aff'g 168 Fed. 360 (1909).

B. Renewal.

Plaintiff had a policy on his stock of drugs and fixtures with a company other than defendant. It was deposited in a bank for safe-keeping. This policy expired July 1, and about a month prior to such date the agent of the defendant, who was also the cashier of the bank where plaintiff's policy was deposited, asked plaintiff not to renew his expiring policy and allow him to write the insurance. It was so agreed, and the agent was to get his data from the policy deposited with the bank. Twice thereafter, during the month, plaintiff asked the agent if he had written the policy, and the agent stated on both occasions that he would do so next morning. The insurance was never effected by the agent and this action was brought against him and his company jointly, for negligent failure to issue such policy. Affirming judgment for $1,719 for the plaintiff, the court held that failure to issue the policy under circumstances such as these was a tort, and that the agent and the company were jointly liable under the rules of law governing

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cated excessive blood pressure, and that as a consequence there would be a delay in considerating the risk, could only have been given between March 13, 1916, after the report was received by defendant at St. Louis, and April 23, 1916, the date of applicant's death. During that time defendant proceeded with reasonable diligence under the circumstances. Failure to give notice of the report of excessive blood pressure is not evidence of negligence. The stipulated period of 60 days for investigation had not yet expired. Neither the examining physician nor the soliciting agent had power to make the insurance effective upon the applicant's passing a successful examination. Both were likewise without authority to bind defendant by assurance that liability for a loss would precede the approval of the application which on its face provided otherwise. The premium note was given on the express condition that its delivery to defendant depended upon the applicant's receipt of a policy. Defendant never demanded or received the premium note or the proceeds thereof. The issuance and the registration of the policy to hasten delivery upon a subsequent approval of the application do not tend to prove negligence. Such issuance and registration, according to the application itself, are not to be construed as an acceptance of the risk. On the undisputed facts the action should have been dismissed. Without regard to the insufficiency of the evidence to sustain the judgment, it is

agency. Wallace v. Hartford Fire Ins. Co., 31 Idaho 481, 174 Pac. 1009 (1918).

II. Life.

Deceased made application for insurance to defendant company's agent on July 1, but did not make the initial payment, which, according to the rules of the company and a statement on the back of the application, should have accompanied the application, until July 11. Deceased was injured by a fall from a hayrack on July 13, as a result of which he died. In the ordinary course it took from 2 to 4 days to send an application from deceased's home to the home office of the company, and return the policy. The increase in business was so great at the time that the company could not break in help sufficient to take care of it in the ordinary course. No policy was issued, and this action was brought by the administrator of the deceased to recover $1,000 on account of the alleged negligence of the company in not issuing this policy. The court affirmed judgment on a directed verdict for the defendant on the ground that, as a matter of law and under the evidence, the plaintiff failed to show any negligence of the company or its agents. Glendy v. National Travelers' Benefit Ass'n, 180 Iowa 572, 163 N. W. 352 (1917).

In Bradley v. Federal Life Ins. Co., 216 Ill. App. — (1920), it was held that an action by the administrator of a deceased person would not lie to recover damages from an insurance company on the ground of the negligence

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the opinion of the writer that no cause of action exists in favor of plaintiff and against defendant.

Reversed and dismissed.

CORNISH, J. (concurring). I agree that no negligence was shown, but I am of the opinion that that part of the opinion dealing with the question of negligence should be eliminated.

In the absence of contract, the defendant owed the deceased no duty to furnish him insurance, and failure to furnish him insurance would not be the basis for an action in tort. It is possible that a case might arise, where one or more persons had conspired to defeat a person of his legal right to procure insurance, that would amount to actionable tort. When, as here, the parties to a contract in terms agree upon the time within which the application or proposition of one may be rejected or accepted by the other, the other has to the last hour of the last day for acceptance or rejection of the proposition. By the terms of the contract itself he is under no obligation to make his investigation except to suit his own convenience within the time. If the maker of the proposition desires an early or more speedy investigation, it should be provided for in the agreement. A contrary rule would never be followed by those not learned in the law, because a layman would always think that, if the agreement gave him 60 days in which to answer, he would be entitled to the 60 days. An action in tort does not lie for refusal to enter into a contract.

of the agent of the company in failing to forward to the company, decedent's application for insurance and the first premium payment, since the action was neither an action to recover damages for injury to personal property nor an action for injury to the person, and hence did not survive under the Illinois Survival Act.

F. A. D.

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KEYWORTH v. ATLANTIC MILLS.

[Supreme Court of Rhode Island, November 14, 1919.]

— R. I. —, 108 Atl. 81.

Workmen's compensation—Rhode Island act—Additional or special compensation—Loss of sight of eye.

Where an injured employee, claiming the loss of sight of his right eye, has not sustained a total loss of the sight thereof, but, on the contrary, retains

CASE NOTE.

Compensation under workmen's compensation acts for loss of or injury to eyes.

I. Partial loss of vision, 707-715.
A. Extent of loss, 707-709.
1. Eighty per cent as total, 707-708.
2. Dodging vision only, 708-709.
B. Basis for compensation, 709-711.
1. Percentage of total disability, 709-710.
2. Percentage of allowance for loss of eye, 710.
3. Absence of provision for partial loss, 710-711.
C. Effect of use of glasses, 711-713.
1. Vision nearly normal with glasses, 711.
2. Fifty per cent with, ten per cent without glasses, 711-712.
3. Inability to use eyes simultaneously, 712-713.
D. Failure to have cataract removed, 713-715.

II. Total loss of vision, 715-722.
A. One eye previously lost, 715-718.
1. Total incapacity, 715.
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3. Total—Additional for one eye, 716-717.
4. Partial incapacity, 717-718.
B. One eye previously useless, 718-719.
C. Simultaneous loss of one eye by disease, 719-720.
D. Removal of eye, 720-721.
1. As more than loss of vision, 720-721.
2. Previously defective eye, 721.
E. Loss of vision of previously defective eye, 721-722.

III. Eye and other injuries combined, 722.

Cross-references. Damages in actions for loss of or injury to eyes, see 6 N. C. C. A. 210-218; compensation under workmen's compensation acts for loss of or injury to eyes, see 6 N. C. C. A. 880-899; damages in actions for loss of, or injury to eyes, see 6 N. C. C. A. 210-218.

I. Partial loss of vision.

A. Extent of loss.

1. Eighty per cent as total.

Claimant was employed in caulking a water main when a chip of lead was accidentally thrown into his eye, causing an abrasion of the cornea, resulting in iritis and eventually in the loss of 80 per cent of the vision of that eye and the consequent loss of the use of the eye. The finding of the commission was based upon the report of a specialist in the treatment of eye troubles, who was agreed upon by the claimant and the insurance carrier, to the effect that the

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about 10 per cent of the normal vision, which is useful to a limited extent for certain purposes, and also retains a stereoscopic vision of some value although it will not afford him any assistance in a vocational pursuit, he is not entitled to additional or special compensation for the entire and irrecoverable loss of sight of an eye under the provisions of paragraph (b) of section 12 of article 2 of the Rhode Island Workmen's Compensation Act.

Appeal by the petitioner from a decree of the Superior Court awarding compensation for total incapacity but refusing additional or special compensation for the loss of sight of an eye. Appeal

vision of the right eye equaled 20 per cent, not materially improved with glasses; and that, aside from that opacity, the eyeball was in good condition, the background of the eyeball normal, and the field of vision normal in extent; but, although the vision would be much improved by the use of an artificial pupil, it would not, in all probability, be sufficiently good to permit him to follow any vocation requiring reading or other relatively fine work; and that the prospects were to the effect that the vision would remain about as it was until the artificial pupil was made, and that there was no danger of the other eye sympathizing with the injured eye. The court held that neither the findings of the commission nor the evidence before it justified its conclusion that complainant had lost the use of the right eye because, if claimant still had 20 per cent of the normal vision he was very far from having lost the use of it, and he could make use of the sight of the eye in many ways, and, while unable to follow any vocation which required reading or other relatively fine work, he could pursue some calling similar to that in which he was engaged when injured. The court further said that if in the future the impairment of the claimant's vision should increase the law gave the industrial commission power to reconsider the award. The order of the commission was reversed and the case remitted to it for further consideration. Boscarino v. Carfagno & Dragonette, 220 N. Y. 323, Ann. Cas. 1918 A 530, 115 N. E. 710 (1917).

2. Dodging vision only.

Claimant filed a claim under the compensation law for an injury to one of his eyes, and the commission found that he had become totally blind in one eye by reason of this injury, and awarded compensation for 104 weeks. A rehearing was granted, and the commission found that claimant still had useful vision, reduced the period during which compensation was to be paid to 9 5-11 weeks, and found that claimant having received $147, owed the employer $80.80, whereupon claimant filed suit in the district court to set aside and modify the award on the second hearing and to reinstate and confirm the award made on the first hearing. The court determined that the claimant's disability amounted to total blindness and made an award on that basis. The commission's second award was based upon the finding that plaintiff had lost one-eleventh of the total loss of vision as a result of the accident, and there was testimony that prior to the accident claimant had, because of trachoma, lost ten-elevenths of normal vision. The evidence showed that at the time of the hearing claimant was unable to count the fingers on one hand at any point before the left eye, while before the injury he could distinguish them at a distance of about 10 feet and could

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denied and dismissed; decree affirmed, and cause remanded for further proceedings.

For appellant—Waterman & Greenlaw and Charles E. Tilley.

For appellee—Gardner, Pirce & Thornley (Benjamin M. McLyman and Charles R. Haslam, of counsel).

read. After the injury he could distinguish an object between himself and the light, but could not determine what it was, having what the medical witness called "dodging vision," that is, he might be able to get out of the way of an approaching object though he could not tell what it was, and it was on those findings that the commission determined that claimant still had useful vision. The court said it did not appear how claimant could have any vision left if, having only one-eleventh of vision, he lost one-eleventh. The judgment of the district court determining that claimant's disability amounted to total blindness was affirmed, the court saying: "Whether or not a condition found to exist amounts to total blindness, as used in this statute, is a question of law, in deciding which the spirit and purpose of the law must be considered. The act is highly remedial, beneficent in purpose, and to be liberally construed. To say that a man who has only such vision as enables him to recognize a form before him, without being able to distinguish its outlines, is not blind within the meaning of this law, is to apply to it a strict rule of construction and defeat its evident purpose." Industrial Commission of Colorado v. Johnson, — Colo. —, 16 N. C. C. A. 350, 172 Pac. 422 (1918).

B. Basis for compensation.

1. Percentage of total disability.

Petitioner was injured by a powder blast, depriving him of four-fifths of the use of both eyes, while in the employ of defendant. The matters chiefly controverted were the permanency of the injury and the period of time for which compensation should be fixed. The testimony of medical witnesses was to the effect that the prosecutor was suffering from conjunctivitis, which disease of the eyes, in their opinion, was curable in 3 months if the prosecutor yielded to treatment therefor in a hospital. Upon that testimony the trial judge found that the prosecutor was suffering from a temporary disability, which would require 3 months within which to effect a cure, and accordingly allowed him compensation for 17 weeks, which was adjudged to be paid in a lump sum, and a further allowance for 13 weeks payable each week, with leave to claimant to apply to the court at the termination of 3 months for further relief in the event that no cure had been effected. No cure was accomplished at the expiration of the 3 months, claimant filed a petition for further relief, and it was at that hearing that the trial judge found that the injury to each of the prosecutor's eyes was partial in character but permanent in quality, amounting to the loss of four-fifths of the permanent usefulness of each eye, and made an order that he receive compensation for a period of 80 weeks for each eye, thus allowing compensation for the loss of 80 per cent of the usefulness of both eyes for 160 weeks. The court said that

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VINCENT, J. On October 5, 1918, the petitioner filed his petition in the superior court, setting forth that on July 23, 1917, being at the time in the employ of the respondent as a painter, he fell out of a second-story window, whereby he sustained two broken ribs, the loss of sight of his right eye, and various bruises, and became totally incapacitated for an undetermined period; that compensation is be-

the trial judge evidently overlooked the provision of the statute which, among other things, provided that the loss of both eyes should constitute a permanent disability, and that compensation should be made therefor according to clause b, which provided that the compensation for the loss of both eyes should not exceed 400 weeks, and therefore, it appearing that there was a loss of usefulness of both eyes to the extent of 80 per cent, the prosecutor was entitled to compensation for 320 weeks. The judgment was reversed and the record remanded to be proceeded with according to law. Vishney v. Empire Steel & Iron Co., 87 N. J. L. 481, 95 Atl. 143 (1915).

2. Percentage of allowance for loss of eye.

Stoughton Wagon Co. v. Myre, 163 Wis. 132, 157 N. W. 522 (1916), was an action to set aside an award made by the industrial commission in favor of defendant. It appeared that, while performing a service in the employ of plaintiff, defendant was struck in the left eye by the head of a bolt, causing injuries which resulted in the permanent loss of four-fifths of the sight of that eye. His earning capacity was not affected by the injury, and the industrial commission awarded him indemnity for the loss of vision, holding that claimant was entitled to four-fifths of the allowance prescribed by the act for total blindness of one eye under the terms of that part of the act, generally referred to as the relative injury clause, which said that in all other cases in this class the compensation should bear such relation to the amount stated in the schedule as the disabilities bore to the disabilities produced by the injuries named in the schedule. The court said that the schedule gave a certain compensation for total blindness of one eye, the physical organ itself being retained, and in this case there was partial blindness of the eye, the physical organ being retained, and that the court was of the opinion that the injury was logically within the statutory class, and hence that compensation under the relative injury provision of the statute was properly awarded. The judgment was affirmed.

3. Absence of provision for partial loss.

While plaintiff was operating a machine, a piece of emery flew into his left eye and injured it. The emery was removed, but the eye became inflamed and iritis set in, totally incapacitating him for nine weeks, and full compensation therefor was paid. When claimant returned to work the inflammation and iritis had subsided and his recovery was complete save for the fact that the injury left a scar in the center of the cornea covering the pupil which caused a blur and prevented him from seeing an object clearly. This condition reduced the vision of his eye nearly one-half, and was permanent, but it was not thought that the vision would be further reduced as a result of the injury. After returning to work claimant had been doing the same work as he had before the injury

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ing made for total incapacity, but that no compensation has been made for the loss of his eye; and that he is entitled to the additional or special compensation provided in section 12, paragraph (b) of article 2 of the Workmen's Compensation Act (Pub. Laws 1911-12, c. 831).

After a hearing, the superior court ordered and decreed that "the

and was receiving the same wages. On that state of facts the board made a further allowance, and in doing so found that the eye had been destroyed by the injury to the extent of more than one-third and somewhat less than one-half, and that therefore he was entitled to 35 weeks compensation in addition to the amount theretofore paid, that being the fair and reasonable percentage of the 100 weeks compensation which the law provided for the full loss of an eye. The court said that, as the award could not be sustained under section 9 because claimant was not wholly incapacitated, it must be sustained, if at all, under section 10, which provided that, while the capacity for work resulting from an injury is partial, the employer should pay a weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he was able to earn thereafter, to which provision was added a schedule of specific injuries fixing the number of weeks for which compensation should be paid, such schedule not dealing with partial loss of an eye and with nothing less than the loss of one eye. The court held that no support could be found for the award under the schedule, nor could authority be found therefor in a general power conferred by the provision, as the board was there restricted to the loss to the claimant's earning capacity in the employment in which he was working at the time of the accident. The court said that the award made by the board was a very equitable one and one which it would prefer to sustain if it could do so without attempting to amend the law by judicial construction, but that it appeared that the exigency arising in the present case was one which the law had not provided for and that the relief in such cases was with the legislature and not with the court. Hirschkorn v. Fiege Desk Co., 184 Mich. 239, 150 N. W. 851 (1915).

C. Effect of use of glasses.

1. Vision nearly normal with glasses.

While claimant was employed as a riveter upon shovels, a small portion of steel lodged in the back of one of his eyeballs, defying all efforts as to its removal. The state industrial commission found that the injury resulted in the loss of the left eye, and made award accordingly, the employer and the insurance carrier appealing. The court held that there was no evidence to support the finding of the commission, for the entire testimony was to the effect that the eye, with the aid of a proper glass, was nearly normal for many purposes, and that while there was an injury that detracted from the value of the eye, it was not the loss of an eye. The award was reversed, and the proceeding remitted to the state industrial commission. Valentine v. Sherwood Metal Working Co., — N. Y. App. Div. —, 178 N. Y. Supp. 494 (1919).

2. Fifty per cent with, ten per cent without glasses.

Claimant received an injury to his

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petitioner is entitled to compensation for total incapacity at the rate of $10 per week, beginning on the 23d day of July, A. D. 1917, and continuing during the period of total incapacity, but not exceeding a period of 500 weeks from the date of said injury," and that "petitioner is entitled to no additional compensation for the entire and irrecoverable loss of sight of an eye under the pro-

right eye and a gonorrheal infection set in, so that he was obliged to quit work. An agreement was made between the claimant and the insurance carrier for certain compensation, which agreement was approved by the industrial accident board. Subsequently, claimant applied for further compensation, and the committee of arbitration decided that he was entitled to compensation for 100 weeks from the date of the accident, and, upon appeal to the industrial accident board, the decision of the committee was affirmed, it being found that the infection which destroyed the sight of the eye was not reasonably accounted for except as coming through or resulting from the accident. Although there was no special finding upon the point, it was evident from the amount allowed that the accident board treated the injury as the loss of an eye rather than as a partial loss, and that it made its allowance under the schedule of fixed liability. The eye was examined for loss of sight by two experts, who made their tests separately and in different ways, one aiming to discover how much the claimant could see when using proper eye glasses, and found that, with their assistance, he had one-half of his normal vision, while the other, making his test without glasses, found that the eye, unaided by artificial means, had lost 90 per cent of its sight and, as neither attempted the other's test, the testimony of each stood unquestioned and without impeachment by anything in the record, so that the net result was that when using proper glasses claimant had 50 per cent of his sight, while without them he had only 10 per cent. In reversing and setting aside the award, the court said that, under those circumstances, it was impossible to say that the injury had resulted in the loss of an eye, and that, inasmuch as the use of glasses is a very ordinary occurrence both in young and old, it was unnecessary to determine whether the loss of 90 per cent of the sight was substantially the loss of the eye, because 90 per cent of the sight is not lost when it can be diminished to 50 per cent by the use of common appliances, it being the duty of the sufferer to minimize the injury as much as he reasonably could. The court further said that the statute apparently had not provided compensation for the partial loss of an eye except as measured by lessened earnings. Cline v. Studebaker Corp., 189 Mich. 514, L. R. A. 1916 C 1139, 155 N. W. 519 (1915).

3. Inability to use eyes simultaneously.

A piece of steel entered an employee's right eye and left the vision of that eye, without a glass, about one-sixtieth of normal vision. With the use of a glass, however, and by covering the good eye, the vision of the injured eye alone was nearly normal, but such vision could not be utilized in connection with the normal eye as, with the two together, there is a lack of co-ordination of images, or double vision, so that when both eyes were used together the use of

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visions of paragraph (b) of section 12 of article 2 of the Workmen's Compensation Act." From this decree of the superior court the petitioner has taken an appeal, which is now before us.

The only question raised by the appeal is whether or not the petitioner has brought himself within the provisions of paragraph (b) before referred to. It appears from the transcript of the

glasses was impracticable. Under the Workmen's Compensation Act additional compensation might have been paid for certain specified injuries, among others for the reduction to one-tenth of normal vision in either eye with glasses, and the board decided that the employee had sustained such reduction of vision, reaching the conclusion by taking into consideration the vision of the right eye as compared with the normal vision of both eyes used together. The court held that in doing so the board correctly interpreted the intention of the legislature, as the construction contended for by the insurer would lead to the unreasonable result of allowing compensation for the loss of an eye, but not for an injury that rendered the eye worse than useless, as, on the testimony of the insurer's own expert, the employee would enjoy normal vision with the left eye if the injured eye were entirely removed. The decree was affirmed. In re O'Brien, 228 Mass. 211, 117 N. E. 1 (1917).

In Frings v. Pierce Arrow Motor Car Co., 182 N. Y. App. Div. 445, 169 N. Y. Supp. 309 (1918), plaintiff was employed as an assembler of motor vehicles, and, while chipping a casting, was struck in the right eye with a sharp piece of steel, which penetrated the cornea, rupturing the lens, causing traumatic cataract, resulting in acute glaucoma, which necessitated the removal of the lens. As a result of the accident the vision of the left or uninjured eye, uncorrected, was normal, and the vision of the right or injured eye was normal with a correcting glass or lens, equal to the lens of the eye which was removed, worn in front of the eye. However, the correcting glass, or lens, could be worn on the injured eye and used only by closing or not using the uninjured eye, owing to the lack of co-ordination of images. Compensation at a rate agreed upon between the claimant and the employer was paid up to the time of his resuming work, and the disability occurred prior to the passage of an amendment allowing compensation in case of partial loss of an eye. The commission denied compensation for permanent loss of the use of an eye on the ground that he had not sustained the permanent loss of the use of the eye, the decision being without prejudice to the claimant renewing his claim when he could show loss of earnings due to the injury to the eye, and the question was certified by the commission as to whether the injury constituted the permanent loss of the use of an eye within the meaning of the workmen's compensation law. The court held that there had not been the loss of an eye within the contemplation of the statute, inasmuch as the permanent loss of the use of the eye, when supplemented by a lens, was to the extent only of using it in connection with the other eye, and should he lose his left eye, he would be able, using the injured eye, aided by a lens, to fully perform his duties. The certified question was answered in the negative.

D. Failure to have cataract removed.

While an employee was engaged

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testimony produced at the hearing before the superior court that the petitioner has not sustained a total loss of the sight of his right eye, but that, on the contrary, he still retains about 10 per cent of the normal vision, which is useful to a limited extent for certain purposes, and that he also retains a stereoscopic vision of

in hammering a cone into an axle of an automobile he was injured by a particle of steel entering his left eye. A few days later he was treated by an eye specialist, who found nothing wrong with the eye and prescribed eye water to allay inflammation and, after laying off a day or so, he returned to his employment and worked for about six months, when he quit and went into business for himself. After this there was no further treatment of the eye for about 6 months, when claimant went to another eye specialist, who made an examination and found nothing in the eye, but advised an X-ray, and by his advice two X-ray photographs were taken, both of which were negative and showed nothing in the eye. Claimant complained of pain and blurred vision, and the eye specialist reduced the condition so that he could see fingers at a distance of about 4 feet. A cataract gradually formed on the eye until, 2 years after the injury, the loss of sight of the eye was complete except that claimant could distinguish light, but not objects with it. A claim for compensation was made, and the committee of arbitration awarded claimant for complete loss of the left eye. This award was affirmed by the industrial board and the circuit court, and the cause was certified as one proper to be reviewed by the supreme court. The employer contended that claimant had sustained no incapacity on account of the accident, except for 2 days at the time of the injury, but that he continued at his usual work, receiving the same wages, and therefore was not entitled to compensation except for the 2 days, and that the loss of eyesight was due to his unreasonable failure to undergo an operation for the removal of the cataract and restoration of vision advised by the specialists employed by him, and not to the original accident. The court said that, while claimant lost only 2 days at the time of the accident, after which he resumed his work, the compensation fixed by the statute for the loss of an eye did not depend on the loss of time but was fixed at 50 per cent of the average weekly wage during 100 weeks. The evidence showed that there was a good probability of recovering normal vision for ordinary purposes by removal of the cataract, and that the operation therefor was not dangerous, and the court held that the fact that the board had no power to require claimant to submit to an operation did not determine the question involved, which was whether the total loss of sight was attributable to the accident which caused the slow growth of the cataract, or to an unreasonable refusal of claimant to have the cataract which caused the loss of vision removed, and said that the statutory provision for reducing or suspending compensation of an employee should he persist in unsanitary or injurious practices which tended either to impair or retard his recovery, or should he refuse to submit to such medical or surgical treatment as should be reasonably essential to his recovery, did not apply to an original application for compensation on account of an entire loss of

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some value, although it would not afford him any assistance in a vocational pursuit.

Upon this state of the testimony the petitioner argues that, having lost so much of the vision of the right eye that it would no longer serve him in any occupation in which he might engage in earning his livelihood, this court should give to the words of the statute,

the sight of an eye, where the question to be decided was whether that loss was due to an unreasonable refusal to remove the cause. The court held that, under the findings of the board, that claimant ought to have the operation performed, the continued total loss of sight should be attributed to such refusal and not to the accident, and that the order of the board was not consistent with its findings. The court said further that if the operation should be had and proved unsuccessful, the employer would be liable for the loss of sight as well as the surgical and hospital services necessary for the operation and the treatment already received. But if successful, its liability would be for the temporary loss of time and treatments had, and surgical and hospital expenses necessary for the operation, and if the operation should not be a substantial success there would be a different basis of compensation from a case of total loss of eyesight. The judgment was reversed and the cause remanded to the circuit court, with directions to set aside the order of the industrial board and for such further proceedings as were provided by statute. Joliet Motor Co. v. Industrial Board of Illinois, 280 Ill. 148, 117 N. E. 423 (1917).

II. Total loss of vision.

A. One eye previously lost.

1. Total incapacity.

A man who had lost one eye met with an injury 5 years later whereby he lost the sight of his remaining eye. Compensation was awarded as for total disability, and the question presented upon this appeal was whether there was error in refusing to rule, as matter of law, that the total incapacity of the employee could not be attributed to the later injury, because it was made up in part of the result of a previous accident. The court sustained the award, saying: "The employee, when he entered the service of the subscriber, had that degree of capacity which enabled him to do the work for which he was hired. That was his capacity. It was an impaired capacity as compared with the normal capacity of a healthy man in the possession of all his faculties. But nevertheless, it was the employee's capacity. It enabled him to earn the wages which he received. * * * His total capacity was thus only a part of that of the normal man. But that capacity, which was all he had, has been transformed into a total incapacity by reason of the injury. That result has come to him entirely through the injury." In re Branconnier, 223 Mass. 273, 111 N. E. 792 (1916).

2. Total—Deduction for one eye.

In Jennings v. Mason City Sewer Pipe Co., — Iowa —, 174 N. W. 785 (1919), it appeared that plaintiff, who had only one eye at the time of his injury, sustained an injury causing loss of that eye. The compensation act provided for compensation for the loss of an eye, 50 per cent of the daily wages during 100 weeks, and for total permanent disability, 50

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"the entire and irrecoverable loss of sight of either eye," an interpretation broad enough to cover his case; in other words, that a man with the sight of his eye reduced to 10 per cent of the normal vision should be deemed to have suffered the "entire and irrecoverable loss of sight" therein.

With this contention of the petitioner we cannot agree. We

per cent of the weekly wages for a period not exceeding 400 weeks, the loss of both eyes being designated as a permanent total disability. The compensation commissioner allowed plaintiff compensation as for a total permanent disability, after deducting therefrom the compensation provided by the act for the loss of one eye, and defendant appealed, contending that the award should have been for the loss of one eye only. The court held that, under the section which provided that the loss of both eyes constituted a total permanent disability, the loss of the only eye constituted a total permanent disability. The court did not determine whether the commissioner had the power under the statute to reduce plaintiff's allowance by deducting the allowance for the loss of one eye from the allowance for total disability inasmuch as the error, if any, was not prejudicial to appellant, and plaintiff was not objecting thereto, but said that, if the man had been previously compensated for the loss of the first eye, it would seem reasonable that the compensation rate then paid should be deemed as applied upon the statutory allowance for total permanent disability, and it would not seem unreasonable to say that where the total permanent disability was caused by the loss of an only eye, the injured party should be deemed, for the purposes of the statute, to have received the compensation rate for the loss of the first eye.

3. Total—Additional for one eye.

In re J. & P. Coates (R. I.), Inc., — R. I. —, 103 Atl. 833 (1918), the employer and employee petitioned the court representing that they had adversary interests and concurred in asking for the construction of sections 10, 11 and 12 of article 2 in so far as they were applicable to the case in question. There was an agreed statement of facts from which it appeared that the employee, while serving in the Spanish-American War in 1898, suffered the total and irrecoverable loss of the sight of his right eye; that thereafter he was employed by the other petitioner as a card stripper, and, while so employed, met with an accident which arose out of and in the course of his employment by being struck on the head by a falling ladder, as a result whereof he suffered the total and irrecoverable loss of the sight of his left eye. Section 10 of the act provided that the total and irrecoverable loss of sight of both eyes constituted permanent total disability. Section 11 provided for compensation for partial incapacity for a period not greater than 300 weeks from the date of the injury. Section 12 provided for the payment of certain compensation in addition to all other compensation provided for in the act when there were certain specific injuries, that for the loss of the sight of both eyes, being for a period of 100 weeks, and that for the irrecoverable loss of the sight of either eye for a period of 50 weeks. The opinion of the court was requested as to whether the loss by plaintiff of his left eye, the right eye having been previously lost, resulted in anything more than partial inca-

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think the words of the statute must be taken in their ordinary sense, and that their meaning is clear. To say that this statute was designed to go any further than to provide for additional compensation for injuries which resulted in total and complete loss of sight would amount to a distortion of its language. The view which we now take is in accord with the opinion of this court in

pacity within the meaning of sections 10 and 11, and, if the court should consider that under the facts total incapacity for work should ensue from the accident, whether there arose, under section 10, a conclusive presumption that the injury to the second eye resulted in permanent total disability, and whether, under section 12, the additional compensation to the employee should be for 50 weeks or for 100 weeks. The court held that a condition of total incapacity resulted to the employee from the injury to his left eye, and that there was a conclusive presumption under the circumstances that the injury resulted in permanent total disability, the court saying: "It is clear that the total and irremediable loss of sight is the fact which furnishes the conclusive presumption of permanent total disability. Such loss, and not what brought it about, creates the conclusive presumption." Upon the question as to the additional compensation provided for in section 12, the court said there could be no question that the specified injury indicated in that section was the entire and irrecoverable loss of the sight of one eye and not of both, and accordingly the employee was entitled to additional compensation therefor for 50 weeks and not for 100 weeks.

4. Partial incapacity.

The end of a crowbar struck plaintiff in the left eye, causing an injury which permanently destroyed the sight of the eye, and, as he had sustained the loss of the other eye in an accident 7 years previously, the accident in question left him blind and totally incapacitated for labor. The accident board awarded compensation upon the basis of total permanent disability. Section 10 of the statute provides "For the loss of an eye 50 per centum," etc., "the loss * * * of both eyes, * * * shall constitute total and permanent disability." The court held that the compensation under the circumstances should be based upon partial incapacity, saying that, if the loss of the first eye had occurred while the compensation act was in force, then the person employing claimant at that time would have been liable, and that the present employer was in no degree the cause of that disability, and that the loss of the second eye, standing by itself, was also a partial disability, and did not occasion the total disability. Under such circumstances, the court said it was clear that the total incapacity could not be entirely attributed to the last accident. Weaver v. Maxwell Motor Co., 186 Mich. 588, L. R. A. 1916 B 1276, Ann. Cas. 1917 E 238, 152 N. W. 993 (1915).

At the time relator entered the employ of respondent he was totally blind in one eye, having lost the sight thereof in an accidental injury prior to his employment with respondent, which injury, within the compensation statute, was a permanent partial disability. While engaged in the work of his employment for respondent he suffered another injury which totally destroyed the sight of his remaining eye and rendered him totally blind. Upon those facts the

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Weber v. American Silk Spinning Co., 38 R. I. 309, 95 Atl. 603, Ann. Cas. 1917 E 153. In that case the petitioner's thumb was injured in a manner which made it necessary to remove therefrom a small piece of bone and to sever pieces of tendons and flesh, rendering the thumb permanently stiff. The superior court found that the injury to the petitioner's thumb did not bring him within the terms

trial court awarded the relator the compensation provided by the statute for a permanent partial disability, and relator contended that the injury suffered by him—the loss of his remaining eye—constituted a permanent total disability, and that, within the proper construction of the act, he was entitled to compensation upon that basis. The compensation act contained a provision that "If an employee receive an injury which, of itself, would only cause permanent partial disability, but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury." The language of this statute, the court said, was clear and unambiguous, and was clearly intended to limit the liability of the employer to compensation commensurate with the injury suffered by the employee while in his service, and to relieve him from the consequences of injuries previously sustained, though both resulted in permanent total disability, and that the question of the wisdom and propriety of the provision was not before them, the remedy, if any was necessary, being with the legislature. The judgment was affirmed. State ex rel. Garwin v. District Court of Cass County, 129 Minn. 156, 8 N. C. C. A. 1052, 151 N. W. 910 (1915).

B. One eye previously useless.

Claimant, an employee of a wire works, sustained an accidental injury resulting in the total loss of the sight of his right eye. Upon hearing of his application for compensation by a deputy commissioner, it appeared that 3 years prior to the accident claimant had suffered an accidental injury to the left eye, which had resulted in the permanent total loss of the vision of that eye, except as to 8/200 minus, which rendered the sight of that eye useless for any vocational purpose. The fact of the left eye having been injured was not taken into account by the commission and was not known to it at the time the award for the loss of the right eye was made. The commission made an award of compensation for a period of 128 weeks for the loss of the eye and the full amount of the award was duly paid. Upon the rehearing, attended by all the parties interested, the commission for the first time became advised as to the facts, and thereupon made an award continuing the compensation granted by the prior award from the time of the last payment until such time as the commission should be shown that the claimant had some useful vision of his left eye, and the employer and insurance carrier appealed therefrom, basing their claim of right to reversal of the award mainly upon the ground that, no appeal having been taken from the first award, it was final and conclusive as between the parties. The court said that the fact that the claim was one entitling claimant to an award for permanent total disability could not be questioned, nor could it be doubted that such an award would have been made had the commission been fully informed as to

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of the Workmen's Compensation Act providing for additional compensation "for the loss by severance" of a thumb, and such finding was held to be without error by this court.

In Re J. & P. Coats, Incorporated, for an Opinion, 103 Atl. 833, this court held that, where the employee at the time of the accident was blind in one eye and sustained a loss of sight in the

the facts, and, as the loss of the sight of the right eye occurred in July, 1914, the award was not affected by the amendment of the act in 1915, but was governed by the law in force prior to that time under which it had been held that an employee who had suffered the loss of a member by a previous injury, and who suffered the loss of the remaining member by a subsequent injury, was entitled to an award for permanent total disability, instead of an award simply for permanent partial disability on account of the second loss. The award of the commission was affirmed. Kriegbaum v. Buffalo Wire Works Co., 182 N. Y. App. Div. 448, 169 N. Y. Supp. 307 (1918).

C. Simultaneous loss of one eye by disease.

Claimant was employed by a machinery manufacturing establishment, and while he was grinding a steel tool, particles of emery were thrown into his eyes. Soon thereafter he became entirely blind in his right eye and had remaining only 20 per cent of vision in his left eye. The state industrial commission found that the loss of 80 per cent of the vision of the left eye was due to its previous defective condition having been aggravated by the accident, and made an award of 128 weeks for partial permanent disability, and to this finding no exception was taken by either the employer or insurance carrier, the latter, in fact, agreeing to make payment therefor in one lump sum, without discount. As to the cause of blindness of the right eye, the testimony was conflicting, the eye specialist agreed upon by both parties testifying that the blindness resulted from optic atrophy. The commission found that the blindness was not due to injury resulting from particles of emery being thrown into the eye, but was due to changes in the background of the eye, disassociated from such accident. Claimant contended that, conceding the findings of the commission to be conclusive as matter of fact, it erred as matter of law in refusing to make an award for total permanent disability, making his contention upon the claim that the expression "previous disability," contained in subdivision 6, section 15 of the act as amended by chapter 615, Laws of 1915, which amendment prevented the adding of a former disability to a later one, applied only to injuries arising out of and in the course of a hazardous employment, and not to such disability as might be the result of disease, and that hence the award should not have been limited on account of the previous disability of the other eye, but should have been made with reference to the last injury only, to wit, the injury to the left eye, which of itself, claimant contended, in view of the existing blindness of the right eye, permanently and totally disabled him. The court refused to pass upon the question, however, saying that the argument of claimant fully disregarded the fact that the evidence disproved the existence of any condition disabling claimant from working prior to the time of receiving the injuries complained of, for while it ap-

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other, and thereby became totally blind, he was entitled to compensation based upon total disability, but not to the additional compensation provided for by section 12 of the Workmen's Compensation Act for the entire and irrecoverable loss of the sight of both eyes, and in its opinion said:

"The purpose of section 12 is plainly to provide compensation for specified

peared from the evidence that claimant's eyes had been diseased for some time before the accident, such condition did not seem to have in any way disabled him, nor even to have been such as to make him aware of its existence, as he testified that prior to the time of receiving those injuries he had never had any trouble with his eyes, and therefore the question whether the expression "previous disability" was limited to the result of injuries sustained in a hazardous employment was not before the court. The determination of the commission was affirmed. Blaes v. E. W. Bliss Co., 177 N. Y. App. Div. 370, 163 N. Y. Supp. 722 (1917).

D. Removal of eye.

1. As more than loss of vision.

Petitioner, while working as foreman of a gang of men sledging rock, was struck in the eye with a small piece of rock and received an injury necessitating removal of the eye and the use of a glass eye. He was offered compensation under a provision of the compensation act for "The total and permanent loss of the sight of an eye, 65 per cent of the average weekly wages during 100 weeks," which he declined, insisting that he was entitled to be compensated under the provision of the act for compensation, "in all other cases of permanent partial disability, including any disfigurement which will impair the future usefulness or occupational opportunities of the injured employee, compensation shall be determined according to the percentage of disability," which carried compensation of 65 per cent of earnings for a period not exceeding 335 weeks. The compensation board made the award on the former basis, which was affirmed by the circuit court. This was held to be erroneous, the court saying that, when the specific injury provision of the statute deals with the eye, it does not provide for compensation for the loss of the eye itself, but solely for the loss of the sight of an eye, and that, as the employee lost not only the sight of his eye but the eye itself, his injury was therefore greater than the mere loss of the sight of the eye and, that being true, the case did not fall within the schedule making compensation solely for the loss of the sight of an eye, but fell within the general provision, awarding compensation "in all other cases of permanent partial disability." The judgment affirming the award was reversed, and the cause remanded, with directions to set aside the award and remand the case to the workmen's compensation board for proceedings consistent with the opinion. Nelson v. Kentucky River Stone & Sand Co., 182 Ky. 317, 206 S. W. 473 (1918). Upon a petition for rehearing, the court said they found no reason for departing from their former opinion, but deemed it proper to say that in holding that the compensation for specific injuries provided in section 18 of the act was confined to those injuries and no others, it was not intended to lay down the rule that the workmen's compensation board could not use the schedule contained in section 18 as a standard by which to

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injuries in addition to the compensation otherwise provided for in the act. There is and can be no question that the specified injury in this case is the entire and irrecoverable loss of the sight of one eye, and not of both, and accordingly the employee is entitled to compensation therefor for 50 weeks, and not for 100 weeks."

In the petitioner's brief several cases are cited construing the Workmen's Compensation Acts in other states, but as such deci-

measure the compensation to be allowed for injuries not classified but falling within the general clause awarding compensation in all other cases of permanent partial disability. The petition for rehearing was therefore overruled, and the opinion extended as indicated. 183 Ky. 583, 209 S. W. 506 (1919).

2. Previously defective eye.

As the result of an accidental injury to claimant's right eye it was removed and compensation was allowed as for the loss of an eye. The eye had previously been injured when claimant was between four and five years old, the tine of a fork having been run through it, and claimant testified that there was just sufficient vision left in the eye to enable him to distinguish between daylight and dark or to tell an approaching object. Claimant was 29 years old when he received the second injury, and apparently could do the work he did and earn the wages he received before his eye was removed, and it was contended by the employer that, while he was injured and in consequence was for a period unable to work, he did not lose an eye, and the period of actual disability resulting from the injury was the measure of the compensation to which he was entitled, the argument in support of the contention being based principally upon the premises that the injured eye did not contribute to claimant's earning capacity and that its loss had not diminished it. The court in sustaining the conclusion of the board said: "The legislature has not attempted a definition, or made a declaration, applicable to the case at bar, except in terms of the loss of an eye. It has not specified a normal eye, although it may be concluded that the law refers to an eye which performs, in some degree, the functions of a normal eye. A mere sightless organ might perhaps be considered no eye at all. Claimant has lost an eye, although an infirm one. It was not wholly useless as an eye. On the contrary, the testimony is that he could with it distinguish light and see approaching objects." Purchase v. Grand Rapids Refrigerator Co., 194 Mich. 103, 160 N. W. 391 (1916).

E. Loss of vision of previously defective eye.

Plaintiff, who was nearsighted, and having vision not exceeding 50 per cent, lost the use of an eye. The commission made an award for the permanent loss of the use of an eye, from which award this appeal was taken, appellants contending that claimant should only be allowed for the loss of one-half vision. The court, in affirming the award, said that the statute did not provide that the loss of the use of an eye should be compensated by an award based upon the amount of vision which existed previous to the accident, but awarded specific compensation for the loss of an eye, and the wages received by petitioner must have been considered her wage-earning capacity with defective vision, and as she lost the use of her eye, such as she had, she was entitled to compensation

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sions are based upon language differing from that of our act, they are not particularly helpful, and do not seem to us to demand any special discussion.

The petitioner's appeal is denied and dismissed, the decree of the superior court is affirmed, and the cause is demanded to said court for further proceedings.

therefor, based upon her earning capacity. Hobertis v. Columbia Shirt Co., 186 N. Y. App. Div. 397, 173 N. Y. Supp. 606 (1919).

III. Eye and other injuries combined.

While petitioner was employed in attending a furnace a flame shot out, severely burning him, and the trial judge found that there was a 50 per cent loss of the usefulness of each hand and a 10 per cent loss of the usefulness of one eye. He considered the two hands together as 50 per cent of total and permanent disability, and allowed therefor 200 weeks, 50 per cent of the 400 weeks allowed by the statute for total and permanent disability, and allowed additional compensation of 10 per cent of 100 weeks for the injury to the eye, making a total of 210 weeks. The award was affirmed by the supreme court and the employer appealed. The court of errors and appeals said that sufficient facts were found by the trial court to warrant a judgment for petitioner, and that there was evidence to support such finding, but that it could not agree with the methods used in fixing the amount of compensation awarded. The compensation act provided that the loss of both arms or both feet or both legs or both eyes or any two thereof should constitute total and permanent disability, and further provided that in other cases in that class, or where the usefulness of a member or any physical function was permanently impaired, the compensation should bear such relation to the amount stated in the above schedule as the disability bears to that produced by the injuries named in the schedule. The court said that the method adopted by the trial judge gave a portion of 400 weeks and a portion of an additional 100 weeks, making a portion of a total of 500 weeks, and that that method was erroneous. The court said further that it could not approve of the method of award advocated by the employer, that compensation should be calculated by taking each injured function separately and adding up the items of partials, and held that, when the trial judge found that there was a 50 per cent loss of the usefulness of each hand and a 10 per cent loss of one eye, he should then have found what percentage of total and permanent disability the combination of 50 per cent loss of the usefulness of two hands and 10 per cent of one eye made, and should have awarded that percentage of 400 weeks. This, the court said, was not strictly a mathematical problem, and was not to be solved by adding up the fractional parts, but was to be determined upon the basis of the percentage of total and permanent disability reasonably found to be produced by the several injuries considered collectively, and with due regard to their cumulative effect. The judgment of the supreme court was reversed that the proceeding might be remanded to the common pleas court for a judgment based upon a finding made in accordance with the foregoing principles. Orlando v. F. Ferguson & Son, 90 N. J. L. 553, 102 Atl. 155 (1917).

R. L. S.

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ERIE R. CO. v. PURUCKER, ADMINISTRATRIX OF MARIETTA.

[Supreme Court of the United States, June 4, 1917.]

244 U. S. 320, 37 Sup. Ct. 629, 61 L. Ed. 1166.

1. **Trial—Instructions—Request—What requisite to.**
A request to charge must be calculated to give the jury an accurate understanding of the law having reference to the phase of the case to which it is applicable.

CASE NOTE.

Assumption of risk under the Federal Employers' Liability Act as to unsafe place or dangerous method of work.

I. Unsafe place, 724-735.
- A. Slippery condition, 724-726.
  - 1. Wet floor—Promise to remedy, 724.
  - 2. Due to leak being repaired, 724-725.
  - 3. Muddy shoes from wet ground, 725-726.
- B. Loose bolts under foot, 726-727.
  - 1. On hand car floor, 726.
  - 2. On top of engine water tank, 727.
- C. Use of old nails by fellow employee, 727-728.
- D. Unshored cut in embankment, 728.
- E. Overhang of sand bank, 728-729.
- F. Space between lumber being unloaded, 729.
- G. Loading coal, 729-730.
  - 1. Rotten floor of coal chute, 729-730.
  - 2. Space between, 730.
- H. Gas in tank car being repaired, 730-731.
- I. Cars and engines, 731-734.
  - 1. Cars without stakes, 731-732.
  - 2. Hole in car roof, 732-733.
  - 3. Engine cab floor, 733-734.
  - 4. Slanting engine step, 734.
- J. Unguarded machinery, 734-735.
  - 1. Gearing on pump engine, 734-735.
  - 2. Set screws and crank on pump engine, 735.

II. Dangerous method, 736-752.
- A. Running train on unusual track, 736-737.
  - 1. Section hand struck while crossing track, 736.
  - 2. Section hand struck while assisting surveyor, 736-737.
- B. Working without lookout, 737-738.
  - 1. Section hands, 737.
  - 2. Painter on bridge, 737-738.
- C. Insufficient help, 738-744.
  - 1. Lifting rails or timbers, 738-740.
  - 2. Carrying ties, 740.
  - 3. Running truck down slanting dock, 741.
  - 4. Train without brakemen, 741-742.
  - 5. Removing posts, 742-743.
  - 6. Loading heavy machinery, 743-744.
  - 7. Hand car too heavy for crew, 744.
- D. Switching methods, 744-747.
  - 1. Switching from both ends of train, 744-747.
  - 2. Shunting cars without warning, 747.
- E. Repairing cars with inadequate facilities, 747-748.
- F. Use of paint gun without guard, 748-749.
- G. Breaking boards with foot, 749.
- H. Handling cable of dirt plow on curve, 749-750.

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2. Federal Employers' Liability Act—Injuries to section man while going to work—Assumption of risk—Refusal of requested instruction.

In an action against a railroad company by a section man employed by it for personal injuries sustained by plaintiff when, in going to work, he stepped from the one of the defendant's two double tracks, on which he was walking, onto the other for the purpose of permitting a train to pass and was struck and run over by an engine, backing on the second track, held that, even conceding that the Federal Employers' Liability Act applied, it was not error

I. Starting stationary gasoline engine, 750-751.
J. Unloading unblocked log car, 751.
K. Using pneumatic riveter without safety spring, 751-752.

Cross-references. Risks assumed under Federal Employers' Liability Act, see 8 N. C. C. A. 834-871; instructions as to assumption of risk in actions under Federal Employers' Liability Act, see 7 N. C. C. A. 685-700; assumption of risk by employee ordered into dangerous place or to work with dangerous appliance, see 5 N. C. C. A. 568-588n.

I. Unsafe place.

A. Slippery condition.

1. Wet floor—Promise to remedy.

The plaintiff, foreman of a tank gang, was at the time of the accident assisting in the work of raising engine tanks with jacks, removing the old trucks and wheels and substituting new ones. The tank, during such operation, was placed over a pit, into which the water used in cleaning out locomotives ran, to be then carried off through a drain. The drain had become obstructed and the water had made the place where the plaintiff worked wet and slippery. While pushing on the car wheels to move them, his foot slipped on the wet floor, and as a result he fell, his breast striking against the flange of one of the wheels which he was moving. The plaintiff admitted that he knew the slippery condition of the floor, but contended that he complained to the foreman in charge of the roundhouse in reference to it, who simply replied: "Well, I'll see." In his pleadings, however, the plaintiff did not set out any promise to repair, upon which he might take his case out of the plea of assumed risk filed on behalf of the employer. From a judgment for the plaintiff, the defendant appealed. The court, in reversing the judgment and rendering judgment for the defendant, held that (1) the remark of the plaintiff's superior on complaint to him of the condition of the work floor was insufficient to constitute a promise to repair; (2) that admitting it constituted such a promise, the plaintiff, not having pleaded it, could not avail himself of it; (3) that under the Federal Employers' Liability Act, the defense of assumed risk still remained, as at common law, and as to injuries arising in interstate commerce, state statutes abrogating the defense were set aside; (4) that the plaintiff, knowing of the negligence of the defendant in furnishing an unnecessarily dangerous work place, and securing no promise to repair, assumed the risk as a matter of law by continuing to work under such conditions. Schaff v. Hendrich, — Tex. Civ. App. —, 207 S. W. 543 (1918).

2. Due to leak being repaired.

The plaintiff, a night pump man at a water station of the defendant, was also required to keep the same in repair. A leak had arisen at the valve seat, and to repair the same he climbed to the top of the water

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for the trial court to refuse to give defendant's requested charge that "if the plaintiff, for his own convenience, voluntarily went along the tracks of the railroad, and this road was being at the time used and operated as a highway of interstate commerce, he assumed the risk and danger of so using the tracks," since such request failed to call attention to the circumstances under which the testimony tended to show the plaintiff was using the tracks at the time and the knowledge of conditions which should have been taken into consideration in order to attribute assumption of risk to him, and failed to take

column. He was not provided with a ladder and the work was done at night. While there, a train came in and stopped at the column. After completing the repairs, the plaintiff attempted to descend to the tender of the engine and then jump to the ground. The top of the water column, however, was wet, due to leakage of water from the defect which he had just repaired, with the result that his foot slipped and he fell to the ground, breaking a bone in his hand and fracturing two of his ribs. It appeared that the plaintiff had kept the columns in question in repair for over 2 years. The court, in affirming the judgment for the defendant, held that the plaintiff assumed the risk. As the court said: "This familiarity with the water columns and the means of making such repairs as the one in question make it reasonably apparent that appellant, at the time of receiving his injuries, was not called upon to meet any danger of which he was ignorant. * * * He also knew, from an inspection of the defect and pipe before he attempted to descend from the water column, that water was leaking on the pipe by which he attempted to descend, and of its slippery condition, in view of which he is estopped to claim that the risk or danger he encountered from the slippery condition of the pipe in attempting to get down from the water column was unknown to him. He also knew that the risk attending his work was necessarily greater at night than it would have been in the daytime, and if the one lantern with which he was at the time provided gave insufficient light, he ought to have provided himself with a second lantern before undertaking the repairs. It is true, as claimed by appellant, that he was not provided by appellee with a ladder upon which he could have climbed to the defect in the water column * * *; but he does not allege, nor does the evidence show, that there had ever been a ladder used in making repairs upon the water columns, or that he had, in making previous repairs thereon, used a ladder, or at any time advised appellee of the necessity of its use." Davis v. Chesapeake & O. R. Co., 166 Ky. 490, 179 S. W. 422 (1915).

3. **Muddy shoes from wet ground.**

The plaintiff, a mechanic, was engaged at the time of the accident in dismantling an engine which had been removed to a track outside of the roundhouse, in order that it might be sent by train to a repair shop. It was necessary that the main rods of the engine be removed and placed crosswise in front of the cylinders. While the plaintiff was standing on the pilot of the engine attempting to tie the rods to the engine with wire, his foot slipped, and he sustained, as a result, a rupture and hernia of his abdomen. The water out of the engine had been allowed to drip on the ground around the place where the plaintiff had been compelled to work, and his shoes had become muddy and slippery as a result. The footboard of the engine was also out of repair, in that the outer part of the step was lower than the inner part, thereby causing the plaintiff's foot to slip

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into account the undisputed testimony that the engine ran into him without signal or warning to him.

3. Federal Employers' Liability Act—Injuries to section man while going to work—Assumption of risk—Negligent operation of train.

In an action against a railroad company by a section man employed by it for personal injuries sustained by plaintiff when, in going to work, he stepped from the one of the defendant's two double tracks, on which he was walking, more easily. The negligence alleged was the failure of the defendant to provide a safe place in which to work. From a judgment for the plaintiff, the defendant appealed, contending that it was not required to furnish a safe place in which to work, since the plaintiff was engaged in making repairs and the character of his employment necessarily required him to work on machinery that was in an unsafe condition. The court, in affirming the judgment, held that the question of assumption of risk was properly submitted to the jury, and that the plaintiff was not so far engaged in making repairs at the time of the accident as to bring him within the rule contended for by the defendant. Texas & P. Ry. Co. v. Schelb, — Tex. Civ. App. —, 196 S. W. 881 (1917).

B. Loose bolts under foot.

1. On hand car floor.

The plaintiff, a section hand, was, when injured, riding to his work on a "pump" hand car provided by the defendant for that purpose. On this particular morning, in addition to the usual number of bars, shovels, picks, and adzes, there had been dumped onto the floor of the car a quantity of loose bolts. About half of them were without nuts, and had a tendency to roll about on the floor. The plaintiff did not arrive until the car was just ready to depart, and as a result did not have time to inspect the car or see the bolts. After the car had proceeded some distance, a fellow employee bumped against the plaintiff, and as he stepped backward he stepped on a bolt. This rolled under his foot, and he lost his balance, falling from the car and sustaining the injuries in suit. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, said: "Nor did the plaintiff assume the risk. To be sure, he assumed the normal hazards incident to riding on the front end of this car. But this particular risk—the risk of being thrown from the car by stepping on a rolling bolt carelessly left on the floor by a fellow workman—he did not assume; for that was abnormal, and he knew nothing of it. He was not obliged to inspect the car; he had a right to assume that the perils of his position had not been affected by the negligence of his master or his companions. * * * The plaintiff did not know the bolt was there, and in view of the facts that he was watching the track, as his duty required, that there were tools and implements on the floor of the car, and that there were seven other men standing on it, it cannot be said as a matter of law that it was so plainly observable that he will be taken to have seen it. Therefore this question was for the jury. * * * The burden of proof on this question of assumption of risk is on the defendant, and not on the plaintiff, and unless the evidence tending to show it is clear and from unimpeached witnesses, and free from contradiction, the trial court cannot be charged with error in refusing to take the question from the jury." Robey v. Boston & M. R. R., 91 Vt. 386, 100 Atl. 925 (1917).

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onto the other for the purpose of permitting a train to pass and was struck and run over by an engine, backing on the second track, which ran into him without signal or warning, held that, even conceding that the Federal Employers' Liability Act applied, the plaintiff, under the circumstances, did not assume the risk attributable to the negligent operation of the train, if the jury found it to be such, unless the consequent danger was so obvious that an ordinarily prudent person in his situation would have observed and appreciated it.

2. On top of engine water tank.

The plaintiff, a fireman, was engaged in moving the water crane back into place after his engine had taken water, when he stepped upon a bolt lying upon the top of the water tank. The bolt turned under his foot and caused him to be thrown against the edge of the tank and receive a rupture. The bolt in question was about the size of a chair post and six or eight inches long. From a judgment for the plaintiff, the defendant appealed. The court, in reversing the judgment and dismissing the cause, said: "This case is governed by the Federal Employers' Liability Act, but the defense of assumed risk is still in existence under that act. * * * Appellee was an experienced fireman, and there was no breach of any duty to warn him of the dangers incident to his service, unless that duty arose out of the presence of the bolt near the manhole. But the proof is undisputed that appellee's engine carried no tool box, and that it was customary and usual to place on this platform about the manhole such articles as appellee says were there at the time of his injury. Appellee had no right to expect that this space about the manhole would at all times be kept free of obstructions. He admits that there were two lumps of coal in this space, which fell over the lattice work supporting the coal after the engine had taken coal but before it took water. It was as probable that he would stumble over one of these lumps of coal as that his foot would be turned by stepping on the bolt. If the defense of assumption of risk means anything, this appears to be a proper case to apply it." Kansas City Southern R. Co. v. Livesay, 118 Ark. 304, 177 S. W. 875 (1915).

C. Use of old nails by fellow employee.

The plaintiff, a truckman, was engaged at the time of the accident in placing an automobile in a box car. While a fellow employee was nailing a triangular block against one of the rear wheels of the auto, the plaintiff was directed by his foreman to wrap some burlap on the other side of the wheel to protect it from injury. While so engaged, a piece of iron flew off the hammer or nail which the fellow employee was using in spiking down the block, and entered the left eye of the plaintiff, causing the loss of sight thereof. The negligence alleged was that the nails used were old and battered; that the use of them at the time in question and under the circumstances then existing made the place of work provided by the defendant unsafe; and that the plaintiff was inexperienced in blocking autos and did not appreciate the danger. From a judgment for the plaintiff, the defendant appealed. The court, in reversing the judgment and remanding the case, held that the defense of assumed risk was available under the Federal Employers' Liability Act except where some safety appliance act was violated, but that the plaintiff here could not be said as a matter of law to have assumed the risk of the condition which caused his injury, since before an employee as-

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4. Federal Employers' Liability Act—Injuries to section man while going to work—Assumption of risk—Refusal of requested instruction.

In an action against a railroad company by a section man employed by it for personal injuries sustained by plaintiff when, in going to work, he stepped from the one of the defendant's two double tracks, on which he was walking, onto the other of such tracks for the purpose of permitting a train to pass and was struck and run over by an engine, backing on the second track, held that even conceding that the Federal Employers' Liability Act applied, it was

sumes the risk arising out of the negligence of a fellow-servant, he must have known of such conduct or it be so customary that he should be charged therewith, and appreciate or bound to appreciate the danger. Panhandle & S. F. Ry. Co. v. Fitts, — Tex. Civ. App. —, 188 S. W. 528 (1916).

D. Unshored cut in embankment.

The plaintiff's decedent, at the time of the accident, was engaged in cutting through a fill, which was to make place for a wooden bent which, with another on the north side of the abutment, was to hold up the track and bridge while the abutment was removed and another permanent structure was built in its place. The face of the fill was shored up and planks were placed uprightly against the face of the cut and braced by crosspieces running from the face of the planks to the face of the abutment. That traffic might not be interrupted, strong stringers were introduced under the ties to hold up the tracks, the ends on one side resting on the abutment, and on the other side, on the roadbed itself. At the time of the accident, the excavation had been carried to a point about under the track and about 10 feet of the distance had been left unshored. About three-quarters of an hour after a train had passed over the tracks, the debris over the place where the deceased was working fell upon him, causing his death. There was evidence to the effect that the fill caved in because of the jar of the train passing over the track above. Upon a verdict of $9,750, a judgment of $6,750 was entered, from which the defendant appealed. The court affirmed the judgment, holding that the question as to whether the deceased, with his limited experience in such work, appreciated the danger of working in the place without the fill properly shored, and therefore assumed the risk, was a question that was properly submitted to the jury. As the court pointed out, the employee had the right to act upon the presumption that his employer had furnished him a safe place in which to work and suitable appliances, and did not assume the risk of negligence on the part of the employer in this respect until he became aware of it, and it must appear that he not only had, or was presumed to have had, knowledge, but that he knew his danger and ought to have appreciated it, and consciously assumed it. The court further pointed out that the case in question was different than the ordinary ditch case, where an employee makes his own work place as he excavates, and thus assumes the risk of negligent work, since possible negligence of the deceased and his fellow workmen in failing to shore the banks was only one factor in the resulting accident, the negligence of the defendant in running trains over the fill while it was being made contributing likewise to the injury, and being a factor over which the deceased had no control. Cincinnati, N. O. & T. P. Ry. Co. v. Hall, 155 C. C. A. 606, 243 Fed. 76 (1917).

E. Overhang of sand bank.

The plaintiff's decedent was engaged at the time of the accident

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not error for the trial court to refuse defendant's requested charge that, "If the plaintiff in getting off the track on which he saw a train approaching could with safety and reasonable convenience have stepped to the right or south of such track, and by his own choice stepped onto a parallel track and was struck by a train on such parallel track, he assumed the risk of such choice," since such request failed to call attention to the circumstances under which the testimony tended to show the plaintiff was using the tracks at the time and the knowledge of conditions which should have been taken into con-

in cutting down a sand bank and loading the sand therefrom, by the use of wheelbarrows, into railroad cars. The sand bank was from 15 to 20 feet high, and to get the sand from the bank, men went to the top and prized it off with crowbars, thus causing the clay and earth and sand to "cave." In prizing off the top of the bank, at which the deceased worked several days before the accident, a clod of mixed clay and sand was left sticking out from the face of the bank about 4 feet. The clod did not present a dangerous appearance, and for that reason was left undisturbed. The deceased was killed by the clod in question breaking off and falling upon him while working at the foot of the bank in removing the sand. It appeared that it was the duty of all the men, especially of such men as the deceased who were the older men on the force, to keep the bank "prized" down. From a judgment for the plaintiff, the defendant appealed, contending that the trial court erred in refusing to set aside the verdict as against the law and evidence. The court, in reversing the judgment and remanding the case, held that the injury resulted from a risk which was inherent in the employment, which the deceased understood and which it was his duty to remove if he thought danger existed therefrom. Norfolk & W. Ry. Co. v. Tucker's Adm'x, 120 Va. 540, 91 S. E. 614 (1917).

F. Space between lumber being unloaded.

The plaintiff was employed to unload lumber from cars stationed near the car shops and carry it to a point near by where it was deposited until used in manufacturing grain doors with which to cooper box cars holding grain. The lumber in the car being unloaded at the time of the accident was loaded lengthwise into both ends of the car and piled crosswise at the doorway. One end had been unloaded during the morning, and before work had been resumed in the afternoon, the car had been switched in the presence of the plaintiff, and been handled very roughly. Thereafter, he mounted the car, walked to the far end, and was returning to the door with an armful of lumber, when he fell into a hole between the lumber lying lengthwise of the car and that lying crosswise. The hole in question it appeared had been created as a result of the shifting of the lumber in the rough handling during the switching operation. The plaintiff testified that he was standing near the car at the time it was switched and appreciated the force of the impact given the car. From a verdict and judgment of $1,700 for the plaintiff, the defendant appealed. The court, in reversing the judgment and ordering the same to be entered for the defendant, held that the plaintiff assumed the risk of working in the car after knowing that the car had been bumped and the lumber probably shifted. Gulf, C. & S. F. Ry. Co. v. Drennan, — Tex. Civ. App. —, 204 S. W. 691 (1918).

G. Loading coal.

1. Rotten floor of coal chute.

The plaintiff, employed to coal en-

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sideration in order to attribute assumption of risk to him, and failed to take into account the undisputed testimony that the engine ran into him without signal or warning to him, and was more properly applicable to the defense of contributory negligence, concerning which the court must be presumed to have given proper instructions.

Writ of error to review the judgment in favor of the plaintiff

gines at a coal chute of the defendant railroad, was ruptured and internally injured when the floor, which was rotten, gave way under the wheels of the coal cart which he was pushing. The defendant filed a plea alleging in the alternative that the plaintiff either knew of the defect or negligently failed to discover the same. From a judgment for the plaintiff, the defendant appealed. The court, in reversing the judgment and remanding the case for new trial, held that the defense of assumption of risk was still open to the employer under the Federal Employers' Liability Act, and since contributory negligence was not a complete bar to recovery, as was assumption of risk, the plea in question, being one of contributory negligence as much as assumption of risk, was demurrable as a plea of contributory negligence. Southern R. Co. v. Peters, 194 Ala. 94, 69 So. 611 (1915).

2. Space between.

One of the duties of the plaintiff was to shovel coal into the tender of a switch engine. In attempting to step from the tender of the engine on to the edge of a plank, which was the near side of the coaling dock, and to walk the plank over to the place where he would begin shoveling the coal into the tender, he lost his footing and fell between the tender and the coal dock for a distance of about 3 feet. Though he was able to get up and walk home, he was severely injured. From a verdict and judgment of $10,000 for the plaintiff, the defendant appealed. The court, in reversing the judgment and dismissing the action, held that the injury was not occasioned by the negligence of the defendant or any of its employees. On petition for a rehearing, the court adhered to its previous decision, and pointed out that the common-law defense of assumption of risk was still open to the defendant, except in case of violation of a statute passed for the protection of employees. Vanevery v. Minneapolis, St. P. & S. S. M. Ry. Co., — N. D. —, 171 N. W. 610 (1918).

H. Gas in tank car being repaired.

The plaintiff's decedent, a boiler maker, was, at the time of the injury, engaged in riveting a grab iron to an oil tank car. His helper had gone into the car to hold the bolts of the grab iron, but because of the gas therein had been compelled to come out at once. Several other workmen then tried to do the work inside the car, but were unable to remain therein. The deceased then entered the car and directed that a red hot rivet be dropped to him inside the car. As this was done an explosion occurred, which started a fire that burned the deceased so badly before he could be removed from the car that he died soon after. A compressed air hose lay near which the deceased might have used to blow out the tank had he so desired. The trial court, after a verdict by the jury for $7,500, sustained a demurrer to the evidence, and the court, in sustaining such a decision, held that the deceased assumed the risk, even if it was conceded that the defendant

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in an action by a section man against his employer, a railroad company, for personal injuries. Affirmed.

For plaintiff in error—C. E. McBride (N. M. Wolfe, on the brief).

was negligent, and that the deceased did not know of the danger of explosion when he went into the car. The court said: "If the servant has full knowledge of all the physical conditions, he is chargeable with knowledge of all the resulting dangers proximately resulting therefrom which would be obvious to a man of ordinary care and prudence. He need not have had in mind at the time he assumed the risk the particular danger which subsequently resulted in his injury." The court further held that where the master and servant were possessed of equal knowledge or means of knowledge of defects or dangers, or were equally ignorant, the servant assumed the risk, but where the master knew, or should have known of dangers of which the servant was ignorant, and of which he was not under an equal obligation to know, there was no assumption of risk. Houston's Adm'x v. Seaboard Air Line Ry., 123 Va. 290, 96 S. E. 270 (1918).

I. Cars and engines.

1. Cars without stakes.

The plaintiff was one of a number of men engaged in loading rails upon a flat car. There were about 80 rails, four or five of which were more or less bent and crooked. Stakes had been placed at the west end of the car and also upon the further side. The end of a rail in being loaded was placed behind the stakes on the west end of the car and was then thrown upon the east end. When one of the crooked rails was thrown in this manner it bounded back and injured one of the muscles of the plaintiff's legs. The plaintiff admitted at the trial that he knew the rails might fall back, but the complaint nevertheless alleged negligence on the part of the defendant in its failure to place a stake at the east end of the car to prevent the rail from falling back and off the car. The question of negligence and assumption of risk was submitted to the jury and a verdict was recovered by the plaintiff. From judgment thereon, the defendant appealed. The court, in reversing judgment, held (1) that the defense of assumption of risk as it existed at common law was open to the carrier since there was no contention that the failure to provide the stake was a violation of the Safety Appliance Act or any other federal statute; (2) that the provision of the Oklahoma constitution providing for the submission of the question of assumption of risk to the jury was applicable to a suit brought under a federal statute; (3) that as a matter of law the plaintiff assumed the risk of injury incident to the failure of the defendant to supply the stake in question, conceding such to be negligence. As the court pointed out, the plaintiff was of mature years, had worked as a section hand, and knowing the risk arising from the alleged negligence, went ahead with the work without protest. Chicago, R. I. & P. Ry. Co. v. Jackson, — Okla. —, 160 Pac. 736 (1916).

The plaintiff was employed by the defendant to operate the mechanical loader used by a train crew in loading steel rails upon flat cars. Just previous to the accident, the con-

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For defendant in error—W. S. Kerr.

Byron B. Marietta brought this suit against the Erie Railroad Company, to recover damages for injuries alleged to have been caused to him by the negligence of the Company. He died pending this

ductor had given an order for the work train to be pulled upon a siding in order to make way for a passenger train. The train had been started so suddenly that the plaintiff had no time to fasten the boom of the loader and thereby prevent it from swinging from one side to another. He started for the caboose, but the conductor ordered him back to the loader to fasten the boom. This he proceeded to do, but in the meantime the train had gained such momentum that he could not safely alight and catch the caboose. As a result, he sat down on the edge of a flat car between the loader and the car upon which had been loaded a number of steel rails. While in such a position, the rails began to fall off, as a result of no standards having been placed on the sides of the car, and plaintiff, to avoid the greater hazard of being hit by a falling rail, jumped to the ground and sustained the injuries in suit. The plaintiff testified that he did not observe the absence of standards upon the car, and it appeared that as they were of a height not exceeding 12 inches they were not conspicuous to one not looking for them. Such standards were always placed on such cars before they were moved, but the duty of performing such work was not connected in any way with the duties of the plaintiff. From a judgment entered on a verdict directed for the defendant, the plaintiff appealed. The court, reversing the judgment and remanding the case, held that the absence of the standards was not under the circumstances so plainly observable that the plaintiff could be said as a matter of law to have known of the condition and assumed the risk—such question being one that should have been submitted to the jury. The court also pointed out that where a servant was injured in interstate commerce, the question of assumed risk was to be determined in accordance with the Federal Employers' Liability Act and the common law as recognized by the federal courts, and that though an employee assumed risks of danger ordinarily incident to the employment, he did not assume the risk of negligence on the part of the employer, unless he had knowledge thereof or in the exercise of ordinary care might necessarily have acquired knowledge thereof. Hargrove v. Gulf, C. & S. F. Ry. Co., — Tex. Civ. App. —, 202 S. W. 188 (1918).

2. Hole in car roof.

The plaintiff, a yardmaster, was at the time of the accident walking on the top of one of the cars of a train which it was his duty to place on a certain track. The track was a little rough, and the motion of the car made him misstep from the running board to the side of the car. As he made the step he saw there was a plank off of the roof. He tried to overstep the hole, but in doing so he slipped and fell to the ground, receiving serious injuries. The dispatcher in advising him to place the train did not inform him that the train was composed of bad order cars, and of this fact the plaintiff knew nothing. The trial court instructed the jury that while a servant assumed all the ordinary risks incident to his

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proceeding in error and the case was revived in the name of his administratrix. Marietta was what is known as a section man in the employ of the Company, and had been such for a period of about four weeks before the injury happened. It was his duty to work on the track of the Company wherever directed by the

employment, yet a master was bound to exercise care to avoid injuries, and if the yardmaster stepped in the hole in the roof of the car and was thrown to the ground and injured, and the railway company, though knowing of the condition of the car, which was unknown to the yardmaster, failed to exercise ordinary care to protect him, the verdict should be for the plaintiff. The court, in affirming a judgment for the plaintiff on appeal by the defendant, held the instruction was proper, and that while members of a train crew assumed the risk of injuries from the bad order cars, as it was necessary to transport them to shops for repairs, that rule did not apply to a person working in a railroad yard, such as a yardmaster like the plaintiff. St. Louis Southwestern R. Co. v. Ellenwood, 123 Ark. 428, 185 S. W. 768 (1916).

3. **Engine cab floor.**

The plaintiff, a fireman, was, by reason of the defective condition of the floor of the engine cab and of the water tank, thrown against the side of the engine, sustaining as a result a severe rupture of the right groin. The plaintiff was making his first trip upon the engine in question. During the outgoing trip, he discovered the defects alleged to have caused the injury, and reported them to his immediate superior, the engineer. At the end of the run there was a roundhouse, where the repairs needed could have been made. On the return trip, the plaintiff was called on short notice, and had no opportunity to examine the engine until it had been started. He noticed finally that the intake valve had been wrapped as he had wrapped it the day before. He also raked in the grate and found that an angle bar had been placed over a hole therein. At the trial of the case, the jury were instructed that an employee did not assume risks created by the master's negligence. The plaintiff's whole complaint and evidence were based upon the theory of negligent failure to keep the engine in proper condition. From a verdict and judgment for the plaintiff, the defendant brought error. The court, in reversing judgment and remanding the case for a new trial, held the instruction erroneous in that it withdrew from consideration by the jury any assumption of risks created by the defendant's negligence which were known and appreciated by the plaintiff. "The true rule in that regard in the courts of the United States," said the court, "is that the servant assumes all the ordinary risks of his employment which are known to him, or which could have been known with the exercise of ordinary care to a person of reasonable prudence and diligence under like circumstances; and with reference to risks not naturally incident to the occupation, but which may arise out of the failure of the master to exercise due care in providing a reasonably safe place in which to work and reasonably safe appliances with which to work, the rule is that the servant does not assume such risks until he becomes aware of the defect or improper construction in the place or appliances

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section foreman on the section extending from Pavonia, in Richland County, Ohio, westward for a distance of several miles. The Erie Railroad Company was engaged in both interstate and intrastate commerce. The testimony shows that it was customary for the section foreman to direct Marietta where to work and to tell

furnished to him, and of the risks arising therefrom, unless such defect and risk are so patent and obvious that an ordinarily careful person would observe the one and appreciate the other.'' Chicago, R. I. & P. Ry. Co. v. Hughes, — Okla. —, 166 Pac. 411 (1917).

4. Slanting engine step.

Plaintiff was employed by the defendant railroad company as a machinist. His place of work was a roundhouse, where engines of defendant were stored when not in use. The engineer of the helper engine stationed at this point discovered that the sand pipe of his engine was out of order, and called upon plaintiff to repair it. In order to perform this service it was necessary for the plaintiff to climb upon the engine. In front of the engine there were steps leading from the ground up over the pilot to the running board. While repairing the engine, plaintiff made several trips up on it, and while coming down on the last trip he slipped and fell and so sustained the injury upon which this action was based. Plaintiff introduced testimony tending to show that one of these steps, the one upon which he slipped, slanted forward from one to one and a half inches. Defendant introduced evidence tending to rebut this contention of the plaintiff, and at the conclusion of all of the evidence defendant requested a directed verdict in its favor. The trial court having ruled in favor of defendant, appeal was taken, and on this appeal the contention was made by plaintiff, among other things, that the defect in question was one so patent that defendant was chargeable with notice thereof. Plaintiff, however, admitted that he was not aware of this particular condition until he had fallen. In affirming the judgment entered upon the directed verdict as above stated, the court held that if, as contended by plaintiff, the defective condition of the step was so patent as to be readily observed by every one, then plaintiff would be deemed to have assumed the risk incident to his employment, so that in any view of the case judgment of the trial court was correct. Barrett v. Virginian Ry. Co., 157 C. C. A. 23, 244 Fed. 397 (1917).

J. Unguarded machinery.

1. Gearing on pump engine.

The plaintiff, an employee of the defendant at one of its pumping stations, was caught in the unguarded gearing which connected the engine and the pump for supplying water for locomotives, sustaining the injuries in suit. The series of cogwheels which connected the crankshaft of the engine with the pumping machinery was usually guarded with cylindrical metal shields, but in order to make repairs, the guards had been removed. The repair man ordered the plaintiff to start the pump and then oil the shaft. As he was performing the latter operation the accident in question occurred. The plaintiff was not told that the guard had been removed, and he did not notice that it was not

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him on the previous day where to report for work on the following day. On the day before the injury was incurred, he was directed by the foreman to report at a point on the section about a quarter of a mile east of a certain tower, located upon the defendant's track. Early on the morning of the day of the injury, he started

in place. From a judgment for the defendant dismissing the complaint, the plaintiff appealed. The court, in reversing the judgment and granting a new trial, held that the question of assumption of risk should have been submitted to the jury, and that the evidence in favor of assumption of risk was not so clear as to entitle the defendant to a nonsuit and a decision that the risk was assumed by the plaintiff as a matter of law. Kelly v. Erie R. Co., — N. Y. App. Div. —, 177 N. Y. Supp. 278 (1919).

2. Set screws and crank on pump engine.

The plaintiff, a station agent, was required to also attend the pump house, some distance from the station, so that the water tank for locomotives would be kept filled. The water was supplied by a triple pump operated by a gasoline engine. The flywheel of the engine was about 6 feet in diameter, leaving the horizontal shaft connecting with the pump about 3 feet from the floor. Upon this shaft was the clutch by which the pump was set in motion, and between the clutch and the crank near the flywheel were two protruding setscrews. After starting the engine, the plaintiff turned down some grease cups on the pump. In order to throw the clutch to start the pump he had to pass near the shaft mentioned. He was in a hurry, and as he attempted to pass he lost his balance, either through a slip upon the greasy floor or a jerk by his coat being drawn into the flywheel or shaft, and in striking out to catch himself, his hand and part of his arm came between the crank of the shaft and top of the hood, entirely severing it from his body. It appeared that the setscrews and crank could have been guarded so as to fully protect from danger those who had to pass by. From a verdict and judgment for the plaintiff, the defendant appealed. The court affirmed the judgment, saying: "Had he been caught on the setscrews or got his hand between the guard and crank while working over, or with, the shaft, the legal inference might be conclusive that the risk incident thereto was assumed by him. But he had just turned some grease cups on the rear of the pump, and started to go to the front of the engine to throw the clutch in gear. In so doing it is easy to understand how the jury could find that in his hurry he either slipped on the greasy floor, or inadvertently and negligently came too near the shaft and flywheel. It does not much matter which, because the jury could well say neither came within the risks understood and appreciated by plaintiff; that it was an involuntary and unforeseen mishap. Both causes given for losing his balance may be referable to plaintiff's negligence rather than to an assumption of known and appreciated danger arising out of defendant's negligence. * * * And so it would be for the jury to say whether facts and circumstances proven establish contributory negligence or assumption of risk." Knapp v. Great Northern R. Co., 130 Minn. 405, 153 N. W. 848 (1915).

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from his residence to report to the foreman accordingly. It appears that at and near the place of injury the Company has a double track; that the north track is used for trains going west and the south track for trains going east; that the plaintiff in going to the place designated went upon the south track and was walking

II. Dangerous method.

A. Running train on unusual track.

1. Section hand struck while crossing track.

The plaintiff's decedent, a section hand, was struck and killed by a passenger train as he was leaving the footpath along the side of the tracks to cross the tracks to the tool shed where the men were required to assemble each morning. The track was doubled at that point, and trains going east ran upon the south track and those going west ran upon the north track. At this particular time, however, the passenger train in question, while going west, ran upon the south track due to a wreck and a necessary detour. The deceased before crossing the tracks looked west to see if any train was approaching from the usual direction on the south track, and as a result of having his attention directed to looking for a train from that direction did not see the approach of the engine from the opposite direction. Had he looked, however, such could have been seen for a distance of 2,150 feet, and at a distance of 850 feet he should have seen upon which track the train was approaching. He had been warned by his foreman when starting work to be on the lookout for trains running in either direction on either track, but during his 8 months of service only one westbound train had run upon the south track. It appeared that the engineer could not see the approach of the deceased due to the rounding of a curve near there, and the fireman, whose duty it was to have seen the deceased and give a warning signal was busy shoveling coal into the engine. The crossing signal at the nearest crossing had furthermore not been given. From a verdict and judgment of $1,300 for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that as the deceased never appreciated the danger to which he was exposed, and would have noticed the train had it been running at a reasonable rate of speed and on the proper track, he could not be considered as assuming the risk as a matter of law. In holding that the question of assumption of risk was properly submitted to the jury, the court pointed out that in actions in state courts based on the Federal Employers' Liability Act, procedure was to be governed by the law of the state, and that while what constituted assumption of risk was substantive law, the method of determining whether in a given case the employee assumed the risk was a question of procedure, which, according to the state law of Indiana, required the submission of the question to the jury. Pennsylvania Co. v. Stalker, — Ind. App. —, 119 N. E. 163 (1918).

See, also, Stool v. Southern Pac. Co., 88 Ore. 350, 172 Pac. 101 (1918).

2. Section hand struck while assisting surveyor.

The plaintiff's decedent, a section man, was working on the day of the accident with the road engineer, who was surveying and setting stakes with the view of improving a curve by a slight change in the track. The road

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eastwardly, when a passenger train bound east came upon this track, and to get out of the way of it he stepped over upon the north or west-bound track; that while walking on that track he was struck and run over by an engine which was running backward and in the opposite direction from that in which trains ordinarily ran upon

was double tracked at the point of the accident and, owing to a broken rail in the northbound track, a northbound passenger train was running at from 35 to 40 miles an hour on the southbound track. A few minutes before the approach of the train, the deceased had been sent north to a certain point to hold a rod by means of which the surveyor intended to take a back sight. While going north, and in a cut where he would have been able to see the train only 661 feet, the deceased was struck and killed. From a verdict and judgment of $3,000 for the plaintiff, the defendant appealed. The court, in affirming the judgment, said: "He assumed the risk of the occasional necessity to run trains on tracks intended for trains going in the opposite direction, but the risk assumed was subject to the limitation that such trains should be run with the care to be reasonably expected under such conditions. Whether this train was so run was * * * a question for the jury." Southern R. Co. v. McGuin, 153 C. C. A. 447, 240 Fed. 649 (1917).

B. Working without lookout.

1. Section hands.

The plaintiff's decedent was employed by the defendant as a track repairer, cleaning snow from the tracks and doing the work of a section hand. While at work upon the tracks he was struck and killed by a passenger train running about 40 miles an hour on its regular schedule time. The train could have been seen by the deceased for a distance of half a mile had he looked, and the whistle was sounded some distance away. Negligence was alleged in the failure of the railroad to furnish a man to keep watch and notify the deceased of the approach of the train. From a judgment entered on dismissal of the complaint on direction of the court, the plaintiff appealed. The court, in affirming the judgment, said: "The accident occurred in daylight, where the decedent by a glance could see a train approaching for a distance of half a mile, and we are fully persuaded that he knew and accepted all of the dangers of the employment, and that he was not exposed to any which did not come fairly within the scope of such employment." The court further pointed out that if trains were passing and repassing at intervals of a few minutes, the duty to furnish a watchman as alleged might have arisen, but on a single track railroad, with trains passing in only one direction at a time and at regular intervals indicated by fixed schedules, such a duty could not be said to exist. Ingham v. New York, O. & W. R. Co., 182 N. Y. App. Div. 112, 169 N. Y. Supp. 346 (1918).

2. Painter on bridge.

The plaintiff at the time of the accident was engaged in painting a bridge over which interstate trains passed. While working on a scaffold suspended from the top of the bridge, a wagon with a high top struck the plank from the scaffold on which the plaintiff was working, with the result that he fell to the floor below and was severely injured. From a judg-

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the north track. This engine had been detached from a train of cars and after pushing another train up a grade on the west-bound track was returning to its own train at the time of the injury. Marietta testified that he had no warning and did not see the approaching engine owing to steam and smoke from the passenger

ment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that there was evidence to support the finding of the jury that the plaintiff did not assume the risk. The court pointed out that negligence on the part of the defendant existed in its failure to keep a lookout and warn passing wagons not to injure the plaintiff by striking the scaffold upon which he was working, and as he was injured as a result of such negligence, which was not assumed in this case because of lack of knowledge of the approach of the wagon in question, he could not be held to have assumed the risk, merely because he assumed the risk of other negligence on the part of the defendant which did not cause the injuries in suit. The court further pointed out that the plaintiff assumed not only the ordinary risks incident to his employment, but also the risks arising from all negligence of the employer of which he had knowledge or must necessarily have acquired knowledge, while performing the duties of his employment with ordinary care. Texas & N. O. R. Co. v. Gericke, — Tex. Civ. App. —, 214 S. W. 668 (1919).

C. Insufficient help.

1. Lifting rails or timbers.

The plaintiff, who had worked for only a few months as a section hand for the defendant railroad, sustained a rupture while assisting two other men in lifting a rail weighing about 990 pounds upon a hand car 3 feet high. Previous to the accident, the plaintiff had assisted three men in lifting a similar rail without any serious consequence to himself. The work was done under the specific instructions of the foreman, who gave the order for the rail in question to be lifted only by the plaintiff and two other men, though it appeared that from six to eight men were often employed in such an operation. From a verdict and judgment for the plaintiff, the defendant appealed, contending that inasmuch as the plaintiff assisted in lifting the first rail, and later assisted in lifting the second without objection or protest, he must be held to have assumed the risk as a matter of law. The court, in affirming the judgment, held that the question of assumption of risk was properly left to the jury, and that since they were at liberty to find either way, their finding was not contrary to law. The court pointed out that actual ignorance of the particular risk on the part of the servant would not relieve him from the assumption of risk, unless his ignorance was excusable or the hazard required knowledge or observation not possessed by a man of ordinary observation, but that the mere fact that the plaintiff had just previous to the accident lifted a similar rail with the help of three men did not put the burden upon him of refusing to do a similar operation with the help of two men, or suffer the alternative of assuming the risk. Whether there was an assumption of risk under such circumstances, said the court, was a question for the decision of a jury. Sorenson v. Northern Pac. R. Co., 53 Mont. 268, 163 Pac. 560 (1917).

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train, which had just passed upon the other track. The engineer and fireman of the backing engine testified that they did not see Marietta until after he was run over by the engine and gave no signal or warning of its approach.

The case was brought, and by the state court was tried, under the

The plaintiff, at the time of the accident, was engaged with four other men, working under the direction of the foreman, in moving a bridge timber, weighing about 700 or 800 pounds, from one flat car to another. Across the end of the car and over which the timber had to be moved was a drain box, the top of which was about 2½ feet above the floor. Two of the men, one of whom was the plaintiff, were engaged in pulling at the front end of the timber, and the two others assisted by the plaintiff were pushing at the rear. When the center of gravity of the bridge timber passed over the drain box, the forward end dropped suddenly downward and forward, its weight jerking on the plaintiff, who had taken hold of it with a lug, resulting in a hernia or rupture. Negligence was alleged in using an insufficient number of men to move the timber and in moving it in the manner directed by the foreman. It appeared that the plaintiff had not handled timbers like the one in question before, did not appreciate the danger of handling it in the manner directed, or understand the number of men required to lift the timber over the drain box. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the question of assumption of risk was properly submitted to the jury. The court also pointed out that as the Federal Employers' Liability Act had taken complete control of the subject of the liability of interstate carriers by rail to their servants for injuries, the statute of Texas had no application, and the question of assumption of risk was to be determined solely by the federal statute and the common law as recognized by the federal courts. As to the defendant's assignment of error in the trial court's failing to give its requested instruction that, if plaintiff, by the exercise of ordinary care, could have known of the insufficiency of the number of men to perform the work, he assumed the risk, the court held that the instruction was properly refused, since the plaintiff did not assume the risks of negligence on the part of the employer until he became actually aware of them, or unless they were so plainly observable that he should be presumed to know of them. Panhandle & S. F. Ry. Co. v. Brooks, — Tex Civ. App. —, 199 S. W. 665 (1917).

The plaintiff, a section hand, sustained a rupture as the result of attempting to lift a certain section of defendant's track with insufficient help. The work was done at the direction of the foreman. The plaintiff in his declaration alleged that the foreman knew that insufficient help was being provided, but did not allege his own lack of such knowledge. Neither was such an allegation inserted in the amended complaint. From an order sustaining a demurrer to the declaration, the plaintiff appealed. The court, in affirming the order, held that the omission to allege lack of knowledge that insufficient help was being provided must be presumed to be intentional, and that the plaintiff relied upon his right to recover, notwithstanding he may have known of existing defects and assumed the risk of working there-

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state law. No objection reviewable in this court involves the correctness of the charge of the trial court submitting the questions of negligence and contributory negligence to the jury. The Company brings the case here because it contends that it alleged and showed that it was an interstate railroad, engaged in the carriage

under. As the court pointed out, the defense of assumption of risk still exists as at common law except where the violation of a federal statute by the employer has contributed to the injury, and that as the danger of overlifting was apparent to a reasonable man, the plaintiff must be presumed to have known of it and assumed the risk. Williams v. Illinois Cent. R. Co., 207 Ill. App. 517 (1917).

The plaintiff, at the time of the accident, was engaged in lifting heavy timbers, and placing them on a dump car to be used in the construction of a trestle. While lifting one of the timbers, the plaintiff strained his back through overexertion and was thereby injured. It was alleged that the crew was inadequate, and that the foreman negligently hurried the work. The trial judge nonsuited the plaintiff, on the ground that he was well aware that the help was insufficient, but continued to do the work assigned to him without complaint. On appeal by the plaintiff, the court affirmed the order of nonsuit, holding that as the master's breach of duty in failing to provide sufficient help was appreciated by the plaintiff, and he did not complain of such, but continued to work with knowledge of such fact, he thereby assumed the risk. Harmon v. Seaboard Air Line Ry. Co., — S. C. —, 96 S. E. 253 (1918).

2. Carrying ties.

The plaintiff, just previous to the accident, had been ordered by his foreman to remove certain rotten ties from a spur track and replace them with new ones, before the arrival of a freight train which was then in the block. The ties in question weighed about 400 pounds each and the plaintiff was furnished with no help other than a small boy of about 15 years of age. The plaintiff complained that the help furnished was insufficient, and though he had been told to hire additional help, such was impossible because of the low rate of pay which was offered. It was necessary that the work in question be done immediately. In carrying one of the ties to a spur track, the plaintiff stumbled and fell, sustaining the injuries in suit. It appeared that two and sometimes four full-grown men were required to handle these ties. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, said: "We think the motion to nonsuit was properly overruled. The plaintiff's evidence tends to prove that the defendant had furnished him insufficient help; that the roadmaster had ordered him to repair the track immediately, so that a waiting train could use it; that he could not get any other help, and that which he had was inefficient, and that the regulations of the defendant company in regard to pay was such as prevented the hiring of help that he needed, even if he had had the time to have gotten it. In any view of this evidence, we do not think that the plaintiff assumed the risk of injury on his own account." Cherry v. Atlantic Coast Line R. Co., 174 N. C. 263, 93 S. E. 783 (1917).

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of freight and passengers between States, and that the train of cars from which the engine which struck Marietta was detached and to which it was returning was engaged in interstate commerce; that inasmuch as he was a section man or track man, employed to work upon the track of an interstate railroad, and was

3. Running truck down slanting dock.

The plaintiff, at the time of the accident, was engaged in transferring certain oil cakes from the company's cars standing on the dock to a barge lying alongside of it. He was using a hand truck for this purpose. While engaged in this work the tide began to recede, causing the incline from the dock to the barge to become gradually more and more steep. While going down the incline with a load of about 700 pounds of cakes upon his truck, the plaintiff slipped and fell, one of the oil cakes toppling over upon him and fracturing his arm. Negligence was charged in the failure of the defendant to furnish additional help in the handling of the truck under the changed conditions. The plaintiff, however, testified that he appreciated the increased danger in handling the truck without assistance, but thought that he was strong enough to do so. From a judgment for the defendant upon a directed verdict, the plaintiff appealed. The court, in affirming the judgment, said: "A risk which is entirely obvious to the employee, and is fully appreciated by him, is an assumed risk under the federal statute, and that being so, the appellant, by his conduct in attempting to handle the truck without assistance, notwithstanding his knowledge of the danger of such an attempt, relieved the respondent from liability." Capan v. Delaware, L. & W. R. Co., 91 N. J. L. 164, 102 Atl. 661 (1917).

4. Train without brakemen.

Plaintiff was foreman of a wrecking crew employed by the defendant railroad. The wrecking train upon which plaintiff and his crew were employed consisted of a tool car, truck car, flat car, camp car and a derrick car. This train was to be moved from one place to another, and while it was out in service, as it was on the occasion of the accident in suit, it was occupied by the wrecking crew as their place of abode at all times when not actually at work, and in all of its movements, in shifting on the sidetracks or running on the road, it was in charge of and operated by a regular train crew, drawn by a regular locomotive engine. This train crew consisted of a conductor, an engineer, a fireman and two brakemen. Shortly prior to the accident in suit, the wrecking crew of which the plaintiff was in charge had been taken to a certain point on defendant's line to remove a wreck which was obstructing the track. This work having been completed at about the end of a day, the crew returned to the car to gather up their tools and to prepare supper, in preparation for an early departure to the division point, which they made headquarters. During the day a number of disabled cars had been taken from the wreck and assembled upon the track, and it was a part of defendant's plan that disabled cars and the five cars composing the wrecking train should be made up into a single train, and thus run into the division point. Preparatory to placing these disabled cars in the train, they had been coupled or chained together by the wrecking crew, with the aid of the train conductor and his train crew,

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proceeding to his work at the time of his injury, both parties were engaged in interstate commerce and the Federal Employers' Liability Act applied to the case, and that because of the refusal of the trial court to charge as to assumption of risk the Company was deprived of the benefit of that defense.

all under the general supervision of the plaintiff. While plaintiff and his men were in the wrecking cars preparing supper, the train conductor determined to start for the division point, but in this movement plaintiff and his crew took no part, it not being a part of their duty. It appeared that at this time two brakemen of the train conductor's crew were absent, but the conductor, nevertheless, undertook to move the train by the use of the locomotive engine, without the aid of the brakemen or any other person. The movement required the hauling of the train down a certain grade, and, because of the condition of the wrecking cars, it was impossible to control the movements of the train by the air brake, and in the absence of the regular brakemen there was no one to handle the hand brake upon the several cars. While the train was being operated down the grade in question, the train parted, and subsequently the rear part of the train crashed into the forward part from lack of control, causing so violent a collision that two of the wrecking crew were thrown many feet upon the floor of the car, others were knocked against the wall of the car, stoves and tables were wrenched from their fastenings, and heavy trucks were displaced and thrown from the flat car; in this accident plaintiff was injured. Suing under the Federal Employers' Liability Act, the plaintiff recovered a verdict and judgment for $7,500, from which defendant appealed. The principal contention upon this appeal was, that since the plaintiff knew of the unsafe condition of the cars, and especially the manner in which they were coupled together, in boarding the train and permitting himself to be carried thereon, plaintiff assumed all the risks incident thereto, so that the trial court should have directed a verdict in favor of defendant on this ground alone. At the trial, plaintiff testified that prior to the starting of the train he had warned the train conductor that it was dangerous to move the train down the grade above mentioned with the train in the condition it was and in the absence of the usual brakemen. It was made plain from the evidence that the wreck was not due to the manner in which the cars were fastened together, but to the absence of the brakemen, resulting in the lack of control of the train in moving down the grade, and the injury therefore, as the court pointed out, was due to the negligence of the conductor in bringing about a condition that plaintiff could not have reasonably anticipated. "This would be especially true," said the court, "when we consider, as we have already stated, that plaintiff was compelled to accompany the wrecking train from place to place under the direction of the defendant. At any rate, the question as to whether the defendant [plaintiff] assumed the risk was one for the jury to determine." Southern R. Co. v. Mays, 152 C. C. A. 91, 239 Fed. 41 (1916).

5. Removing posts.

The bridge crew of which the plaintiff was a member were engaged in removing a row of decayed piling from a trestle. A heavy timber had

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The Court of Appeals treated the case as one controlled by the state law, and held that the Employers' Liability Act did not apply, as in its view Marietta was not engaged at the time of his injury in interstate commerce, and affirmed the ruling of the trial in refusing the two requests to charge which are the basis of the assign-

been placed over the piling as a cap at the time it had been constructed, the two being held together by drift bolts driven through the cap and into the top of each pile near its center. The crew cut the piles off eight or ten feet below the cap timber, pulled the lower end of the upper piece free from the lower piece which was imbedded in the ground, and then worked the upper piece loose from the drift bolt which held it to the cap timber. The pile in question came loose from the drift bolt immediately when lifted from the stump in the ground by the plaintiff, and not, as he expected, only after effort on his part to work it loose. The wood around the drift bolt was rotten, and the top of the pile being cracked, consequently gave way with little or no resistance. The pile fell down upon him and dislocated his ankle. It appeared that the plaintiff did not look up to the top of the pile, though it was but two or three feet above his head, and the cracks in it could have been plainly seen had he looked. The complaint charged defendant with negligence in not giving warning of the danger and in failing to employ a sufficient number of men to do the work. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in reversing judgment and ordering the same to be entered for the defendant, notwithstanding the verdict, pointed out that the case in question did not come within the exception of the Federal Employers' Liability Act, depriving the defendant of the defense of assumption of risk, and the plaintiff, knowing that the timbers were decayed, and might be expected to fall before he expected them, and making no objection to the insufficiency of any help furnished, must be considered as having assumed, as a matter of law, the risk causing his injury. Marshall v. Chicago, R. I. & P. R. Co., 131 Minn. 392, 155 N. W. 208 (1915).

6. Loading heavy machinery.

It was part of the duties of the plaintiff, as brakeman on a local freight train of the defendant railroad, to assist in unloading and loading freight handled by the train. On the day of the accident only three men made up the crew, instead of four, due to the defendant allowing one of the crew to lay off. In loading binders at a certain station, the plaintiff was directed to work alone inside the car. Among the parts loaded was a box of heavy machinery weighing about 600 pounds. While the plaintiff was attempting to "walk" the box back into the car, it became overbalanced, and in falling over to one side of the car, caught and injured him. The plaintiff finished the work of placing the box in question without making any statement regarding his injury, but then required the conductor to give him the help of an extra man. He testified as to his knowledge that the box contained heavy machinery, and said he would never have attempted to handle it had he not thought he could do so successfully. From a judgment for the plaintiff, the defendant appealed. The court reversed judgment and remanded the case with instructions to dismiss the complaint, with

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ments of error in this court. These requests were: (1) "If the plaintiff, for his own convenience, voluntarily went along the tracks of the railroad, and this railroad was being at the time used and operated as a highway of interstate commerce, he assumed the risk and danger of so using the tracks"; and (2) "If the plaintiff in

the statement: "Where the uncontroverted evidence discloses the fact, as it does in this case, that the danger was apparent to an ordinarily prudent person, and that the services were rendered without complaint, the defense of assumption of risk is conclusively established, and there is no question for the jury, and the court should instruct the jury to return a verdict for the master." St. Louis & S. F. R. Co. v. Snowden, 48 Okla. 115, 149 Pac. 1083 (1915).

7. Hand car too heavy for crew.

The plaintiff, a section foreman, was returning with a crew of five section men from repairing the broken joint of a rail, when it became necessary to lift the car from the tracks to make way for an approaching freight train. While so engaged one of the men working under him staggered and gave down by reason of the weight of the car, thus throwing an extra weight upon the plaintiff and injuring the muscles and tendons of his back and spine. The negligence alleged was the furnishing of a hand car by the defendant which was too heavy for use by himself and only five section hands. Under the statute of Texas, the defense of assumed risk in a suit against a railroad by an employee does not exist, the facts constituting such a defense being admissible only upon the question of contributory negligence. Under the Federal Employers' Liability Act, the defense of assumed risk was available to the parties. Counsel for the plaintiff admitted that if the doctrine of assumed risk applied as a result of the plaintiff being engaged in interstate commerce at the time of the accident, that the defense was sustained by the proof. From a judgment for the plaintiff, the defendant appealed. The court, in reversing the judgment, held that the plaintiff was engaged in interstate commerce, that the defense of assumed risk was applicable, and that the plaintiff could not recover. Texas & P. Ry. Co. v. White, — Tex. Civ. App. —, 177 S. W. 1185 (1915).

D. Switching methods.

1. Switching from both ends of train.

Plaintiff was brakeman on a fast interstate freight train known as a manifest train composed of about 40 cars, which had just come into the terminal yard and was about to be taken forward. Shortly after the train had entered the yard, the yardmaster, whose orders plaintiff was bound to obey while in the yard, directed plaintiff to cut out three cars at the head end of the train, switch them on to a sidetrack and then back the engine up to the remainder of the train when it was ready to go ahead. Plaintiff proceeded to do as instructed, and was in the act of recoupling the engine to the train, when a collision took place, due to the fact that the yard crew, likewise under orders of the yardmaster, and with the aid of the yard engine, while engaged in switching cars at the rear end of the train, drove a cut of 29 cars into the standing cars of the train with undue violence. The result of this action was to drive the forward cars and the engine, although they were standing with brakes set, a distance

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getting off the track on which he saw a train approaching could with safety and reasonable convenience have stepped to the right or south of such track, and by his own choice stepped on to a parallel track and was struck by a train on such parallel track, he assumed

of 20 feet along the track. As the result of this collision plaintiff was knocked down and run over, sustaining serious personal injuries, including the loss of an arm. It appeared that the action of the yardmaster, in directing the yard crew to work at the rear end of the train while plaintiff and the road engine were switching at the head end of the train was due to his desire to hasten the outward movement of the train. There was considerable testimony adduced on the part of defendant, tending to show that it was customary in the yard in question and other division points to work both ends of a manifest train in this manner, and for the same purpose. In the action brought by the plaintiff, under the Federal Employers' Liability Act, to recover damages for his injuries so sustained, the issue principally litigated was as to the existence of a custom such as was before mentioned and as to plaintiff's knowledge thereof. It was the contention of the defendant, in this respect, that plaintiff knew of such custom and had taken part in this suit at other times, and was therefore to be charged with having assumed the risk of injury resulting because of such practice. In accordance with this theory, defendant requested but was refused an instruction to the effect that if the jury believed from the evidence that the method adopted by the defendant in making up the train on the occasion in question was the usual and ordinary method of doing this work, then plaintiff assumed all the risks incident to that method, and they should not find a verdict in his favor because of any injury received on account of said method of doing the work, even though it was the direct and proximate cause of his injury. The instruction given in lieu of this one refused was, in substance, that defendant had the right to adopt reasonable rules and regulations for the conduct and method of handling its trains in its yards, and of making up trains for their departure therefrom, and if the jury believed that the custom prevailed in the yard in question of making up the train from both ends at the same time, if they believed that such method was one that reasonably prudent and careful men would have adopted in the conduct of the business, then the plaintiff assumed the risks reasonably and usually incident to and arising from such method of making up trains. The appeal, both in trial court and the United States Supreme Court, turned upon the assigned error in refusing to give the requested instruction above stated, as well as in giving instructions last set out. On this appeal the argument for defendant was that an employee assumed the risks arising from the employer's method of doing the work, where the dangers were open, obvious, or known to the employee, even though they be due to the employer's negligence in establishing the method or system; that the customary method of shifting and coupling cars at both ends of a manifest train at the same time, without notice or warning to those working at the other end, was open, obvious, and known to plaintiff; and that he therefore assumed the risk of any injury from that source. In affirming the judgment of the trial

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the risk of such choice." The refusal to give these requests raises the only federal question in the case.

Conceding, without deciding, that the Federal Employers' Liability Act applied to the circumstances of this case, nevertheless the two requests were properly refused. A request to charge must

court, the United States Supreme Court held that it was not error to refuse to give the requested instruction, giving the following reasons: "(a) The evidence left it in doubt what method was adopted in making up the train in question and what was the usual and ordinary method, and the request therefore failed to define what state of facts should charge plaintiff with an assumption of the risk. (b) The request ignored the question whether plaintiff had knowledge or was chargeable with notice of the customary method. The argument in effect concedes what is plainly inferable from the evidence, that the danger to a brakeman at work in switching at one end of a manifest train, arising from switching operations conducted by another crew at the other end, is not among the ordinary risks of a brakeman's employment. But, if it was an unusual and extraordinary danger, plaintiff could not be held to have assumed it, in the absence of knowledge or notice on his part. To subject an employee, without warning, to unusual dangers not normally incident to the employment, is itself an act of negligence. And, as has been laid down in repeated decisions of this court, while an employee assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible, the employee has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work (and this includes care in establishing a reasonably safe system or method of work), and is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known of it. The employee is not obliged to exercise care to discover dangers not ordinarily incident to the employment, but which result from the employer's negligence. Texas & P. R. Co. v. Archibald, 170 U. S. 665, 671, 672, 42 L. Ed. 1188, 1191, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. Ed. 96, 100, 24 Am. Neg. Rep. 24, 15 Am. Neg. Rep. 230; Texas & P. R. Co. v. Harvey, 228 U. S. 319, 321, 57 L. Ed. 852, 855, 33 Sup. Ct. Rep. 518; Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 101, 58 L. Ed. 521, 524, 34 Sup. Ct. Rep. 229; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 504, 58 L. Ed. 1062, 1070, L. R. A. 1915 C 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915 B 475, 8 N. C. C. A. 834. (c) The request required defendant to be acquitted if the usual method of doing the work was pursued, irrespective of the question of the negligence of the yard crew in carrying it out. Negligence in the doing of the work was the gravamen of plaintiff's complaint, in his declaration as in his evidence, and defendant was not entitled to an instruction making the pursuit of a customary system decisive of the issue, without regard to whether due care was exercised in doing the work itself. Even if plaintiff knew and assumed the risks of an inherently dan-

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be calculated to give the jury an accurate understanding of the law having reference to the phase of the case to which it is applicable. Norfolk & Western Ry. Co. v. Earnest, 229 U. S. 114, 119 [57 L. Ed. 1096, Ann. Cas. 1914 C 172]. The first request simply asked a broad charge that if the plaintiff voluntarily, for his own

gerous method of doing the work, he did not assume the increased risk attributable not to the method, but to negligence in pursuing it. Had the instruction been given in form as requested, the jury, in view of the issue and the evidence, might easily have interpreted it as meaning that if defendant's employees usually and customarily made up trains in such a manner that by a violent collision produced by negligent switching operations at the rear end of a long train a brakeman engaged in the performance of his duties at the forward end, and having no notice or warning of the rear-end switching, was in danger of serious personal injury, there was no liability. This, of course, is not the law. Nor is the modification of the requested instruction a matter of which defendant may complain. The court evidently understood the request as meaning no more than what it said, and as not intended to embrace the hypothesis that plaintiff knew or had notice that the usual method of making up trains was that adopted on the occasion in question. In the absence of such knowledge or notice, the custom could not be made binding upon plaintiff; certainly not without a finding that it was one that a reasonably careful employer would have adopted. It was this finding that the modification called for." Chesapeake & O. R. Co. v. Proffitt, 241 U. S. 462, 60 L. Ed. 1102, 36 Sup. Ct. 620 (1916).

2. Shunting cars without warning.

The plaintiff's intestate, a freight conductor, was run over and killed while making up a train. The plaintiff alleged that his death was caused by the shunting of cars in upon him without any warning of their approach by the ringing of a bell or the blowing of a whistle, and by the failure of the defendant to promulgate rules forbidding the movement of cars in such a manner. A rule promulgated by the defendant required that whenever cars were pushed by an engine (except in shifting and making up trains in the yard), a flagman must take a conspicuous position in front of the leading car. It appeared that the deceased knew of the existence of this rule, and also that it was not in force as to such work as he was engaged in at the time of his death—namely, yard work and the making up of trains therein. From a judgment for the plaintiff upon a verdict and from an order denying defendant's motion for a new trial, the defendant appealed. The court, in reversing the judgment and granting a new trial, held that the deceased took his employment knowing the rules of the defendant railroad, that a flagman was not required to ride on the front of a car being pushed by an engine, and consequently must be deemed to have assumed the risks growing out of the application of the rule. Swartwood v. Lehigh Val. R. Co. (N. Y. App. Div.), 155 N. Y. Supp. 778 (1915).

E. Repairing cars with inadequate facilities.

The plaintiff, a car repairer, while endeavoring to lift the coupling of a car which had dropped below standard height, in order to bolt it in

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convenience, went upon the tracks of the railroad, and the railroad was at the time being used and operated as a highway of interstate commerce, he assumed the risk and danger of so using the tracks. This request omitted elements essential to make assumption of risk applicable to the case. It failed to call attention to the

place, received the injuries in suit. No jacks were furnished him with which to do the work, though he had frequently requested them of the yard foreman and a promise had been made that they would be furnished not more than 3 weeks before the injury. From a nonsuit and judgment for the defendant, the plaintiff appealed. The court, in reversing the judgment, held that the question of assumption of risk by the plaintiff was a question for the jury. "It is the settled law of this state," said the court, "that the servant assumes the ordinary risk incident to his labor, but he does not assume such risks as may be caused by the master negligently failing to furnish suitable appliances to perform his work; but, if the servant continues in the service with knowledge of such defective appliances, he is deemed to have waived the master's negligence and to have assumed the risk in spite of the master's negligence; but if he complains of and calls attention to the defect, and there is a promise on the part of the master to furnish suitable appliances, as it is his duty to do, and the employee while remaining thereafter in the master's service is injured, it is a question for the jury to determine whether the employee, by remaining in the master's service, assumes such risk." Lorick v. Seaboard Air Line Ry. Co., 102 S. C. 276, Ann. Cas. 1917 D 920, 86 S. E. 675 (1915).

The plaintiff at the time of the accident was engaged with a co-worker in repairing iron ore cars. While using a jack for the purpose of pressing back a steel sheet forming the side and bottom of one of the cars, the jack sprung out of place, with the result that the bar which was used to turn it struck the plaintiff and severely injured his right shoulder. The plaintiff alleged the work could not be safely done in the manner required by the defendant; that a safe place in which to work and suitable appliances were not furnished by the defendant; and that the work in question should have been done only in regular car repair shops. The trial court directed a verdict for the defendant, and from judgment thereon the plaintiff appealed. The court affirmed the judgment, holding that the plaintiff, as a matter of law, assumed the risk. The court further pointed out that, under the Federal Employers' Liability Act, the elimination of the defense of assumption of risk in any case where the carrier's violation of any statute enacted for the safety of employees contributed to the employee's injury or death, evidenced the legislative intent that in all other cases assumption of risk was still to be a defense. Smiegil v. Great Northern R. Co., 165 Wis. 57, 160 N. W. 1057 (1917).

F. Use of paint gun without guard.

The plaintiff, a painter, had worked for a number of months with a spraying appliance, called a "paint gun." This paint gun consisted of a tin can which held about a gallon of paint, having certain appliances attached to the can by means of which the paint was sprayed upon the cars and engines. This was applied by means of air pressure, and in the operation of the

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circumstances under which the testimony tended to show the plaintiff was using the tracks at the time, and the knowledge of conditions which should have been taken into consideration in order to attribute assumption of risk to him. It failed to take into account the undisputed testimony that the engine ran into Marietta

machine it scattered paint around and upon the operator, and enveloped him in a mist or fog created by this spray, which he was obliged to breathe while using the instrument. The mist was highly poisonous, and after a number of months the plaintiff became very sick, sustaining the injuries in suit. The defendant knew that the mist was poisonous, and that a nose guard was obtainable which would in large measure have lessened the harmful character of the work. The plaintiff, however, not only did not know of the existence of such a nose guard, but did not know that the mist was poisonous. From a verdict and judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the instruction to the jury was correct which informed them that if the danger and risk of injury to the plaintiff's health in the use of such an appliance without the nose guard was so obvious that an ordinarily prudent person would have observed and appreciated it, the plaintiff must be considered as assuming the risk of injury. Baltimore & O. R. Co. v. Branson, 128 Md. 678, 98 Atl. 225 (1916).

G. Breaking boards with foot.

The plaintiff, a common Mexican laborer in the defendant's repair shops, while engaged in cutting boards with an ax for use in the furnace, was ordered by his foreman, who took the ax from him, to do the work by placing one end of the board on a tripod and breaking it with his foot. In breaking a brittle board in the manner directed, a splinter flew up and hit the plaintiff in the eye. The jury returned a verdict for the plaintiff, and found in answer to specific questions (1) that the method of doing the work directed by the foreman was more dangerous, (2) that the plaintiff did not appreciate the increased danger, and (3) that the danger of splinters flying up when a board was broken was not apparent to a man of the plaintiff's intelligence. The defendant moved for judgment on the findings which was overruled. The court, in affirming the judgment, said: "Here the jury have, in effect, found that the plaintiff with his degree of intelligence and his opportunity neither knew nor comprehended the danger of doing the work in the way directed by his foreman. Assumption of risk is a legitimate defense in such actions. * * * But we cannot, in the face of the record, assume or take judicial notice that the danger of obeying the order received was apparent and so appreciated or realized by the injured workman that he should fail of recovery because of the risk assumed by such obedience." Duran v. Atchison, T. & S. F. R. Co., 100 Kan. 189, 165 Pac. 653 (1917).

H. Handling cable of dirt plow on curve.

The plaintiff, a brakeman, was at the time of the accident working on a train made up of an engine and eight or nine flat cars, which was hauling and dumping earth and stone upon the right of way. The material was unloaded from the flat cars by the use of a plow, which was pulled

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without signal or warning to him. Under such circumstances the injured man would not assume the risk attributable to the negligent operation of the train, if the injury found it to be such, unless the consequent danger was so obvious that an ordinarily prudent person in his situation would have observed and appreciated it.

across the flat cars by a cable running to the engine, thereby throwing off the dirt and stone. The plaintiff had worked on the train less than two weeks and had never before seen the work done on a curve. The engine at the time of the injury had stopped on one end of a curve and had attempted to pull the cable attached to the plow while placed on the inside of the standards of the intervening cars. While the cable did not fly off of the standards, the pressure was so great as to overturn one of the flat cars. As this plan of operation seemed impractical, the cable was run between the standards on the flat cars until it came to the car next to the engine, when it was run on the outside of the car. While the plaintiff was standing on the inside of the curve relaying signals from the conductor at the rear of the train to the engineer, the cable flew off the cars and, assuming a straight line between the engine and the plow, struck and severely injured him. From a judgment for the plaintiff, the defendant appealed. The court, in reversing the judgment and granting a new trial, held that the instruction of the trial court to the jury to the effect that the plaintiff should recover if he did not know that the cable which slipped was not reasonably safe for the purpose for which it was being used, was erroneous as not stating that the plaintiff should not recover if the danger was so obvious that an ordinarily prudent person under the same circumstances would have appreciated it. The court pointed out, however, that the question of assumption of risk was properly left to the jury, since the defendant had never seen the appliance work while the train was stationed on a curve, and though he had seen a flat car recently overturned, the cable had not sprung from the standards holding it. It consequently could not be said, as a matter of law, that he should have known the cable would leave the standards, assume a straight line, and injure persons in its path. Louisville & N. R. Co. v. Henry, 167 Ky. 151, 180 S. W. 74 (1915).

I. Starting stationary gasoline engine.

The plaintiff, at the time of the accident, was operating a stationary gasoline engine used in connection with an air compressor to compress air used in riveting some parts of a bridge then being constructed. The plaintiff was in full control of the repair and operation of the engine, since all the foreman of the construction work did was to notify the plaintiff when he was ready for the machine to start. A pump was provided for use in starting the engine, but the plaintiff had been shown a new method of starting such an engine by the process of "rocking the wheel." In starting the engine by such a method, the plaintiff got one of his hands through the spokes of the large flywheel. When it started, his hand was caught against a longitudinal rod running from near the hub of the wheel to a connection beyond its rim, with the result that one of the bones of his forearm near the wrist was broken and his elbow slightly injured. From a verdict and judgment for the plaintiff in the sum of $1,500, the de-

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Chesapeake & Ohio Ry. Co. v. De Atley, 241 U. S. 310, 313, 314 [60 L. Ed. 1016]; Chesapeake & Ohio Ry. v. Proffitt, 241 U. S. 462, 468 [60 L. Ed. 1102], and cases cited.

The second request pertained to the conduct of the plaintiff, in view of the particular situation, and what he should have done to

fendant appealed. The court, in reversing the judgment with directions to direct a verdict in favor of the defendant, held that the plaintiff assumed the risk of placing his arm between the spokes of the flywheel when starting the engine. "In cases like this," said the court, "where the machinery is in the entire charge of the servant, and under his exclusive management and superintendency, he stands in the relation of vice-principal to his master, and under the facts of this case he assumes the risk growing out of his failure to properly repair or operate the machinery under his control." Cincinnati, N. O. & T. P. R. Co. v. York, 176 Ky. 9, 194 S. W. 1034 (1917).

J. Unloading unblocked log car.

The plaintiff, a car repairer, was at the time of the accident assisting in the rearranging of a load of logs which had spread so as to become too wide to pass through a subway of the defendant railroad. It was necessary to unload a part of the logs, and for this purpose the car was stationed upon a sidetrack and a Marion loader was stationed alongside. The duty of the plaintiff, who was upon the car, was to fasten tongs to the logs so that the Marion loader might lift them from the car. The complaint of the plaintiff alleged that the car was not blocked, with the result that the Marion loader gave it a sudden jerk, causing the plaintiff to be thrown from the car and become severely injured. The defendant contended that the fall was occasioned by the plaintiff's stepping upon a loose piece of bark. The jury found for the plaintiff under an instruction that if the fall was occasioned as described by the defendant there could be no recovery. Upon the question of assumption of risk, the jury were instructed as follows: "In order to charge a servant with assumption of risk, it is necessary that it be made to appear that the servant knew and appreciated the danger from which such injury resulted. Where a servant is ordered to do an act involving peril to himself, the order contains an assurance of safety, and the servant has a right to obey the order unless the danger is so open, obvious and imminent that no person of ordinary care and prudence would encounter it." On appeal by the defendant from judgment entered upon the verdict, the court affirmed the judgment holding that the instruction as to assumption of risk was correct. Jones v. Chicago, M. & St. P. R. Co., 102 Wash. 120, 172 Pac. 810 (1918).

K. Using pneumatic riveter without safety spring.

The plaintiff was a member of a gang of car repairers. The work of this gang involved the use of an ordinary type of pneumatic hammer designed for riveting sheets of steel. Each of the hammers comprised a cylinder barrel tapering towards the muzzle, with a grip handle and air connection at the rear end, and a plunger operating lengthwise through the greater portion of the barrel by means of compressed air. The hammers were provided with sets, each of which consisted of a cylindrical head

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protect his safety, considering his danger at the time, and is open to the same objections. This request did not cover the elements of assumed risk and was more properly applicable to the defense of contributory negligence, concerning which the court must be presumed to have given proper instructions to the jury.

Affirmed.

and shoulder, with a cylindrical extension fitting into the muzzle of the barrel and intended to be operated in connection with the plunger. The hammers were operated by one man, who, holding the hammer with the set pressed against the protruding end of the rivet and applying the air, completed the operation of forming another head on the rivet with the aid of a person located on the opposite side of the plates and pressing against the normal head of the rivet a device known as a "dolly bar." At the time of the accident certain patching work was being done to a hopper car. The plaintiff had been unable to remove a rivet with an ordinary steel punch and a hammer. As a result, the foreman grasped a punch in one of his hands, placed the head of one of the "sets" against the protruding rivet, and then ordered the plaintiff to turn the air into the hammer for the purpose of driving out the rivet. The plaintiff obeyed this order, with the result that the set was driven from the grasp of the foreman, and with the plunger against the side of the car, so that one or the other rebounded, striking the plaintiff under his left eye and driving a small piece of steel through his eye. As a result, the sight of one eye was entirely lost and that of the other impaired. It appeared that if a safety spring had been attached to the hammer, the set as well as the plunger would have been held in place when the air was admitted into the hammer. While the defendant had given an oral order that such safety springs should always be used, the rule had never been observed by the employees, and the defendant never went beyond simply providing them if they were requested. It appeared that the danger so far as observable was a danger to the foreman rather than to the plaintiff, who obeyed his orders. From a judgment for the plaintiff, the defendant appealed. The court, in affirming the judgment, held that the question of assumption of risk was properly left to the jury, as to whether the plaintiff knew of and appreciated the danger involved in turning the air into the hammer in accordance with the order of his foreman. Pittsburgh, C., C. & St. L. Ry. Co. v. Cole, — C. C. A. —, 260 Fed. 357 (1919). O. L. C.

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MALLOY v. CHICAGO GREAT WESTERN R. CO.

[Supreme Court of Iowa, January 27, 1919.]

— Iowa —, 170 N. W. 481.

1. **Release—Personal injuries—Basis of settlement—Statement of physician—Evidence.**

In an action against a railroad company for personal injuries sustained by a helper in a switching crew, in which action the defendant pleaded a com-

CASE NOTE.

Reliance upon mistaken or wilfully false statement of physician as to extent of injuries or progress towards recovery, as ground for avoiding release of right of action.

I. Passenger, 753-780.
A. Railroad, 753-772.
1. Company's surgeon at place of accident, 753-762.
2. Company's local physician, 762-768.
3. Company's hospital surgeon, 768-769.
4. Family physician also representing company, 769-770.
5. Medical gymnast representing company, 770-772.
B. Street railway, 772-780.
1. Company's local surgeon, 772-777.
2. Company's hospital surgeon, 777-780.
II. Employee, 780-819.
A. Railroad, 780-806.
1. Company's physician, 780-790.
2. Company's hospital surgeon, 790-805.
3. Specialist in company's service, 805-806.
B. Shipbuilding company, 806-808.
C. Mining company, 808-811.
D. Laundry company, 811-812.
E. Pile driver operator, 812-813.
F. Wire manufacturing company, 813-814.
G. Abattoir company, 814-819.
III. Miscellaneous cases, 819-821.

I. Passenger.

A. Railroad.

1. Company's surgeon at place of accident.

While riding as a passenger in one of defendant's cars plaintiff's legs were scalded below the knees by steam from a bursting steam heating pipe beside the seat occupied by her, and in the present action for damages therefor defendant pleaded a settlement which plaintiff sought to impeach by alleging that it was secured by false and fraudulent representations, misleading and deceiving her with reference to the extent of her injuries. After the injury plaintiff left the train at a station short of her destination and was met there by a physician summoned by defendant's agent who had been advised of the accident, and by the direction of the agent, on plaintiff's request, she was taken to a hotel, where the physician dressed her wounds and gave her some medicine, this being in the afternoon, and the same physician visited her the next day in the forenoon, again dressing her wounds, and was consulted as to whether she could proceed forthwith to her destination. He advised her that, while it would be better for her to wait another day, still, in view of her desire to reach home and allay the anxiety of her relatives, she might proceed with safety. In response to questions asked by her, the physician said that it would take the wounds 10 days to

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promise and release, held that under the evidence the jury might well have found that both the plaintiff and the defendant, acting through its superintendent, based their settlement on the statement by the defendant's physician that the plaintiff was all right "to go to work, now," that he was "all healed up," and that he was "just as good as ever."

2. **Release—Personal injuries—Rescission—Mistake of fact.**
A mistake of fact, to constitute the basis of rescission of a release for personal injuries, must relate to some present or past event.

3. **Release—Personal injuries—Rescission—Mistake of fact—Statements of physician.**
In an action against a railroad company for personal injuries sustained by

heal, and that she was suffering more from shock than from the burn, which he said was superficial. In the afternoon she was visited by the claim agent of defendant, accompanied by its local agent, and, after two interviews in which the extent of plaintiff's injuries was discussed and the opinion was expressed by the claim agent that the burns were superficial and would be healed in 10 days, the claim agent induced her to settle for $50, and sign a written release for that amount, which was paid, the agent telling her at the same time that he was only authorized to pay her $40, but that he would give her the remaining $10 out of his own pocket. The false and fraudulent representations relied upon to defeat the settlement were the false statements of the physician and the claim agent that the burns were superficial and would heal in 10 days, whereas in fact they were more serious than represented and did not heal for more than 2 months, and left permanent scars, which continued to be more or less troublesome to plaintiff until the trial, 18 months after the injury. After the settlement plaintiff left on a late night train and reached her destination the next morning at 2 o'clock, waited in the station until 7 or 8, and then went to the house of a friend where she spent the day in bed, and on the evening of that day drove about 20 miles into the country in an open rig, spending the balance of the night with a neighbor and arriving at her own home in the evening of the day following. She procured no medical advice or assistance at the city which was her destination, for the reason, as she said, that she thought if her injuries would be healed in 10 days she did not need the services of a physician, and after reaching home she treated the injuries with liniment for something like a month, when she called a physician, who found suppuration of the wound and treated her therefor for about a month, when the wounds had healed, leaving scars which her physician testified were little more than superficial and showed no traces of any continuing diseased condition. The court said it might be conceded that the physician called by the station agent was defendant's representative in such a sense that any false or fraudulent representations made by him to plaintiff as to the nature of her injuries were the false and fraudulent representations of defendant, but that there was not the slightest indication in the evidence that what the physician said to plaintiff was with a fraudulent purpose of enabling the claim agent to subsequently effect a settlement on the false assumption that the burns would be cured in 10 days, and that the fact that plaintiff did not recover within 10 days, as suggested by the physician, was explainable quite as satisfactorily by proof of her subsequent conduct, as on the theory that the statement was intentionally false, and that there

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a helper in a switching crew, in which action the defendant pleaded a compromise and release, held that the statements of the defendant's physician that the plaintiff was all right "to go to work, now," that he was "all healed up," and that he was "just as good as ever," related to the present and described the plaintiff's condition in apt language as it then was, and that they were statements of facts and were intended as such, so as to render a mistake on the part of the physician in the matter ground for rescission of the release.

4. Release—Personal injuries—Mutual mistake—Trial of issue at law.
The issue as to whether a release for personal injuries was the result of mutual mistake is triable at law.

was no indication in her evidence that her wounds would not have been completely healed within 10 days had they been properly treated. It was held to be error to submit to the jury the issue of whether the release was binding on the plaintiff, and the judgment of the trial court was reversed. Kilmartin v. Chicago, B. & Q. R. Co., 137 Iowa 64, 114 N. W. 522 (1908).

Plaintiff recovered judgment against defendant for injuries sustained while she was a passenger on a railroad. Defendant's answer alleged that plaintiff, for a valuable consideration, settled and released her claim for her injury, and plaintiff replied that the settlement was procured by fraud. The evidence tended to establish that plaintiff was injured in defendant's yard while a passenger on one of its trains; that the injuries were caused by the jerking or bumping of the car in which she was riding; that she signed a train conductor's report of the accident, and that the employee who procured this report told her to go to see Dr. O, the company's physician; that when she reached the place where the physician had his office she went to see him and then claimed to be suffering; that he examined her, and told her that he did not find any bruise or permanent injury or broken skin, but that her neck was swollen, and directed her to go home and bathe her neck with hot water to take the swelling out, not making any charge for his services; that Dr. O was and had been for years the local physician for the railroad company; that several days after the examination was made the claim agent of the defendant went to the home of the plaintiff and on paying her $5 procured her signature to a release, stating to plaintiff at the time the release was obtained that it was for the injury sustained up to the time of signing it, but that the case could be reopened if further injury resulted; that plaintiff relied on these statements, believing her injuries were not permanent, but later they proved to be serious and permanent. The plaintiff claimed that the release was procured by fraud and was signed by her under a mistake of fact, and was never intended to be a release for the damages on account of the injuries sustained by her. The court held that the findings of the jury supported her contention as to fraud and that the evidence sustained her position as to the mistake on her part and that the release was not intended to be a satisfaction for the damages for permanent injuries sustained by her; that she and Dr. O and the agent of defendant believed that the injuries were not serious or permanent; and that the evidence also tended to show that the $5 was a gratuity on account of the annoyance and inconvenience that she had suffered. The court said that, under these circumstances, the release was not binding. Defendant complained of the evidence of plaintiff concerning what Dr. O said at the time he examined

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5. Release—Personal injuries—Rescission—Offer to return consideration—Necessity.

Ordinarily, as a condition precedent to rescission of a release for personal injuries, an offer to return the consideration received is essential to the maintenance of the action, but where the amount paid is for some specified injury or for loss of time or the like, and it is sought in the action to recover for some additional injury not contemplated in the contract of release or for damages consequent on injuries necessarily excluded in computing the consideration paid for the release, as where such payment is for loss of time only, or specific items other than injuries on which the action is based, then and in any such event tender of return of the consideration is not essential to the maintenance of the action.

her, for the reason that he was not shown to have been acting for the company in making that examination. But the court said that circumstances were against the defendant on that contention, as plaintiff told Dr. O that she had been sent there by defendant's agent; that he examined her injuries but made no charge for his service; and that for a number of years he had been the company's doctor at that place; and therefore there was no error in admitting the evidence. Judgment for plaintiff was affirmed. Ladd v. Chicago, R. I. & P. Ry. Co., 97 Kan. 543, 155 Pac. 943 (1916).

Plaintiff recovered a judgment against defendant railroad company to compensate an injury sustained by her in a wreck while she was a passenger on one of defendant's trains. A few hours after her injury, while she was still en route to her destination, she compromised and settled her claim for damages for the sum of $10 and executed a release in full. Shortly after the accident a physician and surgeon representing the railway company examined all of the injured passengers and gave them such treatment as their condition required and the opportunity afforded. Plaintiff sustained an injury which later developed into hernia, and also an injury to her wrist, which immediately gave her considerable pain, but upon being examined by the doctor she told him only about her wrist, which he bandaged for her, and told her that she had only sustained a sprain, which was not serious, and that it would soon be entirely well. She testified that her injury made her sick to her stomach, but that the other pain which she suffered was not to be compared to the pain in her arm. Some hours later, and while still pursuing her journey, a claim agent representing the railway company asked to see and was shown her hand, and told her that he had talked with the doctor and had been assured that her hand would be all right, and said he wanted to pay her something on account of the delay she had sustained. She told him she did not want any pay if her hand got well, and that she signed a paper the exact nature of which she did not understand except that she knew it was a release of some kind. After plaintiff reached her home the hernia developed and a bursa or tumor developed on her wrist, which she still had at the time of the trial 13 months subsequently. Her doctor testified that the tumor was not serious, and could be permanently cured by a surgical operation, and that, if the operation was not performed, she would suffer but little inconvenience, excepting the disfigurement, and that many persons would prefer to go through life without having it removed. There was a judgment in favor of plaintiff for $1,500 and also in favor of her husband, who joined as a plaintiff, for $250. The court said that, as plaintiff made no state-

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6. Release—Personal injuries to railroad employee—Basis of payment—Loss of time—Evidence.

In an action against a railroad company for personal injuries sustained by a helper in a switching crew, in which action the defendant pleaded a compromise and release, held that the fair inference to be drawn from the evidence was that the payment on which the release was based was for loss of time.

7. Release—Personal injuries to railroad employee—Mutual mistake—Inquiry concerning consideration, etc.

In an action against a railroad company for personal injuries sustained by a helper in a switching crew, in which action the defendant pleaded a compromise and release, held that, though the release was general, covering injuries

ment to the doctor in regard to the injury which developed into the hernia, his statement to her that she would soon be well could not be considered as applying to that injury, and, serious as it proved to be, the court would be compelled to hold that the sum of money constituting the consideration for the release compensated that injury also, had the doctor's representation in regard to the injury to her wrist proven true. However, the court said, it was upon the assurance of the doctor and the reiterated assurance of the claim agent that he had himself talked with the doctor, and the belief inspired thereby that she had sustained only a slight and temporary injury to her wrist, that plaintiff made the settlement, and, while plaintiff's physician said that the injury to the wrist was slight and that the operation, if one was performed to remove the bursa, would not be a serious one, and that no great inconvenience or disfigurement would result if an operation was never performed, the jury might have thought otherwise, as a skilled and busy surgeon like the one who testified might regard slightly, and as of trivial importance, an operation of the kind which would have afforded plaintiff complete relief, the thought of it might have excited such trepidation in the mind of a nervous person as to make preferable the permanent inconvenience and disfigurement attendant upon a failure to have an operation performed, and therefore the court could not say that the jury was not warranted in finding that the doctor's representation was false when he stated that her injury was only slight and that her recovery would be speedy and complete, and that if there were such untrue statements she was not bound by the release. The court further said that, while it was no doubt true that in making up the verdict the jury awarded a larger amount for the hernia than for the bursa, the contract of release was an indivisible one, and, if binding at all, it barred any action, and if not fully binding it did not bar any part of the cause of action; and that it was not claimed that the damages were excessive if there was any cause of action. The judgment was affirmed. Chicago, R. I. & P. R. Co. v. Smith, 128 Ark. 223, 193 S. W. 791 (1917).

Plaintiff was injured by the derailment of one of defendant's cars while being carried as a passenger, and was taken to a hospital and there treated for 7 weeks by physicians employed by defendant. To plaintiff's complaint alleging negligence, defendant answered, denying negligence and setting up as a special defense a release and settlement given by plaintiff in consideration of the payment to her of $450, to which special defense she made reply, admitting the making of the release and the receipt of the money, but alleging that she was induced to accept the amount by reason of the false and fraudulent representations made to her by de-

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ries of every kind and nature and extending forever, inquiry concerning the nature of the consideration and for what computed was permissible and was not precluded by the terms of the release, based as it was on a mutual mistake.

8. **Release—Personal injuries to railroad employee—Pleading—Evidence.**
Where, in an action against a railroad company for personal injuries sustained by a helper in a switching crew, the defendant pleaded a compromise and release and the plaintiff's reply was in two counts, one pleading that the release was procured by fraud and the other that it was based on mutual mistake, held that, the reply having been in no manner assailed, all that was exacted was that the evidence be sufficient to carry either issue to the jury.

fendant's claim agent and defendant's physician as to her condition and as to the nature and extent of her injuries. The court said that the plaintiff had the burden of proving the charge that the defendant's agents—the doctors and the claim adjuster—deliberately and consciously misrepresented to plaintiff her physical condition with intent to induce her to make the settlement, and that she was thereby induced to make it, and that to prove fraud the evidence must be clear, precise and indubitable. The court further said that it could not be said that such evidence was presented in the case, as plaintiff herself testified only that the physician who had entire charge of the case, after her first day in the hospital, and during her stay there, stated as his opinion that her injuries were not serious, and while on the trial she claimed that she was, in fact, suffering from internal injuries, in at least two places in her brief it was said that defendant's physicians failed to discover such injury. The court said that clearly, then, the physicians were not and could not be guilty of fraudulent misrepresentation, and while, if they failed to discover such injuries, that might indicate negligence on their part, that question was no part of the issue made by the pleadings, and furthermore, as neither of the physicians who attended her for the defendant was present at the settlement, nor did they at any time take part in the negotiations for it, the attempt to invalidate the contract of settlement wholly failed, and defendant's motion for a nonsuit should have been sustained. The judgment was reversed and the case remanded. Denver & R. G. R. Co. v. Ptolemy, — Colo. —, 169 Pac. 541 (1917).

In Chicago, R. I. & P. Ry. Co. v. Johnson, — Okla. —, 175 Pac. 494 (1918), it appeared that plaintiff received injuries while traveling as a passenger upon one of defendant's trains, and within a short time after the accident she signed a release and settlement whereby, in consideration of $400, she released and discharged defendant from all claims by reason of the injuries. Subsequently this action was brought, and plaintiff recovered judgment for $2,100, and on this appeal, brought by defendant, the principal question was whether there was sufficient evidence to submit the case to the jury on the question of fraud in procuring the release relied upon by defendant, there being no dispute that plaintiff's injuries were caused by defendant's negligence, nor any question presented as to plaintiff's status as a passenger or the defendant's duty towards her as such. It appeared from the evidence that a few minutes after the collision Dr. R, the regular company's physician, visited plaintiff, and was shortly followed by Dr. H, both of whom were called by defendant, examined plaintiff, and were informed at the time she was pregnant. After the examination each informed her that her in-

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9. **Appeal—Failure to urge question below—Inconsistency in pleading in avoidance of release for personal injuries.**

Inconsistency in pleading both fraud and mutual mistake in avoidance of a release for personal injuries cannot be urged for the first time on appeal.

10. **Release—Personal injuries to railroad employee—Basis of settlement—Statements of physician—Fraud—Sufficiency of evidence.**

In an action against a railroad company for personal injuries sustained by a helper in a switching crew, in which action the defendant pleaded a compromise and release, held that it would seem that the evidence was sufficient to carry to the jury the issue of fraud in the statements of the defendant's physician on which the release was based.

juries were slight and that she would soon recover, and Dr. H left, and about an hour and a half later Dr. R made another examination, and stated that plaintiff would suffer no serious result from her injuries; that there would be no danger of having any bad trouble; that the muscles and leaders of her neck and back were strained; and that there was no danger of a miscarriage because, if she was going to have one, she would be suffering with abdominal pains. Negotiations were opened for settlement by Dr. R, who offered $200, and Dr. R, the husband of plaintiff and defendant's claim agent went to the smoking compartment to negotiate for a settlement, plaintiff's husband stating that he did not want to settle then, but desired to wait until the result of his wife's injury could be ascertained. The claim agent and Dr. R both insisted upon and urged an immediate settlement, and Dr. R stated to the husband that he regarded $200 a fair settlement, and told the husband that he could put the utmost confidence in what he told him, as he would advise him in the very best way he knew how, and that he need not worry about a miscarriage, and repeated that if plaintiff was going to have one, she would have been suffering with pains by that time. The claim agent offered $250, saying that he was going to be liberal, and Dr. R seconded the offer by advising the husband that if R's own wife were the one injured he would consider $200 a good settlement. Dr. R took part in all the negotiations, urging and insisting that an immediate settlement be made, and accompanied the husband and the claim agent to plaintiff's berth, where the release was signed, leaving the train with the claim agent as soon as the instrument was signed. Plaintiff suffered a miscarriage about 30 days later. The court held that that evidence was sufficient to warrant the court in submitting the case to the jury, and to sustain the verdict finding that the release was obtained by fraud, saying that the assertion by Dr. R that plaintiff was but slightly injured, and that the absence of pains after the injury indicated that there would be no miscarriage, was a false statement of a substantive fact. The physicians examined on behalf of plaintiff testified that the absence of pain was no indication upon which to base such a prognosis, and Dr. R himself admitted upon cross-examination that the absence of pains was not a sufficient basis for the prognosis and admitted that he knew plaintiff might have a miscarriage. The court also found that the representation made by Drs. H and R were believed by plaintiff and her husband, who relied upon them and were induced thereby to sign the release, which they would not have signed otherwise. In speaking of the duty of the physician, the court said: "It was his duty to express an honest opinion, according to his best learn-

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11. Release—Personal injuries to railroad employee—Fraud—Mutual mistake—Direction of verdict for defendant.

Where, in an action against a railroad company for personal injuries sustained by a helper in a switching crew, the defendant pleaded a compromise and release and the plaintiff replied by pleading both that the release was procured by fraud and that it was based on mutual mistake, and there was no motion to require the plaintiff to elect on which of such issues he would stand and the evidence sustaining either was sufficient to carry it to the jury, it was error for the trial court to direct the return of a verdict for the defendant.

Action against a railroad company for personal injuries sustained

ing and experience, as to the nature and extent of plaintiff's injuries, the probable consequences resulting therefrom, and the probable duration of time necessary for a complete recovery; and when he failed to make such disclosure to plaintiff, and followed up his deception by throwing the weight of his professional influence upon the side of the company in the negotiations for a settlement, and because of the invited confidence reposed in him by plaintiff and her husband induced her to execute the release, the jury was well warranted in finding the release was obtained by fraud." The court said further that it was no part of the professional duties of Dr. R to express any opinion as to the adequacy of the proposition offered by the company in compromise and settlement of the damages suffered by plaintiff, and when he went outside of his professional duties, and by means of false and fraudulent statements misled plaintiff and her husband to induce a settlement favorable to the company, his conduct was reprehensible and deserving of condemnation. Plaintiff recovered judgment for $2,100, and it was alleged for defendant that the trial court erred in instructing the jury by stating that the term of plaintiff's life expectancy was 38.81 years. The American Mortality Tables had been admitted in evidence, and from those tables it appeared that plaintiff's expectancy was as stated by the court. It was urged by defendant, however, that the tables did not cover the expectancy of women, and that plaintiff did not come within any of the classes covered by the table, and that it was error for the court to assume plaintiff's expectancy to be as stated, but that that question should have been left to the jury to determine from all the evidence in the case, and that the tables were not conclusive. The court said the tables were properly admitted in evidence, and when there is any other evidence from which the jury must find the expectancy of life to be different from that shown by the tables, they are not conclusive, but that they are controlling in the absence of evidence tending to show the expectancy was greater or less than that shown by them, and, where there was no testimony contradicting the tables as to plaintiff's probability of life, and no request from counsel that the jury be instructed that such tables were not conclusive evidence, reversible error was not shown. It was further held to be proper that such tables be admitted in evidence, without reference to sex, to show the expectancy of a woman. The judgment was affirmed.

While a passenger on one of defendant's roads plaintiff suffered injuries to his legs and ankles and a rupture as a result of a derailment of the train. In an action for damages therefor defendant pleaded not guilty and accord and satisfaction, alleging as to the latter that on the

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by a helper in a switching crew. Directed verdict for defendant. Reversed.

For appellant—H. W. Stowe and Mitchell & Files.

For appellee—Carr, Carr & Evans and Price & Burnquist.

The following are the pleadings in the action:

date of the derailment and injury the matter of defendant's liability was adjusted and settled between the parties for the sum of $10, which was paid and accepted in full settlement of all rights or claims against defendant. Plaintiff's replication alleged that the release in question was procured by defendant's claim agent immediately after the casualty and while plaintiff was shocked and excited, and when he was in such mental condition that he did not know or realize that he was injured, but that the condition of plaintiff was known or ought to have been known to defendant's agent, and therefore the settlement was procured by fraud or entered into by mutual mistake at a time when plaintiff was incapable of entering into a valid contract. Plaintiff recovered a judgment for $1,000, and defendant appealed. There was testimony tending to show that the release was executed after defendant's attending physician had stated to him, after having treated the injured ankle and making some examination of other injuries, that he was mostly scared and sick at the stomach and would soon get over that, and upon a statement of the claim agent that the doctor said plaintiff was not hurt much and was mostly scared and would soon get over it. On appeal the instructions of the trial court were reviewed and held to properly present the issue that to release plaintiff from the effects of the release he must show that it was executed through fraud, and not merely that he was at the time of settlement injured more seriously than he thought. The court held that the statement of the physician was not a mere statement of an opinion, and said that when it was recalled that the claim agent appeared to have known what the physician had said to plaintiff it would seem that the agent and the physician alike were under strong obligations, either to make truthful statements to plaintiff or none at all concerning his complaint of injury to his loins and groin, and that, as the evidence tended to show that the statements were relied upon by plaintiff in entering into the settlement, the case was rightly submitted to the jury unless the form of the release required the case to be tried on the equity side of the court below and there heard and determined upon appropriate issues before recovery could be allowed, if at all, for the damages. Upon that question the court said that the rule prevailing in the court was that in a suit at law it is proper for the plaintiff to meet a plea of release by a replication that the release was obtained by fraud, whether the fraud was in the execution or in misrepresentation as to material facts inducing execution, and that, therefore, resort to equity was unnecessary. The judgment was affirmed. Southern R. Co. v. Clark, 147 C. C. A. 547, 233 Fed. 900 (1916).

Plaintiff, a passenger, was injured by one of defendant's trains, and was

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Petition at Law.

Plaintiff, for cause of action against the defendant, states:

That defendant is a corporation engaged in the business of operating a line of railroad as a common carrier of freight and passengers in, through and between the states of Nebraska, Iowa, Illinois, Minnesota, and other states, and was at the time of the matters hereinafter alleged and at all times since said date, engaged in commerce between said named states.

That defendant's line of railway passes through the city of Oelwein in the state of Iowa, and that it now has and had at all times named herein, switch yards in said city of Oelwein, Iowa.

taken by the same train to another town where she was taken in charge by defendant's claim agent, who secured the services of a company's physician, who examined her and told her that she was not seriously injured, and she signed the release for damages in consideration of $10. After completing her journey by the same train, on the same day, she discovered that she was more seriously injured than she thought, or than she had been told by the company physician, and at once brought suit for damages. Defendant admitted liability, but pleaded in bar the written release, to which plaintiff replied that she was induced to and did execute the release by reason of the false and fraudulent representations made to her at the time of its execution by the claim agent and the company physician, and without which she would not have signed the release. The physician admitted telling plaintiff that her injuries were slight and did not amount to anything, and that she would be all right in a few days except probably for some soreness. Counsel for defendant insisted that the statements of the physician were but the expression of an opinion as to the probable duration of the injuries. The court said that with that view they could not agree, and as the jury found otherwise, under the rulings of the trial court, the finding was correct, saying: "The statements made by the physician within an hour or so after the accident occurred was of such positive character that it amounted to a representation of material fact, and the rule in such case seems to be that a representation within the meaning of the law of fraud is anything short of a warranty, which proceeds from the action or conduct of the party charged, and which is sufficient to create upon the mind a distinct impression of fact conducive to action. The gist of fraudulent misrepresentation is the producing of a false impression upon the mind of the other party, and if this result is actually accomplished the means of accomplishing it are immaterial." Judgment for plaintiff was affirmed. St. Louis & S. F. R. Co. v. Reed, 37 Okla. 350, 132 Pac. 355 (1913).

2. Company's local physician.

Plaintiff, a woman 76 years of age and weak and feeble in body, was injured while attempting to board defendant's train when its servants failed to hold the train until plaintiff could reach a seat, as they were requested to do by her son, who was carrying baggage and was unable to assist her, the starting of the train, it was alleged, causing plaintiff to be thrown against the end of a seat and on to the floor, thereby injuring her shoulder, arm, side, neck, and other parts of her body. In addition to defendant's plea of general denial, it specially pleaded a settlement, and in consideration of the sum of $50 plaintiff had executed a release to defendant of all claims and liabilities

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That plaintiff herein was at the time of the said injury ..... years of age, and was in the employ of the defendant as a switchman, working in its switch yards at said town of Oelwein.

That on the night of the 17th of March, 1915, plaintiff was engaged in the said employment for defendant as a switchman, and at or about the hour of 10:30 p. m. of said date was engaged in making up a train engaged in interstate commerce, and was engaged in performing services for said defendants in furtherance of defendant's interstate commerce within the purview of the Act of Congress approved April 22, 1908, and entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases," as amending by the Act of Congress approved April 5, 1910, and entitled, "An

by reason of the injuries. By supplemental petition plaintiff alleged, in general terms, that the settlement and release were void for the reason that they were procured by defendant through its agents and employees by false and fraudulent representations, and further pleaded that Dr. F, who was a local physician of the defendant company, waited upon and treated plaintiff for the injuries, and falsely and fraudulently represented and stated to her that her injuries were not serious, but were slight and temporary, and that she was suffering from other ailments than said injuries, and advised and stated to plaintiff that she had better settle with the defendant for whatever sum she could get, and that defendant's claim agent, who procured the settlement, falsely and fraudulently repeated the statements of Dr. F, and plaintiff at the time had confidence in and believed the statements of Dr. F, and, so relying, was induced to make the settlement in question. The case was submitted to a jury under a general charge, and resulted in a verdict in favor of plaintiff in the sum of $1,500, upon which was credited the $50 paid under the settlement, and from this judgment defendant appealed. According to plaintiff's testimony, prior to the time of the purported settlement between the railway company and plaintiff, Dr. F made statements to her, with reference to her condition, to the effect that her injuries were slight, that she would soon recover therefrom, and that most of her trouble was from causes other than the fall. The court said that these statements which plaintiff claimed Dr. F made to her were in effect even stronger as to the slightness of her injuries than the statement that plaintiff alleged the claim agent imputed to the doctor. It was not shown that Dr. F had anything to do with the settlement or adjustment of claims against the defendant company. He was employed as defendant's local physician or surgeon at that point, and, it seems, was engaged in the general practice there, and had been called in at the instance of plaintiff herself, to treat her, after she had arrived at the place and had been taken to the house of her daughter. He visited her there several times, and then, after several days, she sent for him again, and he made some eight visits altogether. Defendant's claim agent testified that he did not see Dr. F between the date of the injury and the date of settlement, and Dr. F testified to the same effect, and the claim agent also testified that it was Dr. F's practice to make a report to defendant's claim department of injury cases which he treated, and he had doubtless seen such report with reference to plaintiff's case before the settlement was made. Dr. F testified that he told plaintiff that he considered her injuries slight, and he stated on the trial that he was of the same opinion at that time. At the time the settlement was made, the only persons present beside plaintiff and the claim agent were her two

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act to amend an act,'' entitled ''An act relating to the liability of common carriers by railroad to their employees in certain cases.'' Approved April 22, 1907.

That on said date and at or about the hour named, plaintiff, in the performance of his work as a switchman, attempted to get upon a car for the purpose of switching the same and placing said car in a train then being made up for interstate commerce; that car was in motion and was of the style known as the ''Gondola''; that the sides of said car are fastened with hinges at or near the top and with clasps at the bottom, and that when said clasps were broken or were left open, the bottom of said sides swung outward; that is, said sides would swing outward from the bottom when lifted

daughters and a son-in-law, and they all denied that any effort was made by the claim agent or anyone else to induce the plaintiff to accept the settlement offered and to execute the release, but that the claim agent told her that he was not authorized to offer more than $50, and upon plaintiff trying to secure $75 and payment of the drug bill, he replied that $50 was all that he was authorized to pay, and she could accept it or not, as she saw fit. The court said that, while there was a difference in opinions among the judges as to the sufficiency of the evidence to sustain the judgment canceling and setting aside the release, and the evidence supporting the judgment was not as cogent as it might be and consisted largely of the testimony of plaintiff herself, yet the court was not justified in reversing the judgment and rendering judgment for defendant on the ground that plaintiff failed to sustain her allegations of fraudulent settlement by the necessary quantum of proof, and that, since the judgment must be reversed for other errors, the court deemed it unnecessary to pass upon the sufficiency of the evidence in that respect. The judgment was reversed and remanded for error on the part of the trial court in permitting leading questions by plaintiff. Chicago, R. I. & G. Ry. Co. v. Taylor, — Tex. Civ. App. —, 203 S. W. 90 (1918).

While employed in the railway mail service, plaintiff was injured in a collision on defendant's road and brought action to recover damages, to which defendant pleaded a denial of the allegations of negligence and a written release of all claims and rights of action against defendant on account of the injury. Plaintiff replied that the release was obtained from him while he was weak, sick and suffering from his injuries and unfitted entirely to exercise judgment and deliberation, being induced thereto by the fraud and misrepresentations of defendant's claim agent and surgeon, and that the release was without consideration. Plaintiff had a verdict for $1,266, defendant's motion for a new trial was overruled, judgment entered on the verdict, and defendant appealed. After getting out of the wreck plaintiff attempted to walk, but fainted, and was placed in a sleeper and returned to his home, where he was met by defendant's surgeons. He was still unable to walk and the surgeons, or one of them, continued for some time to attend him at his home, but informed him that his injuries were not of a very serious character. He continued in bed for 10 days, after which he was up a part of the time but had to lie down frequently, and complained of dizziness and suffered considerable pain, and did no business for a period of five or six weeks. During the earlier part of that period the company's surgeon visited him daily, but thereafter at less frequent intervals, and the evidence tended to show that such visits ceased prior to the beginning of negotiations for a settlement. The claim agent visited

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by hand or would swing outward by the movement of the car when in motion.

That at the time plaintiff attempted to mount said car in performance of his duties as switchman, said car was moving in a southeasterly direction; that plaintiff carried in his right hand a lantern, and in mounting the car, placed his foot in the stirrup or sill-step on the right-hand side of said car and at or near the front end thereof and took hold of the side handrail on said car with his left hand.

He states that the sill-step on said car at the point where he attempted to mount the same was not to exceed five inches in width and that the handhold on said car was placed in an upright or perpendicular position and was not placed in an horizontal position, and that because of the matter herein

him and said he had lately interviewed the surgeon, who informed him that plaintiff would be able to return to his work in two months, and proposed to settle by paying plaintiff an amount equal to two months' salary, which he had been earning prior to his injury, being in the aggregate $234. Plaintiff's wife objected to the settlement, but he agreed to it and received a check for the money and signed the release. He did not claim to have been misled or deceived by the surgeon or claim agent in any way except by their assurances as to the nature and extent of his injuries. His testimony tended to show that he did not recover as soon as he had been led to hope, but for a considerable period was compelled to undergo treatment involving suffering and expense, and was not, at the time of the trial, fully restored to health, though he had returned to his employment in the postal service. His injury consisted of bruises upon the head and body; no limbs were broken, and the most serious complaint made by him was that the injuries so received, externally and internally, culminated in a nervous disease or weakness known as neurasthenia. The court pointed out that, while the visible surface injuries which plaintiff sustained were doubtless painful, they were not such as to excite serious apprehension either in the physician or himself, and from these he appeared to be recovering, and that nerve diseases such as afflicted plaintiff were ordinarily of obscure origin and character and slow development, and that the disappearance of outward indications of injury might have deceived both plaintiff and the surgeon as to his true condition, and, in reversing the judgment in favor of plaintiff said: "When reduced to brief statement, the most that can be said of Dr. Jennings' connection with appellee's cause of action is that his assurances of an early recovery have proven incorrect; but, in the absence of some fact or circumstance justifying the conclusion that they were fraudulently made to deceive or mislead the injured man as to his real condition, and thus aid the appellant in obtaining an advantageous settlement with him, the fact that he relied thereon in executing the release affords no ground in law for avoiding its effect. We must not be understood as holding that expressions of professional opinion by a surgeon in the employment of a party charged with responsibility for a personal injury, when made to the injured person for the purpose of inducing a settlement of his claim for damages may not constitute fraud and false representations, but we do hold that to justify the conclusion of fraud something more must be shown than that the opinion or representation has been proved incorrect, and this, we think, is the utmost of the showing made by the appellee." Nason v. Chicago, R. I. & P. Ry. Co., 140 Iowa 533, 118 N. W. 751 (1908).

Plaintiff was injured in a wreck of one of defendant's trains while riding

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stated, said car was not equipped with safety appliances as required by the Act of Congress relating thereto or the order of the interstate commerce of March 13, 1911.

That at the time plaintiff attempted to mount said car the side thereof was not fastened but was negligently permitted to swing loose, a fact not known to plaintiff, and that as he placed his foot in said sill-step and took hold of the side handle to raise himself from the ground, the side of said car swung outward and struck him on the left side knocking him from said car, severely bruising his side; that in falling from said car he sprained and lacerated the ligaments of his side and ruptured a blood vessel or vessels in his lungs. That the side of the car that struck plaintiff is made of iron and

as a passenger, and was removed to a hospital where he was given treatment by defendant's local physician, and 2 days after the injury, while he was still in the hospital, a claim agent representing defendant called upon him and effected a settlement for $150, for which plaintiff signed and delivered the usual formal release. It was represented to him at the time of the settlement, by the company physician and also by the claim agent, that his injuries were not serious, and that he would fully recover within three or four weeks, and within a few days thereafter he left the hospital and returned to his home, about 25 miles distant. He was unable to walk unassisted, and defendant's physician supplied him with a pair of crutches, and thereafter he occasionally returned for further treatment. Not recovering as rapidly as was represented by the physician, plaintiff applied, about one month after the injury, to other physicians for relief, and a thorough examination and X-ray photographs of his back and hip showed that he had sustained an impacted fracture of the neck of the femur of the left leg, an injury to the sacro-iliac joint, a curvature of the spine, and a shortening of one of the legs. Plaintiff then brought an action to recover damages, which was transferred to the federal court, where, after trial, it was dismissed without prejudice and plaintiff brought the present action, joining therein the engineer and conductor of the train as parties defendant. The company conceded liability for the injuries sustained, but pleaded the settlement, and the sole issue litigated, aside from the nature and character of the injury and the question of damages, was whether the release was obtained by fraud. At the conclusion of the trial, counsel for defendant requested the court to submit to the jury certain special questions embodying the issue of whether either the claim agent or the defendant's physician at the time of the settlement made any false and fraudulent statements as to the character of plaintiff's injuries with intent to deceive and defraud him, and, if such statements were found by the jury to have been made, to indicate what they were. The court refused to submit the question in the form presented, but did submit two distinct questions embodying the substance of those presented by defendant, with the exception that the intent to deceive was eliminated and the jury was not required to state what the false statements were, calling for the general conclusion whether any false and fraudulent statements were made to bring about the settlement. Defendant contended that, having decided to submit special questions, the court should have submitted them so as to require the jury to state in their answer the facts called for by the question proposed by defendant, and that, since the questions in fact submitted called only for the general conclusion of the jury, there was an abuse of discretion entitling defendant to a new trial. The court

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that said car was in motion at the time he was struck and knocked therefrom and sustained the injuries herein complained of.

Plaintiff states that his injuries were caused solely by the negligence of the defendant and that the negligence of the defendant was the approximate cause thereof and that he was free from negligence in any way contributing thereto.

He states that his injuries are permanent, and that since the date thereof he has been wholly incapacitated from following his work as a switchman and from performing any other manual labor. Plaintiff states that defendant was negligent in each of the following particulars, to wit:

In permitting said car to remain and be handled with the side thereof

overruled this objection, holding that, as the question of submission of a special issue was within the discretion of the trial court, the form of the questions or issues to be so submitted also rested in its discretion. Defendant requested the court to charge the jury that fraud and intent to deceive were necessary ingredients of plaintiff's cause of action, in so far as the validity of the release was concerned, and that, unless the jury found that the statements made to plaintiff at the time of the settlement by the physician and claim agent as to the nature and character of plaintiff's injuries were made with a knowledge of their falsity and with intent to deceive plaintiff, the release could not be set aside. The court refused to so instruct and the general charge did not include the element of intentional deception. At the time of the accident plaintiff was seated in the accommodation coach of the train, which was derailed and for some distance passed over the crossties and violently bumped up and down until it came to a stop, and whatever injuries he received came from this violent bumping as the car passed over the ties. Defendant's physician testified that soon after plaintiff was taken to the hospital he made a careful examination of his body with a view of determining the nature and character of his injuries and found no broken bones, and that the only injuries suffered by plaintiff were in the form of bruises, from which he would soon recover, and advised defendant's claim agent that plaintiff had no serious injury. The physician denied having advised plaintiff to go ahead and settle with the claim agent, as testified to by plaintiff, but admitted that he stated to plaintiff that he had no broken bones, had been bruised only, and would be well and able to go to work in two or three weeks. Defendant contended that to entitle plaintiff to rescind the release it was incumbent upon him to show that he was induced to execute it by the intentional deception of the physician and claim agent, and that the court erred in not so charging the jury. In denying this contention of defendant the court pointed out that, in an old common-law action of deceit, an essential element was intentional fraud and deception, and that there were many authorities holding to a strict application of the rule and that from such strict application much injustice had resulted; that the courts have ingrafted modifications and qualifications upon the rule, and the present trend of judicial opinion does not require, in all cases, a showing of an evil intent; that in actions the result of which placed the parties in statu quo, restoring to each what he parted with, equity would grant relief where the representations which induced and brought about the contract were, in fact, false, though made in good faith; and that the rule had been frequently stated and applied, both in actions for a rescission of the contract and where the alleged fraud had been presented as defensive mat-

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unfastened, well knowing that said car was dangerous and would probably result in injury to employees mounting or attempting to mount the same.

In failing to warn plaintiff of the dangerous condition of said car and in failing to have the side thereof properly and securely fastened.

In placing upon said car and permitting to remain thereon a sill-step of the dimensions hereinbefore described.

Plaintiff further states that it is, and to his knowledge for many years has been, the custom and duty of the switchmen to get upon moving cars in the performance of their work, which custom was well known to defendant and was performed under the immediate orders and directions of said defendant, and that said custom is uniform not only with defendant but with all railroad companies.

ter, that it was fraud for one to make an unqualified representation, not knowing whether it was true or false, and that the unqualified statement amounted to an affirmation of one's own knowledge. Applying this rule to the present case, the court said: "In the case at bar the physician representing defendant made a physical examination of plaintiff a short time after the accident. Upon the examination so made he represented to plaintiff the facts heretofore stated, which were repeated by the claim agent. The jury was fully justified in finding that the representations were, in fact, untrue, though not intentionally so, and that they were made to induce a settlement of plaintiff's claim for damages. Plaintiff relied, and had the right to rely, upon the representations, and the jury properly found that he was induced thereby to make the settlement and sign the release. This brings the case within the rule of the authorities cited. The representations, aside from the statement that no bones were broken, were of matters of substance, and not the mere opinion of the physician." The order of the trial court denying a new trial to defendant was affirmed. Jacobson v. Chicago, M. & St. P. R. Co., 132 Minn. 181, L. R. A. 1916 D 144, Ann. Cas. 1918 A 355, 156 N. W. 251 (1916).

3. Company's hospital surgeon.

In St. Louis & S. F. R. Co. v. Richards, 23 Okla. 256, 23 L. R. A. (N. S.) 1032, 102 Pac. 92 (1909), plaintiff sued for injuries received while a passenger on one of defendant's trains, when the coach in which she was riding turned over on its side and she was struck by a seat, or, perhaps, by some of the passengers falling upon her. She fainted at the time of the accident, and when consciousness returned was lying under a seat amidst the glass from the windows. On being carried out of the coach she was placed on some cushions on the ground, and remained there with the other passengers from 6 o'clock in the evening until about 3 o'clock in the morning, at which time she was placed upon a relief train and taken to the company's hospital, where she arrived between 8 and 9 o'clock in the morning. While lying on the ground at the scene of the accident, she was given a hypodermic injection and some whiskey, as she remembers it, something like three times. At the hospital, after drinking some coffee, she was visited by the physician and claim agent of the company. The physician examined plaintiff to ascertain the extent of her injuries, and she testified that he told her that she was not hurt at all, that her injuries consisted of slight bruises and the shock only, and that she was frightened and nervous and would get over it in a few days, probably a week. After he examined her and told her there was nothing the matter, she asked him why it was her side hurt her so, and was

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That because of the matters herein stated and of the permanent injuries received by plaintiff as hereinbefore set forth, he has suffered great physical pain and mental anguish, and that he will continue to suffer physical pain and mental anguish during the remainder of his lifetime.

That by reason of the negligence of the defendant and because of the matters hereinbefore set forth, plaintiff has been damaged in the sum of $10,000, no part of which has been paid.

Wherefore, plaintiff prays for judgment against said defendant for said [sum] of $10,000 and for the costs of this action.

Answer.

Comes now defendant, and for its answer to the petition of plaintiff herein states:

told it was just from the fall, and that in a week or two she would be all right, and not to worry. After he left she was given another hypodermic injection to relieve the pain which was coming back on her. About an hour afterwards the claim agent returned and proposed a settlement, informing her, as did the physician, that she was frightened, and that her hurt consisted of bruises and the shock. She informed him that she would be willing to settle, but if she knew she was injured, she would not, as she was a widow and had children to support. The claim agent thereupon told her that, if a settlement were to be made, it had to be made immediately, because he had to leave on some business, and that she signed the release believing the statements of the claim agent and the physician. The injury of which plaintiff complained was prolapsus of the uterus, with other bruises and injuries of an internal and external character. Plaintiff recovered a judgment for $6,200, which defendant claimed was so excessive as to be evidence of the fact that it was given under the influence of passion and prejudice. The court pointed out that, prior to the accident, plaintiff had always been well, and had made a living for herself and two children by washing and running a boarding house, where she had from 12 to 15 boarders, with the same number of rooms, and did all the work herself, in which occupation she made from $65 to $75 per month; that since her injuries she had not been able to earn anything at all; that beside other treatments she had gone to Arizona and remained a year and 8 months, taking treatment for her lungs, which had not troubled her prior to the injuries received in the wreck; that while there she was in the hospital for over 4 months, paying $60 a month for nurse and doctor bills; that she had paid to a physician in Arizona $270 and yet owed him $100; and that to another physician she had paid altogether $95 for treatment for the prolapsus, on account of which she had since the time of the injury suffered intense pains, suffering agony at times. Under these circumstances, the court said they could not say that the verdict was excessive. On rehearing, the court adhered to its former decision that it was not necessary for plaintiff to tender back the amount received as consideration for the release, and further said that in its judgment it did not add anything to the effect of the release that it contained a proviso releasing and discharging all suits, actions and causes of actions or claims growing out of the alleged injury, because the same facts which would render it invalid against plaintiff in one particular would render it equally invalid as to the other.

4. Family physician also representing company.

Plaintiffs brought suit for injuries

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Division I.

Defendant admits that it is a corporation engaged in operating a line of railroad, substantially as alleged in said petition;

Admits that plaintiff was in its employ as switchman on or about the date alleged;

Admits that on or about the date alleged, and while in its employ, plaintiff received an injury, but whether the character and extent of said injury are as alleged in his petition, defendant has neither knowledge nor information sufficient to form a belief, and therefore denies the same;

And defendant denies that the injury to plaintiff was the result of any negligence on the part of this defendant.

received while plaintiff wife was a passenger upon defendant's train; defendant pleaded a release, to which plaintiffs replied, alleging that it was procured from plaintiffs through the misrepresentation made by Dr. B, their family physician, who was acting as surgeon for the railroad company, to the effect that the injuries were trivial, and that she would be well in a few weeks, and by his insistence that she would not get any more in case of suit. Plaintiff wife alleged that her injuries were much more serious than had been represented by Dr. B, that they were permanent, that the amount paid was inadequate, and that she had been overreached by the defendant through its surgeon, who was acting in a dual capacity. The jury found for plaintiffs for $500, and defendant appealed from a refusal by the trial judge of a motion for a new trial. The trial judge, in his order refusing a new trial, said: "I think it is fair to say the testimony does not convict Dr. Black of a fraudulent intent in what he did and said. The plaintiff's counsel so admitted to the jury." The defendant requested the court to charge "that in this case there can be no recovery unless the jury are satisfied by the preponderance of the testimony that the release in this case was procured by fraud or misrepresentation." The trial judge modified this instruction by adding the words "or mistake." In holding that this modification of defendant's request to the instruction was error, the court said: "The mistake on account of which the plaintiff asked to be relieved from the contract is that she made it on the faith of the opinion and advice of Dr. Black, the physician selected by her, as to the extent of her injuries, and the probability of her recovery against the defendant. In such settlements, resting necessarily on opinion, both parties know that they are taking the risk of error and mistake, and a release in such case can only be set aside on the grounds of fraud or bad faith in the transaction, and not on the ground of mistake or error of judgment or misleading statements when honestly made in good faith." The judgment was reversed and a new trial granted. Lawton v. Charleston & W. C. R. Co., 91 S. C. 332, 74 S. E. 750 (1912).

5. Medical gymnast representing company.

While riding as a passenger in one of defendant's railway cars, plaintiff received injuries for which he claimed damages in the sum of $5,000, less $600 which he acknowledged to have been paid to him by defendant. Defendant pleaded as an affirmative defense, a release of all claims for damage on account of the injuries, wherein the consideration was recited as being "the sum of $600 and treatment till cured of this trouble by C. L. Norbom, medical gymnast," and in reply to that defense plaintiff al-

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All allegations in said petition contained not in this division of its answer specifically admitted, defendant denies.

Division II.

For further and separate defense to plaintiff's cause of action, defendant reaffirms and realleges all the allegations of Division I thereof, and further says that it denies that the injury received by plaintiff was the result of any negligence on the part of this defendant, its agents or servants, but that if the plaintiff was injured as alleged in his petition as a result of any negligence on the part of this defendant, the plaintiff had full knowledge, and by the exercise of ordinary care could and should have had full knowledge of all the

leged that after the injury defendant sent to him a physician and said medical gymnast, who examined him as to the nature and extent of his injury, and advised him that his injury was not of a serious nature, and would not prove permanent; that they could and would effect a cure within 6 months, and that plaintiff's only loss by reason of the injury would be the loss of his time during the period necessary to effect a cure; that at the time of signing the release plaintiff did not know the extent or nature of his injury, and had no means of knowing the same other than through the statements of said physician and gymnast; that he believed such statements to be true, and, relying thereon, signed the release; that the statements and representations made as to the extent and nature of his injury were not true, and were made for the purpose of inducing plaintiff to sign the release; that plaintiff took treatment of the medical gymnast as directed by defendant until advised that he could not be cured, and that his injury would prove permanent. There was evidence tending to show that the first physician who called upon and treated plaintiff after the accident was Dr. G, one of the regular surgeons of defendant, who had also on occasions prior thereto rendered medical services to plaintiff's family, but whether or not he was then called at the instance of the plaintiff was not shown. He called upon plaintiff five or six times professionally, and about 3 weeks after the accident, upon the recommendation of Dr. G, plaintiff commenced taking treatment from the medical gymnast. Plaintiff paid the gymnast for the first two or three treatments while defendant paid for all the subsequent ones, which continued for a year at frequent intervals, and amounted to over $700, which arrangement was in accordance with the agreement made prior to the signing of the release. Plaintiff testified that under the treatment by the medical gymnast he improved very rapidly for a time, and the medical gymnast told him that the best thing for him to do was to get a settlement with the company as soon as possible because he would soon get well; that ordinarily such cases would take from 30 to 60 days to effect a cure, and that there were no bones broken and nothing to show for an injury after plaintiff got well, and that Dr. S, defendant's physician, also said that plaintiff would get well when he examined plaintiff a few days before the signing of the release. The trial court took the case from the jury and decided as matter of law that the release was not secured by fraud. In reversing this judgment, with direction to grant plaintiff's motion for a new trial, the court said: "It is true in this case that the statements of Norbom may in a sense be regarded as an expression of his opinion touching the future recovery of appellant, but the unqualified manner in which they

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matters and things alleged in his petition as constituting negligence, and appreciated the danger to himself arising therefrom; that with such knowledge and appreciation of the dangers arising from such alleged negligence he continued in the employment and assumed all risks of injury arising therefrom, and cannot recover.

Division III.

Defendant further pleading, reaffirms and realleges all the allegations of Divisions I and II hereof, and in partial defense to plaintiff's cause of action and mitigation of damages, alleges that plaintiff was himself guilty of negligence which contributed to his injury.

were made, coupled with the urgent recommendation for settlement, rendered them as effectual in inducing appellant to make the settlement and sign the release as if they had been false statements touching the present physical condition of broken bones. We think the fact that Norbom may have unintentionally misrepresented to appellant his true condition at the time would not of itself prevent the avoidance of the release, if as a matter of fact such representations were untrue, were made in the interest of respondent, and did induce appellant to sign the release. This was for the jury to determine under all the circumstances shown by the evidence." Pattison v. Seattle R. & S. R. Co., 55 Wash. 625, 104 Pac. 825 (1909).

B. Street railway.

1. Company's local surgeon.

Plaintiff was injured in a street railway accident, and was immediately removed to a nearby drug store where she was attended by Dr. H, the company's physician and surgeon, under whose direction she was taken to a hospital, stopping on the way for an X-ray examination. She was 49 years of age, and for 18 years had been a clerk in a dry goods store, her average wages for some time prior to her injury being $50 per month. Up to the time of the accident her health had always been good, but since that time it had been broken, and her crippled condition, resulting from the accident, required her to use crutches down to the date of the trial. While not a resident of the city in which she was injured and cared for, she had relatives with her at the time who remained with her for about a week. Dr. McC was called in by Dr. H and examined plaintiff on the evening following the injury, and, after plaintiff had been for some time in the hospital, she consulted an attorney, who was afterwards one of her attorneys in the trial in the court below and on this appeal, and, after advising with him, and as a result thereof, Dr. A was sent to examine her, and after talking with her Dr. A called in Dr. McK who was a surgeon, Dr. A being only a physician. About 7 weeks after the employment of Dr. A, the claim agent for the company visited plaintiff at the hospital, talked to her about a settlement, and tendered her a check for $900. He told her that was all the company would pay, and she could take that or nothing, provided she had not employed an attorney, but, if she had the company would pay nothing, and that he had settled her hospital and other expenses. She consulted Dr. A and he gave her his opinion as to her conditions, saying that she would probably not be able to work that winter, it then being November, and advised her to accept the settlement, but cautioned her not to tell her attorney that he had made that recommendation. She thereupon

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Division IV.

For further and separate defense to plaintiff's cause of action, defendant reaffirms and realleges all the allegations of Divisions I, II and III hereof.

Defendant admits that on or about the date named in said petition plaintiff, while in the employ of defendant, received an injury, but denies that said injury was the result of any negligence on the part of this defendant.

Defendant avers that on account of said injury, plaintiff made claim against this defendant for damages suffered, liability for which was denied by the defendant.

Defendant avers, however, that on or about the 15th day of June, 1915, said claim was compromised by the parties hereto, J. F. Malloy, plaintiff, and Chicago Great Western Railroad Company, defendant, and in the said com-

executed a release, took the check for $900, and gave a receipt in full payment for her claim. She kept the check from November until the following March, when she deposited it in her checking account and continued to check against it for about 2 years until it was exhausted. She then commenced suit claiming damages in the sum of $30,000, and recovered thereon the verdict for $9,100, being $10,000 less the $900 already paid. On the trial the defense was, in substance, a general denial, a plea of contributory negligence, and a plea of the settlement. As to the settlement, plaintiff alleged that, from the time of the accident until the date of the settlement, she was in the charge of the physician employed, directed and controlled by defendant; that said physician misrepresented to her the extent of her injuries; represented to her that she had practically recovered; kept her under the influence of drugs and opiates, so that she felt little pain; and advised her to accept the tender of the defendant; that the claim agent of the company co-operated with the physician to deceive her and mislead her into such settlement; and that she was under the influence of drugs at the time she signed the release and receipt. Upon this appeal the court discussed only the question raised by the release, saying that the validity of the release depended, first, upon the fairness and good faith of its original execution, or, if these were wanting or there was sufficient evidence to justify the submission of that question to the jury, then, second, upon plaintiff's ratification. The court said that the rule given by the trial court that the proof of fraud must be clear and convincing was correct, but that the mere giving of such a rule did not furnish such proof, but there must have been some evidence before the jury which it would be entitled to consider as clear and convincing. In holding that there was no such evidence in the case, the court found that plaintiff's allegation of having been drugged to such an extent as to prevent her from comprehending the extent of her injuries at the time of the settlement and the nature and extent of the settlement, was wholly unsupported by proof; that her allegations of fraud, misconduct, and undue influence on the part of defendant's physician, if intended to apply to Dr. H, was very unsatisfactorily proven, and if intended to apply to Drs. A and McK, were without force until sufficient evidence was adduced to justify the jury in finding that those doctors were in the employ of the company. On that question the court found that there was not only no such proof, but that the proof conclusively showed the contrary, it appearing that Dr. A was employed by her attorney, and that through Dr. A she employed Dr. McK, and that there was absolutely nothing in the record to impeach their good faith or their loyalty to

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promise, in consideration of the sum of four hundred fifty dollars, this plaintiff did release any and all claims for damages which he had or claimed to have against this defendant on account of or arising out of said injury, and that by reason of said compromise, the claims for damages which plaintiff asserts in his petition have been fully satisfied.

That to evidence said compromise, a written contract was entered into between the plaintiff and the defendant, which contract was signed by the plaintiff on said date, to wit, June 15, 1915, a copy of which is hereto attached and marked Exhibit "A".

Exhibit "A".

In consideration of the sum of four hundred fifty & no-100 dollars

her interests, and that the whole theory of plaintiff that Drs. A and McK represented the defendant company, as well as the theory that the settlement was procured by fraud and misrepresentation, was without foundation save in the unwarranted inference and argument of counsel. The court said that apparently plaintiff saw fit, in the matter of settlement, to rely upon her doctor rather than her lawyer, and that was her own affair, a settlement made under such circumstances being just as binding as though it were made under the guidance and advice of her attorney. The court further said that an instruction that, even if the physician or claim agent or both advised the plaintiff to execute the release, that would not entitle her to rescind it, unless they coupled the advice with false representations on which she relied, while a correct statement of law, had no application to the present case, for, if the physician alleged to have been relied upon was Dr. H, plaintiff's testimony showed that she did not rely upon his representation, but expressly called Dr. A and acted upon his advice, and if the physician referred to was Dr. A, then no advice given by him and no reliance placed upon his representation could form any basis for the recovery, because he was her physician, and for his representations and advice the company would not be responsible. The court also discussed the question as to whether, if no actual fraud was perpetrated in procuring the release, it might nevertheless be held a settlement for such injuries only as plaintiff said she was told of by the physicians, and believed she had sustained, and held that there was no basis for such claim where, as in this case, it was sought to compromise and settle a general claim for all the injuries resulting from a particular accident, and there was not in the release a single word relating to particular injuries. The court held that the motion, made at the close of the evidence, for a directed verdict upon the ground that there was no proof in any manner tending to avoid the bona fides of the release, and that the evidence conclusively showed that plaintiff had fully ratified it, should have been sustained. The judgment was accordingly reversed, with direction to the trial court to enter judgment of dismissal. Colorado Springs & I. Ry. Co. v. Huntling, — Colo. —, 181 Pac. 129 (1919).

While plaintiff was alighting from a street car on which she was a passenger, she received, according to the allegations of her complaint, severe injuries which permanently injured and prevented her from pursuing her vocation as a trained nurse, and in the present suit for damages recovered a judgment for $5,000. On the trial defendant offered as a defense, in addition to denial of negligence and a plea of contributory negligence, that plaintiff had released defendant

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($450) paid to me by Chicago Great Western Railroad Company the receipt of which is hereby acknowledged, I do hereby release the said company and its agents and servants of and from all claims, demands, actions, causes of action, or suits at law for or because of any matter or thing done, omitted, or suffered to be done, by the said company, its agents or servants up to and including the day of the date hereof and especially on account of all injuries of every kind or nature received by me on the 7th day of March, 1915, at Oelwein, Iowa, wherein I strained my left side when my feet slipped as I was attempting to get on the head end of the first car of a string of cars which were being pushed down the lead by yard switch engine, also for all injuries of every kind or nature received by me on or about the 17th and 18th days of March, 1915, wherein I again strained my side, which

from further liability for the injuries in consideration of $250 paid to her and the payment by defendant of the expenses incurred for medical attention by a physician and surgeon in the treatment of her injuries. Plaintiff, while admitting the execution of the release, averred that it was in consideration of the $250 alone, and not in payment of the expenses incurred to the surgeon, and averred that plaintiff was under no obligation to pay the surgeon by reason of the fact that he was the regular salaried physician of defendant and attended upon plaintiff at the instance and request of defendant, and that the release was made because of representations made to her by defendant's physicians, either through mistake as to the facts or with intent to deceive plaintiff, and that the release was signed either as the result of a mutual mistake as to the character and extent of her injuries or was fraudulently and wrongfully procured from her. It appeared from the evidence that plaintiff was a large, fleshy woman, weighing about 200 pounds, and was between 60 and 65 years of age; that defendant's physician, Dr. R, appeared at her home by direction of the defendant soon after the accident, and attended her; that on his first examination he found she had been hurt in her lower limb, and that he manipulated it with his hands, measured it, tried to see if it worked or moved, and found that it did not; that he told her she would be all right in about 10 days; that she was suffering more from nervous shock than anything else, and that he did not think any bones were broken. In about 2 weeks plaintiff, still suffering and unable to move her limb, had her sister telephone Dr. R to bring some other physician with him that could find out whether her limb was broken, and the next day Dr. R brought Dr. K, another of the surgeons in the employ of defendant, who both examined plaintiff, measuring and manipulating the injured limb, and Dr. R told her that he would call in the morning and report the result, this occurring 2 weeks after the injury. There was conflict in the testimony as to what Dr. R told her when he again called, plaintiff testifying that he assured her that she would be as well as ever and could go about her business in 3 months, and Dr. R testifying that all he had stated to her about her ultimate recovery was merely stated by way of opinion. On the same day or a day or two thereafter, defendant's claim agent called and the money was paid to plaintiff and the release signed. The court said that it was not disputed that the injuries resulted in an impacted fracture, nor was there any question but that in such cases the fracture almost inevitably resulted in a shortening of the limb, and that, knowing the fact of an impacted fracture, it must be assumed that Dr. R, granting that he was a competent surgeon, knew

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was caused by attempting to get on the side of Hart Convertible car and also by caboose running out of caboose trace cornering engine, at which time I again strained my side. Was employed as switchman for Chicago Great Western Railroad Company at time of accidents.

The question of my future employment in no way enters into this settlement and no verbal promise or contract for future employment has been made.

In witness whereof, I have hereunto set my hand and seal this 16th day of June, 1915. Sgnd. Jas. F. Malloy, [Seal.]

Reply.

Comes now the plaintiff, and for reply to the answer of the defendant herein and to each division thereof, states:

that it would have resulted in a shortening of the limb, and that it was impossible for plaintiff ever to become as well as ever, as good as ever, or as able to attend to her business as she had been before receiving the injury, and that there was evidence on the part of plaintiff which, for the purpose of the case, must have been taken as though it stood uncontradicted, to the effect that Dr. R had told her that, notwithstanding her injuries, she would be as well as ever, and that her leg would be as good as ever, which, under the facts, could mean nothing but that there would be no shortening of the limb, no crippled condition and no permanent disability. The court said further that if Dr. R in effect told plaintiff that she would suffer no permanent disability or impairment of the use of her limb, and made that statement as one of fact and not mere opinion, and made it with a knowledge of her condition which he had or ought to have had, and made it with the intention of influencing her action in settling with the company, she would not be bound by the release unless she herself knew the nature and the probable result of the injury, and signed the release and accepted the money in question, knowing at the time, either from her own experience or knowledge or from what Dr. R had told her, that her limb was broken, and that it would probably result in a shortening of the limb, and that these were matters to be submitted to the jury. Any and all statements of the doctor as to the length of time plaintiff would be laid up, how long she would be confined to her bed or to the house, and how long before she could go about her business, the court said, could be and were no more than mere expressions of opinion. The court said that the evidence, so far as concerns that feature of the case, warranted the submission of the case to the jury under proper instructions, and that in view of that, the demurrer interposed by defendant was properly overruled. A motion to require plaintiff to elect upon which of her causes of attack upon the release she would go to the jury was made by defendant, and the court said it should have been sustained, saying: "If the release was entered into as the result of a mutual mistake, that is one thing: if it was the result of fraudulent representations and procured wrongfully, that is quite another. It cannot be both. Plaintiff must stand on one or the other." There were other errors and the case was reversed and remanded. Carroll v. United Rys. Co. of St. Louis, 157 Mo. App. 247, 137 S. W. 303 (1911).

Plaintiff brought suit against defendant street railway company alleging that at the time of the accident in question he was a cripple compelled to walk on crutches, and by reason of the defective condition of the steps on one of defendant's cars he was thrown to the street with

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Division I.

Plaintiff denies each and every affirmative allegation in said answer contained except as the same are hereinafter specifically admitted or except as the same are admissions of the matters alleged in plaintiff's petition.

Plaintiff further states that he admits that on or about the 16th day of June, 1915, he signed a paper purporting to be a receipt for certain money at that time paid to him as wages by the defendant and a release of all claims for wages up to that date. That a copy of said paper was not furnished him by defendant, and that as to whether or not "Exhibit A" attached to defendant's answer is a true copy of the paper signed by plaintiff, he has at this time neither knowledge nor information sufficient to form a belief, and therefore denies that said exhibit is a true copy of said receipt so signed by him.

great force, and, as a result, his left arm and wrist were bruised and he received internal injuries in the region of his appendix which caused an abcess and inflammation in that portion of the body which required an operation. Defendant denied negligence, pleaded contributory negligence, and in addition pleaded a settlement by which plaintiff, in consideration of $15, released the company from all liability on account of the accident. Plaintiff replied to the allegations of defendant concerning the release that the same had been signed upon fraudulent representation by defendant's physician that his injury did not amount to much; that such physician negligently failed to make any examination of plaintiff, other than to look at his hand or the wrist where it was injured; that such physician, acting for defendant, and with a view, purpose and intention of misleading plaintiff so that a settlement for comparatively nothing could be secured, negligently failed and refused to advise plaintiff that the full extent of his injuries could not be ascertained until some future time; and that such physician knew or should have known that, where a person received the fall that plaintiff received, he could not know within a few hours the extent of the injuries received. The court pointed out that plaintiff did not allege that he told the physician of any blow that he had received or complain of any pain in the region of his appendix, or that he had any bruises of any kind in that vicinity, but that, on the contrary, so far as the reply showed, the only injuries complained of by plaintiff were those to his hand and wrist, and that no facts of any description which would lead an ordinarily prudent physician to believe that plaintiff had been injured in the region of his appendix were brought to his attention. In affirming the judgment the court said: "We therefore conclude that a physician who gives an honest opinion in regard to the condition of a patient based upon all the facts that are brought to his attention and which ordinary care would reveal, cannot be said to have fraudulently misrepresented the condition of the patient merely because, without any facts on which to base an opinion, he failed to predict that the patient would have appendicitis." Hammond v. Louisville R. Co., 170 Ky. 357, 185 S. W. 1129 (1916).

2. **Company's hospital surgeon.**

Plaintiff, while a passenger on one of defendant's cars, sustained a compound comminuted fracture of the bones of the right leg near the ankle, the manner of the injury not being described, as defendant admitted at the trial that it was originally liable. He was taken to the office of Dr. P and from there to a hospital, Dr. P accompanying him. About 5 weeks after the accident, plaintiff's leg was amputated below the knee, and later

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Division II.

Replying to the fourth division of defendant's answer, plaintiff states that subsequent and immediately after he was injured on the 17th day of March, 1915, as alleged in his petition, and under the direction of the defendant, he was treated and attended by a physician in the employ of the defendant company and whose services were paid for by said company; that excepting for a few treatments following shortly after said injury, he received medical and surgical treatment only from Dr. C. J. Saunders, the defendant's physician and surgeon in the city of Fort Dodge, Iowa, except that on a few occasions and for temporary treatment and under the direction of the defendant, in the absence of said Dr. Saunders from the city, he was treated by other physicians whose services were paid for by said defendant.

it became necessary to amputate it above the knee. Sixteen days after the accident the defendant's superintendent paid him, on account of the company, $500, and agreed to pay all his hospital and surgical expenses, and the plaintiff released the defendant from all claims and demands. Defendant relied upon that settlement as a complete defense, to which plaintiff replied that the settlement was fraudulently obtained, and not binding. The case was tried twice before the present suit, each trial resulting in a verdict for plaintiff, and at those trials the question of fraud was eliminated by the court, the only question submitted to the jury being the mental competency of plaintiff to make the settlement at the time he made it. The verdicts were set aside by the law court because it appeared clearly to the court that plaintiff was mentally competent of making the settlement, that he well understood at the time what he was doing, and fully appreciated the effect of the settlement. At the third trial the presiding justice was of the opinion that the evidence on the question of competency was no more favorable to plaintiff than it had been, and instructed the jury, in effect, that they would not be authorized to find a verdict for plaintiff on the ground that he was mentally incompetent of making the settlement, but that if they found certain facts to be true, they would be authorized to find that the settlement was fraudulently procured, and the jury so found. The case was taken up on defendant's exceptions to the instructions of the presiding justice on the question of fraud, and on the denial of a motion for a new trial. Two or three days after the accident Dr. P was employed by defendant's superintendent to visit plaintiff at the hospital, and was directed, so he testified, to see that everything was done to save plaintiff's leg, and he visited plaintiff at intervals of three or four days, four times before the release was executed. Plaintiff did not know that Dr. P was employed by defendant, and although he had not himself employed him, it did not appear that he gave the matter any thought. Plaintiff testified that Dr. P at one time told him that he thought the leg would be saved, but he was unable to fix the time the statement was made, and a hospital nurse testified that Dr. P told the plaintiff every time that he was going to save his leg. Dr. P denied having told plaintiff that he would save the leg, but said he had some hope of saving it, and admitted upon cross-examination that, at one of the first two or three visits, he might have told plaintiff that he hoped to save the leg, and also said that he reminded plaintiff that Dr. R, the surgeon in charge of the hospital, told him at the start that he thought the leg would have to come off, and further testified that the day before the settlement, the last time he saw plaintiff before the settlement was made, he thought there was some

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Plaintiff states that immediately prior to the date of the alleged settlement referred to in division four of defendant's answer, and prior to the time that he signed the written receipt for defendant and accepted from defendant the sum of $450, said Dr. C. J. Saunders stated to plaintiff that he had entirely recovered from his said injuries received and sustained on said 17th day of March, 1915; that there had been a complete recovery; that the sprained and lacerated condition of the ligaments of his side had healed and said ligaments had united; that the ruptured blood vessels had healed, and that plaintiff with a few days' rest was fully recovered and in a condition to resume manual labor of any kind and to resume his usual work as a switchman. He further states that at the time of signing said receipt, the same statements were made and repeated to him by one Kenzie, the superintendent for defendant at the

chance of saving the leg, and that he talked with him that day about the leg, and plaintiff said, in connection with some talk about a settlement, that he was going to have the money and keep the leg. The hospital nurse testified that plaintiff asked him several times if the leg could be saved, and that he told him no, and Dr. R testified that he advised amputation at the first, and that, although he talked with plaintiff about it, he never gave him any encouragement that the leg could be saved. It appeared that the plaintiff and defendant's superintendent, Mr. Farr, agreed upon the terms of settlement in a room in the hospital to which plaintiff had been removed for that purpose, and that no one else was present, but that nothing was said by either as to the prospects of saving the leg. Before the release was executed Dr. R was called in by the superintendent and the terms of the settlement were stated to him, and Dr. R testified that he read the release to plaintiff, and explained to him that he would not get any more money, even if the leg had to be amputated. The court said it might be conceded that Dr. P, as plaintiff testified, told him at one time that he thought the leg would be saved, and said that if it appeared that this statement of opinion was intentionally false, it might probably be inferred, under the circumstances, that the purpose was fraudulent, but that it did not so appear, and, although the opinion turned out to be a mistaken one, it appeared that plaintiff's condition became worse about a week after the settlement, and yet the amputation was deferred two weeks longer, no reason for the delay being suggested unless it was that further efforts could be made to save the leg. The court said: "The situation, then, was this: Mr. Farr, we assume, feared that the leg could not be saved. Indeed, he may have had a strong conviction of it. The plaintiff had the opinions of two doctors to be guided by, one unfavorable and the other more favorable, but not fraudulent. He hoped to save the leg. He says he believed he would save it. He chose to act upon that belief, and he made what may be called an improvident settlement. It is asserted, and not denied, that he said he meant to 'have the money and keep the leg.' This statement indicates, we think, that he knew the question of saving the leg was debatable, or, at least, had been debated." Under these circumstances, the court stated, it could not be properly said that the defendant or its agent had fraudulently produced a false impression upon the mind of the plaintiff, or that the probability of saving the leg was a fact peculiarly or exclusively within the knowledge of the defendant or its agents, or that it was the defendant's legal duty to communicate to the plaintiff the belief of its agents as to a recovery, and that the verdict was clearly wrong, and the motion for a new trial must be sus-

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city of Oelwein, Iowa, said Kinsey making the further statement that he got his knowledge from reports made to him by the defendant's physician and surgeon, Dr. Saunders.

Plaintiff states that the assertions and representations made to him by said physician and by said superintendent were of material facts; that the same were positively made as true and were for the purpose of securing an undue advantage over plaintiff and to induce him to sign said receipt and release this defendant; that he in good faith relied on said statements and representations and acted thereon in signing said receipt and accepting payment of said sum of money. He further states and avers the fact to be that said statements and representations were false and were well known to be false by defendant's representatives, viz., its physician and superintendent, at the time

tained. Barrett v. Lewiston, B. & B. St. R. Co., 110 Me. 24, 85 Atl. 306 (1912).

II. Employee.

A. Railroad.

1. Company's physician.

In Chicago, R. I. & P. Ry. Co. v. Burke, — Okla. —, 175 Pac. 547 (1918), plaintiff sued for $40,000 damages for personal injuries suffered by him for an injury to his knee while employed as a switchman by defendant. Defendant answered and set up that, in consideration of the sum of $2,500, plaintiff had compromised his claim and released and forever discharged defendant "from any and all liability for all claims for all injuries, including those that may hereafter develop." Plaintiff's reply alleged that the release and settlement were obtained by false and fraudulent representations, made to him by the doctors and claim agents of defendant, to the effect that he would soon be well and that the injuries were not permanent; that he relied upon said representations and made the settlement because of such reliance; that the injuries were really permanent; that said representations were untrue; and that the plaintiff tendered back to the defendant the $2,500 received in settlement and asked that the release be held null and void. Plaintiff recovered a judgment for $7,500 less the $2,500 paid at the time of the release. The uncontradicted evidence showed that the plaintiff was treated and operated upon for the injuries received by the surgeon of the company, who positively stated to the plaintiff that his injuries were not permanent and he would recover, and that these statements of the surgeon were communicated to the claim agent who made the settlement with plaintiff. The statements of the surgeon were to the effect that plaintiff's knee would be all right, and with gradual usage the leg would be all right, there being nothing that would cause permanent injury. Another surgeon called to testify stated that a knee with the semilunar cartilages misplaced and removed, the ligaments lacerated, having tenderness with the accompanying inflammation, would have its function permanently impaired, and that, however the inflammation might subside and nature replace the cartilage with new tissues, those tissues would never completely fulfil the functions of the original. The court said that, by adopting and pleading the release as a defense, the defendant ratified the act of the surgeon in making the statement to the plaintiff so as to present as a matter of fact the question whether the release was void for constructive fraud. In affirming the judgment, the court said: "If the statement of the surgeon to the plaintiff, and communicated to the claim agent, had been merely an expression of his opinion as to the injuries suf-

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the same were made, and that said representations were knowingly made with the intent to mislead the plaintiff, and that plaintiff was misled thereby.

Plaintiff now charges the fact to be that he had not recovered from his said injuries; that the sprained and lacerated ligaments had not healed and united and that the ruptured blood vessels were not at said time recovered from said injury, and he states that he was in no condition to resume manual labor, which fact he avers was well known to said physician and surgeon, and he states that he would not have signed said receipt and accepted said money were it not for his reliance upon the statements and representations made to him which he at said time believed to be true. The plaintiff states that as soon as he attempted to resume manual labor and to resume his work as a switchman he suffered intense pain, passed blood from his lung, and was wholly

fered by the plaintiff, such statements would not have been sufficient to have avoided the release in question, is in accord with the unbroken line of decision, but the positive statement of the surgeon, the servant of the defendant, in the instant case, was that the injuries of the plaintiff were not permanent and that he would fully recover, and we are of the opinion that the positive statements made by Dr. Porter, the servant of the defendant, to the plaintiff, were material, and that plaintiff had a right to rely thereon in making settlement, and said representations being untrue in fact, even though the falsity was not known to the said surgeon and they were not made with intent to deceive the plaintiff, plaintiff had a right to rescind the settlement, as the statement of the surgeon of the company that the injuries of plaintiff were not permanent and he would entirely recover, upon which statement plaintiff relied, constituted constructive fraud; fraud in law.'' The cause was affirmed.

In Seymour v. Chicago & N. W. R. Co., 181 Iowa 218, 164 N. W. 352 (1917), plaintiff sued for personal injuries received while in the employ of defendant, and it was affirmatively defended and admitted that plaintiff had made a written settlement which acknowledged receipt of $500 in full satisfaction, and contained a statement that the signer had read and understood the release and that no contract or promise of employment was made with him. Plaintiff replied that the settlement was not binding because of fraudulent statements made to plaintiff by the defendant's claim agent and physician. It was alleged that the assistant claim agent, with fraudulent intent to deceive and induce the settlement, told plaintiff that he was making a big fuss over his injuries, which were trifling, and that plaintiff should have been at work in defendant's freight service for 6 weeks; and that the general claim agent of defendant fraudulently stated and represented to plaintiff that his shoulder would be all right, and that in case anything happened to plaintiff on his resuming his former employment defendant would take care of him. The court said that the claim agents were not doctors and had no personal knowledge of the physical condition of plaintiff, and that what they said was the expression of a naked opinion upon which plaintiff, under the circumstances, had no right to rely. As to the fraud on the part of defendant's physician, it appeared that plaintiff, after talking to defendant's assistant claim agent, went to Dr. H, who was the chief surgeon of defendant, who examined plaintiff and told him that his injury was not permanent and that he would be able to resume his run as a freight brakeman in from four to six weeks, and the agent testified that he honestly believed what he told plaintiff. The court said it was only by considering testimony as to plaintiff's condition

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unable to perform manual labor of any kind, and that his said injuries, as alleged in his petition, are permanent.

That by reason of the facts herein stated said receipt and release was procured by fraud, and plaintiff was by fraud and misrepresentations induced to sign the same; and that said release and receipt are void, of no legal force or effect and not binding on plaintiff.

Division III.

Plaintiff states that subsequent to the injuries received by him on the 17th day of March, 1915, as alleged in his petition, he was placed in the care of the defendant's physician and surgeon, one Dr. C. J. Saunders of Fort Dodge, Iowa, except for a few treatments received from the defendant's doctor at Oelwein,

later than when Dr. H saw him that there was room to claim that the doctor was mistaken or that his opinion was an unreasonable one, and when it was further considered that there was no evidence that the doctor was present at the settlement or spoke with reference to or in aid of a settlement, the statement made by Dr. H made no question of fraudulent representation for the jury. It was further contended in effect that Dr. H knew that plaintiff had an incurable dislocation, or knew that the injury made a second dislocation highly probable, of which fact plaintiff was ignorant, and that the opinion given by the doctor therefore amounted to a fraudulent concealment. The court recognized the rule that concealment may operate as a fraud, and said that the claim that the jury should have had the question rested on the argument that a second dislocation was most likely to occur, and that a skilled surgeon like Dr. H must have known this, and therefore his silence on the point might have been fraudulent concealment. It appeared that 15 days before the settlement was made plaintiff went to work as a passenger brakeman, and that he quit that service and returned to his work as a freight brakeman 16 days after Dr. H had given his opinion that the injuries were not permanent, and that he remained in that service for about two months, and would probably have done so indefinitely if he had not suffered a second dislocation, and that it did not appear, even on what was found after the second injury, that the outward signs disproved the prognosis of Dr. H made before there was a second injury. The court said it was a serious question whether the whole controversy might not be disposed of by holding that the representations of Dr. H were the truth under these circumstances, but that the court did not care to base its opinion upon a finding to that effect, and held that, under the circumstances, no sufficient evidence was presented that there was any fraud on the part of Dr. H in stating his opinion as to the extent of plaintiff's injuries. In this connection the court pointed out that there was a difference of opinion as to whether a second dislocation was probable from the first injury even among the expert witnesses called on behalf of plaintiff, and the fact that a physician gave an honest opinion and other doctors did not have such opinion does not indicate that its utterance is a fraud. The judgment of the trial court for defendant upon a directed verdict against the plaintiff was affirmed.

While engaged in interstate commerce in the capacity of a brakeman on a local freight train, plaintiff was injured while throwing a jack switch, by the block on the switch lever striking his right foot and breaking the bones and wounding the tendons to such an extent that he was laid off from work for several

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and also excepting that on a few occasions in the absence of said Dr. Saunders from the city of Fort Dodge, and under the direction of the defendant, he received temporary treatment from other physicians whose services were paid [for] by defendant.

Plaintiff states that at the time he signed the receipt or release referred to in division four of defendant's answer, and received from defendant the payment as therein alleged, that both plaintiff and defendant were wholly and unconsciously ignorant of the nature and character and extent of plaintiff's injuries; that it was not contemplated by either plaintiff or defendant that said payment and release compensated plaintiff or was in fact a release or settlement for injuries sustained other than the loss of time for the period between March 17 and June 16, 1915; that at the time of the execution of said release,

months and his right foot was permanently injured. He alleged negligence of defendant in failing to furnish a safe and suitable appliance, in that the switch was old, worn, rusty and out of date, and not in working order, and to his complaint defendant, in addition to the usual defenses, pleaded that plaintiff had voluntarily released it from all liability. Defendant had judgment, from which plaintiff appealed. The question was raised as to whether the release was affected by a provision of the Federal Employers' Liability Act providing "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void," and it was held that the provision in question had reference to contracts made by parties prior to the injury, but that there was no provision in the statute preventing the parties from agreeing upon the terms of settlement after the cause of action had arisen out of the injury. The testimony concerning the release tended to show that defendant's physician not only advised plaintiff that his foot was well, but that he phoned to defendant that plaintiff was all right; that the physician knew when he advised plaintiff that his foot was all right that it would have been necessary for plaintiff to release the defendant from liability to get employment; that plaintiff was induced to grant the release by reason of his reliance upon the advice of the physician as to his physical condition; that the advice of the physician was erroneous, and that he failed to exercise due care in ascertaining the fact upon which he based his opinion as to the condition of plaintiff's injury by failing to resort to the X-ray; and that plaintiff was unduly influenced by the erroneous advice of the physician while acting within the scope of his authority, and that such erroneous advice was the direct and proximate cause of the signing of the release by plaintiff, for which defendant was responsible. The court held that the trial judge was in error in granting a motion for the direction of a verdict and reversed the judgment and remanded the case for a new trial. Ballenger v. Southern R. Co., 106 S. C. 200, 90 S. E. 1019 (1916).

In St. Louis, I. M. & S. R. Co. v. Carter, 93 Ark. 589, 126 S. W. 99 (1910), the testimony on the part of plaintiff tended to establish that he was in the employ of defendant as a brakeman, and while he was engaged in the performance of his duties in unloading freight he had rolled a barrel of lard, weighing from 400 to 500 pounds, to the door of a car, and was engaged in removing it from the car, defendant negligently and carelessly kicked or shoved a number of cars with great violence against the box car, knocking plaintiff and the barrel of lard from the car to the

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plaintiff and defendant did not know or consider the nature and extent of plaintiff's injuries and that said payment of the money was made and receipt or release signed by plaintiff in ignorance of the fact that the injuries sustained by him on the 17th day of March, 1915, were not healed and recovered, that the lacerated ligaments and blood vessels had not healed and reunited, that both plaintiff and defendant were wholly and mutually mistaken in regard to plaintiff's condition at said time, and that all that was contemplated, intended and considered in such settlement was the payment for the time lost by plaintiff, estimated at the amount that he would have earned in his employment as a switchman, together with the sum plaintiff had paid or obligated himself to pay to a physician or physicians for treatment at times when the defendant's physician was absent from the city of Fort Dodge.

ground, so that the barrel struck him on the small of the back, injuring him severely. A few days thereafter his disability developed more fully, and on the advice of the local physician of the defendant he went to its hospital. The injury affected his entire nervous system, and while at the hospital he was under the treatment of a number of defendant's surgeons and specialists, and, after he had been at the hospital nearly 5 months, defendant's chief surgeon at the hospital made an examination of him, and told him that he was completely recovered, that there was nothing the matter with him, except that he had stayed at the hospital so long and worried himself; and, when asked by plaintiff if he could depend on what the surgeon said, that there would be no danger thereafter, the surgeon replied: "You sure can do it." The surgeon then sent him to the general claim agent of the defendant, where he executed a release, there being a sharp conflict in the testimony of plaintiff and the claim agent as to what occurred at its execution, plaintiff testifying that they spoke about the surgeon pronouncing him fully recovered, and that they then agreed that the amount of the wages that would be due to him for the time which he had lost was $325, and that he then signed the release, and received a voucher for that amount. The release, in effect, stated that the receipt of the sum was in full accord and satisfaction of all claims and damages growing out of the injuries. Plaintiff returned to his home, and in a few days he began to suffer pain from the injury, and to grow worse, so that he consulted his family doctor, who examined him and then called in two other physicians to examine him, and they testified that he had a depression in the lower portion of his spine between the fourth and fifth lumbar vertebrae, and that he had a fracture of the coccyx bone. Those physicians continued their examination and treatment of him for some time, and at the trial a board of four physicians was appointed to make a physical examination, two being selected by the plaintiff and two by defendant, and they appeared in the case as witnesses, and in addition, other physicians gave testimony upon the trial of the case relative to the nature and extent of the injury sustained by plaintiff, and the evidence on his behalf tended to prove that the injury had caused a great depression between the fourth and fifth lumbar vertebrae and a fracture of the coccygeal bone, that this caused a present paralysis of one of plaintiff's legs and might result in the paralysis of his urinal organs, and the muscles controlling the bowels, that the injury did and would continue to give the plaintiff intense pain and disable him from labor, and some of the physicians declared the injury permanent. Plaintiff was a married man, 28 years old, and sued for $50,000 damages. The jury returned a

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That it was not the intention of either party, plaintiff or defendant, to compensate plaintiff for injuries sustained, but for loss of time only, and he avers the fact to be that both parties were mutually and wholly mistaken as to plaintiff's condition at the time of said alleged settlement, and that both parties, plaintiff and defendant, were mutually mistaken at said time.

That by reason of the matters herein set forth, that is, the mutual mistake of both plaintiff and defendant as alleged, and because of the fact that there was no consideration, therefore said alleged release and settlement is void and binding on neither party hereto, and plaintiff refuses to be bound thereby. He states that said alleged settlement was not in fact and was not intended to be in settlement of anything more than his loss of time up to the date thereof.

verdict in his favor for $5,000, less the $325 received by him, and from a judgment entered thereon defendant prosecuted this appeal. In affirming the judgment, the supreme court approved an instruction given by the trial court on behalf of plaintiff as follows: "But if the jury find from the preponderance of the evidence that before, or at the time, the consideration was paid for said release, and the same was executed, the physician and surgeon of the defendant railway company made an examination of the plaintiff's injuries, and thereupon assured the plaintiff that his injuries were not permanent, but that plaintiff would be able to resume his position and duties with defendant in a short time, and, relying upon said statement to be true, he executed said release, thinking it a settlement for wages for time lost on account of the injury, but soon afterwards it was developed that plaintiff was permanently injured, and that he would never be able to perform labor in his line of employment, but that at the time of making said statements defendant's physician and surgeon either knew that plaintiff was permanently injured and misrepresented that fact, or was honestly mistaken as to extent of plaintiff's injuries, and misled him into signing said release, then plaintiff is not bound by the same, and the jury should so find." The principal objection to the instruction was to the words "thinking it a settlement for wages for time lost on account of the injury," defendant claiming that the instruction permitted the jury to find for plaintiff, if they found that it was a settlement for time lost only. The court said, however, that, construed as a whole, the instruction required plaintiff to show both that the instrument was obtained by misrepresentations or fraud and also that he thought it was a settlement for wages, and that any error in the clause objected to was therefore not prejudicial.

Plaintiff's arm was broken at the elbow while he was employed by defendant as a freight brakeman, and he was taken to M and placed in charge of defendant's physician and surgeon at that place, who reduced the fracture and rendered such services as were necessary to proper treatment of the injury. Plaintiff remained there in the defendant's hospital under the care of the physician for about 3 weeks, and soon after leaving the hospital expressed a desire to visit relatives residing in S. The M physician consented, and prepared the arm for a journey, advising plaintiff to consult a physician at S for such advice and treatment as might be found necessary, and gave him a letter of introduction to defendant's physician at S. Plaintiff presented the letter to this physician, who removed some of the bandages and gave plaintiff some instructions about the care of the arm. Plaintiff visited the physician at different times for about a month at that place. On one of

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Wherefore, plaintiff renews the prayer of his petition.

Amendment to Reply.

Division IV.

Plaintiff states that subsequent to the time he sustained the injuries complained of in his petition, he filed petition and claim against said defendant before the industrial commissioner of the state of Iowa, under the provisions of Chapter 8-a, Title 12 of the 1913 Supplement to the Code of Iowa, and acts amendatory thereof. That his petition and claim filed under the provisions of said Code chapter as herein stated, was for injuries sustained while in the employ of the defendant and including the injuries received on the night of

the visits he claims to have stated to the doctor that he was anxious to make a settlement with the company and to go back to work, and inquired about the condition of his arm, and whether it would be advisable to return to work, and the physician then, and again upon a visit to him about a week later, stated that the arm was all right and would be perfectly well within 6 months, and advised that he should not undertake any heavy work and that he should not go to work as a freight brakeman for at least 6 months. Plaintiff testified that, in reliance upon the statements of this physician, he returned to M, made a settlement with the company, and returned to work upon one of its passenger trains. In reply to defendant's plea of the release plaintiff alleged that the statements of the physician were false and untrue, and known to be false and untrue when made, and further claimed that the injured arm was improperly set by the M physician, would never be restored to its former condition, and that in consequence plaintiff was permanently injured, and that the settlement he made for an amount equal to the wages lost during the time he was out of employment was wholly inadequate and unjust. The court said that since the S physician did not know of the improper or imperfect setting of the fracture, and was not called upon to examine the arm for the purpose of ascertaining its condition in that respect, and was not under any duty to do so, it was clear that the expression of his opinion that the arm would be all right in a short time was not such a false or fraudulent representation as would justify setting aside the settlement made; and that, as plaintiff was fully aware of the fact that his connection with the case was temporary and for the purpose only of rendering such treatments as might be necessary during plaintiff's visit to S, and as he also knew that the only person capable of speaking with first knowledge on the subject was the physician at M, and that at most the knowledge of the physician at S was superficial and the result of a mere casual inspection of the injured arm, it would seem that, if plaintiff in good faith desired information as regarded settling his claim he should have applied to the physician at M, who knew or ought to have known the facts, and upon whose representation plaintiff would have had the right to rely. The court said further that the testimony of plaintiff made it reasonably clear that he did not in fact rely upon the advice of the physician at S, as that physician advised him not to undertake heavy work and not to engage as a freight brakeman, but, contrary to the advice, plaintiff abandoned the passenger train service and went to work as a freight brakeman for defendant within a very short time after the advice was given and continued therein for several months, until it was claimed his arm failed

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the 17th day of March, 1915. Plaintiff states and shows to the court that the defendant appeared in said proceedings and, in answer to plaintiff's claim for review and for compensation, stated and averred that plaintiff's injuries grew out of his employment while engaged in interstate commerce, and that his right of recovery, if any, was governed wholly by the Act of Congress known as the Employers' Liability Act. Plaintiff further states that defendant in said proceedings asked that the application filed by plaintiff therein be dismissed because his right of recovery, if any, was under the Act of Congress heretofore referred to. That upon the filing of said answer in said proceedings, plaintiff did dismiss the same and commenced this action, basing his claim and cause of action under said Act of Congress known as the Employers' Liability Act.

him; and that this showed as a matter of fact that plaintiff placed no particular reliance upon the advice of that physician, presumably for the reason that he was aware of the fact that the doctor's knowledge of the injury was imperfect. Fitzpatrick v. Chicago, M. & St. P. R. Co., 121 Minn. 370, 141 N. W. 485 (1913).

In St. Louis, I. M. & S. R. Co. v. Morgan, 115 Ark. 529, 171 S. W. 1187 (1914), plaintiff sued for damages for injuries received while working as a section foreman for defendant, by being struck by one of defendant's trains while he and another employee were endeavoring to get a speeder off the track, and among other defenses pleaded was a release given in consideration of a payment of $45, which plaintiff contended was procured by fraud, deception and misrepresentation. The principal misrepresentations relied upon by plaintiff as defense to the release concerned alleged representations that the release contained a contract for permanent employment, and, upon a former trial, an appeal from which is reported in 107 Ark. 202, 154 S. W. 518 (1913), it appeared that no reliance was placed upon any misrepresentation of the existing physical condition of plaintiff by the doctors at the time of sending him from the hospital in which he was treated, nor upon any representation by them as to the time required for the complete recovery from the injury, although it appeared in that case that plaintiff testified that the doctor told him he was able to go back to work, and that after the doctor told him he was all right, and the claim agent told him that the doctor said he was all right, he thought he might get well. Upon the present appeal from a second trial the court said that there was testimony sufficient to warrant a finding that the physician or surgeon who treated plaintiff at the hospital represented to him that he was not permanently injured, and that the settlement was induced by that statement, and the court followed St. Louis, I. M. & S. R. Co. v. Hambright, 87 Ark. 614, 113 S. W. 803 (1908), post, in holding that, even if the statement was not fraudulent, it constituted a mistake of fact which absolved the parties from the binding force of the contract. The judgment for plaintiff was reversed, however, for other errors, and the cause remanded for a new trial.

While plaintiff was working as a switchman his foot was injured when he attempted to couple a car to a switch engine by means of an automatic coupler which was out of repair. His foot was caught and crushed so that the big toe had to be amputated and the other toes on that foot were mashed off. He was given attention that night by the local surgeon, and the next day sent to a hospital operated for the benefit of the employees of defendant company. The injury occurred on July 4, and he remained in the hospital until Novem-

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He now states and avers that the defendant herein having in said proceedings before the industrial commissioner plead as a defense in its written answer that plaintiff was, at the time of said injury, employed in interstate commerce, is now estopped in this proceeding from changing its position, and now claiming, alleging or averring that plaintiff at the time of said injury was not engaged in interstate commerce, and is not entitled to recover under said Act of Congress, and is estopped from putting that fact in issue in this proceeding.

LADD, C. J. The plaintiff was in the employment of defendant in the evening of March 17, 1915, as one of the helpers in a

ber 2, when he applied to Dr. V, the surgeon in charge, for a discharge or release, assigning as a reason that his wife was about to be confined, and that he could secure proper attention at home with his family. Dr. V objected to the discharge, but finally acceded to his wishes and gave him a letter of introduction to the claim agent of the company, and also gave him a letter addressed to the claim agent, stating that the bearer had been that day discharged upon his request from the hospital for injuries consisting of loss of all of the toes of the left foot, extensive loss of skin structure, dorsal and plantar surface of same foot, which was considered permanent; that plaintiff was now convalescent and was sent to the claim agent for such consideration as the case seemed to merit; that "judging from plaintiff's present condition it would probably be ——— ——— before he was able to resume his old employment;" that while under care his "conduct had been O. K."; that a large granular area still remained unhealed which would probably require two to four months' treatment; that plaintiff said his sister was a professional nurse, who would undertake to dress his foot at regular intervals under advice of his physician; and that plaintiff assumed all risk in going before the wound was healed, and also assumed all bills for expenses for medicine, dressing and treatment, and that he had read the clearance letter. The letter was read to plaintiff by Dr. V and delivered to him to be handed to the claim agent, which was done. The claim agent offered him $600 in settlement to pay for his loss of time, and plaintiff at first declined it, but on the next day accepted it and executed to the company a written release reciting that he accepted the sum in full release of all claims against the company by reason of his injury. He returned to his home and was there treated by other surgeons, and it was afterwards found necessary to amputate the foot. He brought suit for the injuries and the trial court gave a peremptory instruction to return a verdict in favor of the company. Upon appeal the court said that the letter of Dr. V, when read in the light of the attending circumstances, could not be construed to amount to a representation as to the extent of plaintiff's injuries; that the surgeon merely stated that the unhealed area would require from two to four months' treatment, and that in the portion of the letter, which appeared to have been written upon a printed blank, where there was a space for stating the probable duration of the injury, the blank was left unfilled, which showed that the surgeon was not through with the case and did not attempt to give an opinion as to the full extent of the injury; that plaintiff was not finally discharged as a well man, and the surgeon was not holding out to him that he was cured, but that the letter was more

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switching crew. At about 10:30 o'clock, he attempted to get on a car for the purpose of switching the same and placing it in a train being made up. The car was of a style known as the "Gondola" or Hart Company vertible. The sides of the car are fastened with hinges at or near the top, with clasps at the bottom. When the clasps are broken or unfastened at the bottom, the sides swing outward; that is, when lifted by hand or swung by a movement of the car. The car at the time was moving in a southeasterly di-

in the nature of an excuse or a reason why he should be allowed to leave the hospital before he recovered. The court said that the fact that plaintiff's injury did not heal as rapidly as he anticipated, and that it was later found necessary to amputate his foot, did not prove that there was a misrepresentation of facts by Dr. V, or even a mistake as to his diagnosis. The release was held to be binding and the judgment affirmed. Francis v. St. Louis, I. M. & S. R. Co., 102 Ark. 616, 145 S. W. 534 (1912).

Deceased was hit on the forehead by a rebounding bar of steel, the outer and inner plates of the skull were fractured, and he was rendered unconscious, remaining in that condition, according to the testimony of the physician who attended him, 9 hours, or, according to his wife, 4 days. He was treated by a physician for about 12 days, and was then sent to the hospital where nearly all the sick and injured employees of defendant were treated. He executed a release which described no particular injuries but released defendant of all damages that had accrued or might accrue to plaintiff by reason of the accident, was permitted to go home, and died as the result of the injury about one month after the release was given. Plaintiff sought to avoid the effect of the release on the ground that deceased was mentally incompetent at the time it was signed, so that he did not know or understand what he was doing or comprehend the nature and legal effect of the release, and because the release and settlement were made under a mutual mistake on the part of the claim agent and deceased. The court found the evidence clearly insufficient to raise the issue of want of mental capacity. On the question of mistake as to the nature of the injury, it appeared from the evidence that defendant's claim agent, upon being informed that deceased wished to make a settlement, went to see him, and, upon asking deceased what he thought he ought to have, was told he thought he ought to have full time, and it was agreed to go to the physician who had been treating deceased to determine the extent of his disability. This physician was not in the employment of defendant, but he treated certain of its employees through courtesy to Dr. G, surgeon of defendant. Deceased went to see this physician, who examined him and talked with him, when defendant's claim agent came in, and the physician told them that deceased seemed to be all right and in good shape and, as he had been waiting for about a week to go home and said he felt all right, the physician said he did not see any reason why he should not go; that he thought he could dismiss him and did not find anything more to treat. The physician testified that to his knowledge there was nothing there to treat, and that the opinion that he gave at that time was an honest opinion, and that he would not have

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rection, and, while carrying a lantern in his right hand, plaintiff put his foot on the sill-step in the right-hand side and at or near the front and took hold of the side handrail with his left hand and attempted to mount the car. As he did so, one of the seven doors constituting the side of the car swung out, caught him and broke his hold, and, in his words, "My foot struck the ground, and I hung with this hand and it jerked."

dismissed deceased if he had not thought that he was well. The court held that this mistake in regard to the extent of plaintiff's injuries was no ground for setting aside the release, and a judgment in favor of the former wife of decedent and their minor child for $5,000 was set aside and judgment rendered for defendant. San Antonio & A. P. R. Co. v. Polka, 57 Tex. Civ. App. 626, 124 S. W. 226 (1910).

Plaintiff sustained an injury to his eye by the breaking of a lubricating glass, the danger of which he appreciated but as to which he was released from the assumption of risk by having made a complaint and relied upon a promise that the glass would be guarded. Defendant pleaded a settlement which plaintiff claimed was induced by misrepresentation of a material fact, plaintiff claiming that the company's physician told him, in effect, that his eye was substantially all right, and at the end of 2 weeks would clear up, and that the statement was repeated to him with some positiveness by the claim agent at the time of the settlement, which statement was untrue, and was relied upon by plaintiff in making the settlement. The court, in sustaining a judgment for plaintiff, said that it might be conceded that the evidence would not sustain a finding to the effect that either the physician or claim agent entertained a wrongful intent to deceive or defraud when they made the statement, but that, to avoid a settlement, it was not necessary to prove such intent, but it was enough that a misrepresentation of a material fact was made, upon which plaintiff relied, and by which he was induced to make a settlement to his injury, and that, if the statement was made, though innocently, and so relied upon by plaintiff, defendant must submit to a rescission of the contract of settlement. Smith v. Great Northern R. Co., 139 Minn. 343, 166 N. W. 350 (1918).

Plaintiff was injured by falling into an engine pit in defendant's roundhouse due to the alleged negligence of defendant in permitting the roundhouse to become filled with steam so that plaintiff could not see where he was going. Some time after his injury, for a consideration, he executed a written release of his cause of action which he claimed he was induced to sign by a material misrepresentation made by the defendant's physician as to the extent of his injury. Such a misrepresentation, the court said, though innocently made, gave ground for avoiding the release, and it was held that the evidence sustained a finding that the extent of plaintiff's injuries was misrepresented to him at the time, and the order of the trial court denying defendant's alternative motion for judgment or a new trial was affirmed. Enger v. Great Northern R. Co., 141 Minn. 86, 169 N. W. 474 (1918).

2. Company's hospital surgeon.

Plaintiff was in the employ of de-

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The petition alleged that in falling he sprained and lacerated the ligaments of his side and ruptured a blood vessel or vessels in his lungs; that these injuries were caused by the negligence of the defendant, in that it permitted the car to be handled with the sides unfastened knowing that in such condition it was dangerous, in failing to warn plaintiff of its dangerous condition, and in permitting to so remain thereon a sill-step of dimensions of that used;

fendant as a section man, and while engaged in removing decayed ties from under the rails was struck upon the foot with a pick by another section man as he swung it for the purpose of driving it into the tie to assist in handling it, and, while the injury was slight at first, infection or blood poisoning soon set in and developed seriously, and plaintiff was taken to a hospital where he was attended by defendant's surgeon. A little over a month after the injury defendant's claim agent procured a release of plaintiff's claim for a consideration of $250, an amount which the court said was small compared with the injuries suffered and fell far short of paying plaintiff's pecuniary loss. Plaintiff claimed that the release was procured by misrepresentation and fraud under the following circumstances: That while plaintiff was lying in the hospital the claim agent of defendant called on him in the presence of defendant's surgeon, who was attending to him and participated in the negotiations, and when the claim agent asked how long it would take before plaintiff would be well again, the surgeon answered that in six or eight weeks plaintiff would be well and strong and able to go to work. The surgeon denied making that statement, but frankly testified that such a statement would not be truthful, and said that he expected it would take plaintiff a much longer time to get well. Plaintiff was in fact in the hospital for eight months thereafter. The jury by their verdict found that the surgeon did make the statement charged, and the court found that the evidence was conflicting and sufficient to sustain the verdict, and said: "True, the alleged statement was of matter of opinion, and a mere expression of opinion is ordinarily not regarded as an actionable representation, but this is not an invariable rule. If the surgeon of a railroad company knows that a release of damages is being bargained for on the basis of his opinion as to the extent of the injury and the length of disability, he is bound to give an honest opinion, and a false assertion of opinion will amount to a fraud." Shortly before plaintiff left the hospital defendant's claim agent procured from plaintiff a document in the form of a confirmation of the release in question, which recited that the consideration for it was the payment by defendant of the bill of its surgeon and of the hospital. The court said that the evidence of plaintiff was that, at the time the first release was obtained, it was agreed that defendant should pay those bills, and that that agreement was not only not denied, but defendant's surgeon in fact testified that it was the universal custom to pay such expenses, and the court held that in that state of the evidence there was no consideration to sustain the second instrument. Judgment for plaintiff was affirmed. Oestreich v. Chicago, St. P., M. & O. R. Co., 140 Minn. 280, 167 N. W. 1032 (1918).

Plaintiff's leg was broken about

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that, in attempting to go on the car, he pursued the customary method; that his injuries were permanent; and prayed recovery of damages suffered.

The answer admitted the employment, and that plaintiff was injured, but put the other allegations in issue, and pleaded that on or about June 15, 1915, the parties hereto compromised the claims sued on, and that, in consideration of $450 paid him, plaintiff released all claims for damages and prayed to go hence with its costs.

halfway between the knee and ankle while in the discharge of his duties as an employee of defendant. He was immediately taken to defendant's hospital and remained there 5 months, under the care and treatment of defendant's surgeons, doctors K and H. After he had been in the hospital about 3 months he accepted from defendant the sum of $600 in consideration for a written release from his claim for damages. In avoidance of the release plaintiff alleged that defendant's claim agent took him to its chief surgeon, Dr. K, and his assistant, Dr. H, who had charge of the hospital and of plaintiff and the medical treatment of him, and there procured from each of them the statement and representation that he was not permanently nor seriously hurt; that the bones in his leg had properly knitted and united together; and that the leg, within 2 months' time, would be as good and as strong as it ever was; that he was on the safe side and could safely make the settlement, and that it was a good settlement for his injuries. Plaintiff further alleged that the claim agent used the physicians and their statements and representations, repeating and reciting them to plaintiff, and that upon the basis thereof and faith therein induced plaintiff to make the settlement and sign the release, but that he was misled and overreached in so agreeing and executing the release for the reason that the statements and representations were not true, because the bones in his leg had not then properly knitted and united together, nor would they ever do so, but were permanently and incurably crushed and impaired so that he was left deformed and unable to do any constant or heavy work. The case was tried before a jury, and upon the conclusion of plaintiff's evidence a peremptory instruction was given in favor of defendant upon the theory that an issue had not been raised with respect to the validity of the release, and upon the verdict returned, a judgment was rendered in defendant's favor from which plaintiff prosecuted this appeal. In regard to the making of the settlement plaintiff testified that the claim agent offered him $500 and suggested that he call in some friend to consider the matter, and that plaintiff called in a Mr. D, who came and went with him to the claim agent's office; that at that time the leg was still hurting him, and the claim agent suggested that they go down to the doctor's office, which was done, and the doctor examined the leg and told plaintiff that in 2 months it would be in as perfect condition as if it was never hurt; that they then went back to the claim agent's office and plaintiff was again offered $500 on the strength of the doctor's statement that the leg was in good condition, and when plaintiff still complained that the leg was not well the agent said that he would give him another $100; that plaintiff did not then con-

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In reply, plaintiff pleaded that the alleged settlement had been obtained by fraud, and also that it was obtained in consequence of a mistake.

At the close of the evidence, defendant moved the court to direct a verdict in its favor for that: (1) The evidence failed to show the condition of the car as alleged had existed for such length of time as that defendant was charged with notice and in the exercise of ordinary care must have repaired same prior to the injury; (2)

sent because he wanted to make sure that his leg would be well; that he then left the office with Mr. D and met Dr. H, whom Mr. D asked for advice as to accepting the money, particularly if the leg would be well in the future, to which Dr. H stated that the leg was in good shape and that it would hurt only for a short while, after which plaintiff would not know that he was ever hurt, and advised him to make the settlement. The testimony of plaintiff's physician given at the trial showed that, while there had been a union of the smaller bone of the leg the larger bone had not formed a bony union, the union being only fibrous, so that there was movement; that the smaller bone was shortened about one-half inch, causing the larger bone to be bowed; that in his belief the injury would be more or less permanent, and that he did not believe there had been a bony union since the leg was fractured; and that, with the leg bowed as it was, even if united by a firm bony union, there would still be lessened efficiency and a greater liability to fracture, and that without bony union it would cause him pain. The court held that the statements by Dr. K, as testified to by plaintiff, that the fracture had united and the leg was in good condition, was a positive statement of an existing fact and not a mere statement of opinion, and that it was error to refuse to submit the case to the jury. The case was reversed and remanded. Alenkowsky v. Texas & N. O. Ry. Co., — Tex. Civ. App. —, 188 S. W. 956 (1916).

Plaintiff, one of defendant's section foremen under the supervision of its roadmaster, while assisting other employees in unloading ties from cars, was, due to the negligent handling of a tie by others, struck upon the leg below the knee, receiving bruises and injuries. A few days thereafter plaintiff, at the instance of defendant's local physician who first treated him for the injuries, went to a hospital conducted by the railway company's hospital association, a corporation under the laws of the state, where he remained and was treated by doctors W and L, the surgeons in charge, for about 2 months. He then, in consideration of $110 paid to him by defendant, executed an instrument in writing releasing defendant from all claims for damages on account of the injuries. Notwithstanding the release he commenced and prosecuted this suit by which he recovered judgment for $9,877.35 as damages, in addition to the $110 paid to him as stated. He contended that the release was not binding upon him because he was induced to execute it by his reliance upon false representations made to him by doctors W and L, whom he alleged acted for defendant in making the representations as to the extent of the injuries to his leg. Defendant contended that the release was fair and was freely made by plaintiff, with knowledge of all the facts known to it; that the represen-

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that the evidence was insufficient to show that the compromise was void by reason of fraud; (3) that the mistake, if any, was insufficient to set the compromise contract aside or to render it invalid; and (4) the evidence failed to show any mistake in plaintiff's condition as it in fact was. This motion was sustained, and the only issue presented in this case relates to the sufficiency of the evidence to raise an issue for the jury as to whether the settlement was based on fraud or mutual mistake.

tations made to him by the doctors were not false and fraudulent but were true and honest expressions of their opinion; and that defendant was not bound by such representations because said doctors were not its agents, and in making the representations did not act for it. The representations in question were made to plaintiff by doctors W and L, who had treated him for about 2 months just before he executed his release, and were that the injuries to his leg were only temporary; that, while still slightly swollen, his leg was all right and was well; that plaintiff could safely go back to his work as a section foreman in a few days; and that the swelling in his leg would disappear as soon as he got out and went to work. It appeared from the testimony that, instead of passing away as the doctor said it would, the swelling in his leg gradually grew worse and, at the time of trial, his leg was in a condition which probably would necessitate amputation. Defendant pointed to undisputed testimony that the hospital association was incorporated under the laws of the state as a benevolent or charitable society without capital stock, and that the funds necessary to pay the expenses of the association were obtained by assessments against its members, and that doctors W and L were employees of the association; denied that doctors W and L were interested in or had anything to do with the settlement made with plaintiff or with any settlements made by defendant with its employees; and contended that any statements made by them to plaintiff were nothing more than honest expressions of their opinions as to his physical condition, and were not made to induce him to act as he did, and that defendant's claim agent, in making the settlement, was not influenced by any statement made by the doctors as to plaintiff's condition. The court conceded that, if the testimony specified was all there was in the record, defendant's contention should be sustained, but held that there was other testimony before the court which authorized a finding that the doctors, at the time they made the statements to plaintiff, were, as the surgeons in charge of the hospital, defendant's agents and employees, and in making the statement acted within the scope of their authority, and that a finding that the representations were intended to influence plaintiff's action in the matter in making the settlement with defendant was warranted. In support of this, the court pointed out that, while the hospital association was a corporation as stated, it was controlled by a board of trustees, a majority of whom, by the laws of the association, consisted at all times of the persons who, for the time being, occupied towards defendant the relationship of assistant to its president, its general manager, general attorney, and general superintendent, so that the power to control the association was in de-

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In order to establish the alleged fraud and mistake, the plaintiff has testified to the injuries as alleged and to his treatment, first by Dr. Wasen and afterwards by Dr. Saunders of Ft. Dodge, and to having spit blood after the injury continually except for three weeks, relating that the agent of the defendant at Ft. Dodge handed him a note dated June, 1915, from the superintendent, saying:

"Please tell Malloy to come to Oelwein whenever he is ready and get me by calling Jess Beale's residence on phone."

fendant's general officers, as such, and hence independent, for it had power and control over its officers; that defendant had issued to doctors W and L as such surgeons, and that they had accepted and used, passes entitling them to free transportation over defendant's line of railway, which could not have been lawfully done unless they were the employees of defendant; that, as part of their duties as such surgeons, as they seem to have construed it, they made reports to defendant's claim agent for his use in making settlement with injured employees, showing the condition of such employees with reference to their injuries; that, on the occasion when plaintiff executed the release in question, it appeared that Dr. L accompanied him to the office of defendant's claim agent, to whom he introduced plaintiff, and to whom he made a statement as to plaintiff's condition; and that it further appeared that it was in compliance with Dr. L's direction to one of defendant's employees in its general offices that such employee issued to plaintiff a pass entitling him to free transportation from the hospital to his home. This testimony the court held to be sufficient to authorize a finding that doctors W and L, as chief and assistant surgeon respectively in charge of the hospital, were agents and employees of defendant, and said that, if they were, then it was within the scope of their employment as such surgeons not only to treat but to advise plaintiff concerning the nature and duration of his injuries and the probability of his recovery therefrom. The court further said that the testimony tending to show that the representations made to plaintiff were intended to influence his actions in the matter of the settlement was sufficient to support a finding that they were so intended. By that the court said they did not mean to say that the testimony was sufficient to show that the surgeons, at the time they made the statements, knew them to be untrue, but that they made them with knowledge on their part, at the time, that plaintiff contemplated leaving the hospital and, before leaving, took up with defendant's claim agent the matter of a settlement of his claim against defendant for damages on account of the injuries he had suffered, and that they expected plaintiff would be influenced by what they said as to his condition in making the settlement. Upon the question whether the statements made by the surgeons were intentionally false, the court said: "But the rule seems to be that if the statements were false, and were made to appellee to induce him to settle his claim, the fact that they were innocently made by the surgeons would not deprive appellee of a right to have the release set aside." The court further said that they thought that the statement that plaintiff's leg was all right and was well ought not to be construed as merely the opinion of the surgeon, but as a statement of

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Later, in the same month, he telephoned the agent to communicate a similar message to plaintiff, and on the 15th of the month requested the agent to "phone Malloy to come to Oelwein at any time, now." Following this last communication, the plaintiff called on Dr. Saunders, the company's physician at Ft. Dodge, and informed him that the superintendent had sent for him, and inquired of the doctor concerning his condition. Plaintiff testified that the doctor said:

fact, and that it could not fairly be said that the real condition of plaintiff's leg was a matter equally open to him and the trained expert who had treated it for two months, nor that the means of deriving information upon which a fair judgment as to its condition could be predicated were equally open to him and to them. The court further said that, when the testimony as to the known consequences and as to the probable consequences to plaintiff of the injuries was considered, they did not think the amount of the judgment should be disturbed as being excessive. On motion for rehearing and reexamination of the record the court found that the statement that Dr. W had accepted a pass was erroneous, but that the matter was immaterial from a legal standpoint in view of the fact that the representations made by him to plaintiff were also made by Dr. L, who had accepted and used such pass, and therefore the motion for rehearing did not present a reason why the judgment rendered by the court should be set aside, and it was overruled. The judgment was affirmed. Missouri, K. & T. Ry. Co. v. Haven, — Tex. Civ. App. —, 200 S. W. 1152 (1917).

While plaintiff was employed by defendant he was ordered, with four other men, to pick up a heavy timber and carry it to a push car, and while he was so assisting in carrying the timber the strain which he was under caused his foot to slide or turn when he stepped on some gravel which prevented him from sustaining himself against the additional strain, so that the weight of the piece of timber came on him with such force that it hurt him in the groin and injured his testicles. Testimony was adduced tending to establish that it was customary for a crew of seven or nine men to work together in handling timbers of that size and weight, and that such a load was too heavy for five men. The issues were tried before a jury, and the court gave a peremptory instruction in favor of defendant. A day or two after the injury plaintiff was sent to the company's hospital and was there treated by one of its physicians, and when released from the hospital he was sent to the claim agent, who made a settlement with him for $25 in full compensation for his injuries. On the trial he attempted to avoid the effect of the release on the ground that he was induced to sign it by statements made to him by the company's physician to the effect that his injuries were trivial and that he would be fully recovered and able to go back to work in a few days, and the court said that the testimony tended to show that the statement, if made, was untrue. The court held that the testimony of plaintiff warranted a submission to the jury of the question whether there was such a misstatement of facts as prevented the execution of the release from barring plaintiff's right to sue, and that there was

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"'Did Kinzey send over after you?' and I said, 'Yes, sir.' 'Well,' he said, 'you are all right to go to work now.' He said, 'You are all healed up and everything. When did you spit any blood?' I said, 'I have not spit any blood for about three weeks, I think.' 'Well,' he said, 'you are all right then. But,' he said, 'if you ain't in any hurry, it would be all right to rest a few days longer.' 'Well,' I said, 'what would you call a few days, Doctor?' 'What would you say about the 1st of July?' he said. 'That is all right.' And he put his hand on my shoulder, and he said, 'You are just as good as ever, Jimmie.'"

The witness swore that he believed Dr. Saunders and relied upon

also enough to go to the jury upon the issues of negligence, contributory negligence and assumption of risk. The case was reversed and remanded for a new trial. Griffin v. St. Louis, I. M. & S. R. Co., 121 Ark. 433, 12 N. C. C. A. 415, 181 S. W. 278 (1915).

Plaintiff was engaged by defendant with other section hands to assist in extinguishing a fire which was burning in cotton stored upon defendant's platform, and in doing so alleged that he got upon a flat car containing tanks of water at the command of his foreman to carry buckets of water to other employees, and that at about 2 a. m. he ceased work, and while attempting to alight from the car upon which he was working, lost his balance and jumped to the ground to avoid falling, and thereby received the injuries complained of, which it was alleged resulted proximately from the failure of defendant to furnish a light to work by. Among other defenses defendant pleaded a settlement and release by plaintiff of all claims against defendant for the alleged injuries, to which plaintiff answered by a special plea asserting that the settlement and release was obtained by the fraud of defendant and its agents, and that the amount received, $39, was grossly inadequate for his injuries. It appeared from the evidence that after injuring his foot in jumping from the car plaintiff first applied to it some simple home remedy, but that it was taken care of about two or three days thereafter by Dr. J, and after about 9 days, the foot becoming worse, he was sent by defendant to a hospital, traveling on transportation furnished by defendant, and admitted to the hospital upon a permit furnished by it, where he remained 19 days, during which time Dr. M took charge of, examined and dressed the foot about every 2 days and gave it careful attention; that on the day plaintiff left the hospital Dr. M told him while visiting him in the hospital ward that his foot would be well in two or three weeks, and that plaintiff believed what Dr. M told him and relied upon his statements. In attending to plaintiff's injuries Dr. M did so as an employee of defendant, and about an hour after the conversation with him defendant's claim agent called on plaintiff, who was in bed at the time, and had him unbandage his foot and put it upon the floor and bear his weight upon it, stating at the time that it seemed to be getting on very well and that plaintiff would be able to resume work in about two weeks, and, when asked if he had said anything to Dr. M about the injury, the claim agent replied that the doctor had told him that plaintiff would be well in two or three weeks. The claim agent offered $25 for a settlement, and after some dickering agreed to pay $39 and give plaintiff a return pass to the hospital in case he should desire to return. The case was tried nearly one year after the accident and more than 10 months after plaintiff's discharge

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the statement made to him and went to Oelwein that night where he met the superintendent the next day, and:

"I told him I was all right, and he said, 'Yes, I heard you were.' I told him Dr. Saunders said I was all right, and he said he heard I was. We went into the office and out to the yard office, and he figured out my time. He showed me what time I had lost and wrote out a check for it, and I signed a receipt, and that was all there was to it. We figured out what the understanding was, and the money we figured it out by hours."

In signing the receipt, he relied upon what Dr. Saunders told

from the hospital, and it was shown that his injuries were then more serious than at the time of his discharge and were permanent; that he had been unable to work during that time; that he was obliged to use crutches, suffered intense pain almost day and night and was unable to sleep, and when in bed was compelled to rest his foot upon a pillow. Dr. M conceded the foot to be in much more serious condition than when plaintiff was discharged, but was of the opinion that an examination might show that subsequent causes produced the present condition. Doctors Z and C testified that the injuries were serious and permanent, and that the pain and suffering could only be relieved by an amputation, and the former testified that, assuming that the injuries apparent in the foot at the time of the trial were the same as were present at the time of the injury, a competent physician or surgeon would have detected the same upon an examination of the kind made by those in charge of plaintiff at the hospital. The court held that both Dr. M and the claim agent, by representing to plaintiff that his injuries were slight and that he would be able to resume work in two weeks, concealed plaintiff's actual condition, as it was made to appear more than a year afterwards that his injuries were permanent and could have been detected at the time the representation was made; that plaintiff had a right to rely upon a statement of both the physician and the claim agent; and that it also appeared that injury resulted from plaintiff's reliance upon their representations since it induced him, in view of the subsequent developments of his injuries, to accept from defendant in payment a sum grossly inadequate. The court said it might be further said that it was immaterial whether Dr. M and the claim agent made the statements innocently, since the rule was that, even though the person making the false representations believed them to be true, that fact was unavailing, and the injured party was entitled to relief against them if the representations made or repeated were actually false. The judgment for plaintiff for $5,500 was affirmed. Missouri, K. & T. Ry. Co. of Texas v. Maples, — Tex. Civ. App. —, 162 S. W. 426 (1913).

Plaintiff sustained injuries, as he alleged, because the engineer of one of defendant's trains, whose duty it was to slow the train to about five miles an hour for the purpose of permitting plaintiff, who was a brakeman, to board it, permitted the train to advance from ten to twelve miles an hour, which rate plaintiff was unable to determine from his position until after he had caught hold of a handhold on one of the cars, when it was too late to prevent the injury, which was caused by jerking his body into such a position that his heel struck a crosstie. The jury returned a general verdict in favor of defend-

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him and had no other knowledge of his physical condition. Later, he explained that, when he told the superintendent that Dr. Saunders said he was all right, the superintendent replied:

"Well, I have gotten a report from Dr. Saunders, too, and he said you was all right, and you can—we will settle up now, and you can go to work."

He was receiving 37 cents an hour, and the amount was arrived at by computing at that rate. He undertook to work, but was compelled to quit on account of his injury—having started again to

ant, and upon the original hearing on appeal, the court decided that the release, although based upon a consideration of $1 and the additional consideration of the promise of reemployment, was not a nudum pactum. Upon a rehearing, however, the court concluded that it went too far in its deduction from the testimony upon the matter of fraudulent representation as to the permanency of plaintiff's injuries and granted plaintiff's motion for a rehearing and reversed the judgment of the lower court and remanded the case. The court said that upon the former hearing it had taken the view that the evidence failed to show any combination of action between defendant's physician and claim agent with reference to the statement made as to plaintiff's condition, but that, upon the motion for rehearing, it appeared that the testimony was susceptible to the construction that the claim agent was present at the hospital at the time that Dr. K informed plaintiff that he was practically well and would be well in a few days, and that it followed that if the trial court committed error involving the merits of the case the charge should be reversed, and, upon finding that such error was committed, the opinion on the original hearing was withdrawn and the order of the court affirming the judgment of the lower court set aside. The motion of plaintiff for a rehearing was granted and the judgment of the lower court reversed and remanded. Gregory v. Pecos & N. T. Ry. Co., — Tex. Civ. App. —, 155 S. W. 648 (1913).

Plaintiff, a lineman employed by defendant, whose duty it was to climb poles and string electric wires, came in contact with one of defendant's wires and was thrown to the ground and his head, back and spine injured. About a week thereafter he entered into a contract with defendant whereby it agreed to pay him $2 per day for all the working days until its physician testified that he was able to resume his duty, in consideration whereof plaintiff agreed to release defendant from all claims and damages growing out of the injury, and such payments were made for about a month when they ceased, defendant claiming that its physician had certified that plaintiff was able to resume his work. In the present suit for his injuries plaintiff alleged that, at the time of the filing of the petition, he was not and had not theretofore been able to resume his duties, and that if a certificate to the effect that he was able to resume his duties had been made by defendant's physician it was false and untrue and made with the fraudulent purpose of preventing plaintiff from receiving from defendant $2 per day during the time he was unable to resume his work with defendant. Plaintiff secured a verdict and judgment for $615 subject to a credit of $115 already paid under the agreement. The court said that the burden of showing

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spit blood and passing blood through the bowels, and continued in that condition up to the time of the trial. The testimony of the plaintiff's wife corroborated his account of the interview with Dr. Saunders.

From this evidence the jury might well have found that both plaintiff and the defendant, acting through its superintendent, based their settlement on the statement by Dr. Saunders that the plaintiff was all right "to go to work, now," and that he was "all healed

that the certificate, if one had been given, was falsely or fraudulently made was upon the plaintiff, and that, therefore, the court properly admitted evidence offered by plaintiff in chief as to the extent of his injuries and of his condition at the time the certificate was said to have been made to the company, it being admitted with an admonition to the jury that it was only for the purpose of bearing upon the issue as to whether or not the certificate of the company's physician was falsely or fraudulently made. The judgment was affirmed. Camden v. Interstate Ry. Co. (Ky.), 118 S. W. 268 (1909).

Plaintiff recovered a judgment in a suit for damages for personal injuries sustained while in defendant's employ as a brakeman, and on appeal the only assignment of error was that the court erred in refusing a peremptory instruction for the defendant on the ground that it was shown that plaintiff and defendant had compromised and settled all of the cause of action set up in the suit. In defense to the release, plaintiff alleged that it was signed under false and untrue representations to plaintiff made by defendant's physicians and known by them to be false and untrue. It appeared from the evidence that plaintiff was for some time under the care of doctors D and B, and afterwards was under the care of Dr. T, who were all physicians in the employ of defendant; that thereafter plaintiff went to —— and negotiated with defendant's claim agent with reference to a settlement and executed the release in question, accepting $450 in settlement of his cause of action; that doctors D and B examined plaintiff and expressed an opinion to him that he was not permanently injured, and would be able to return to work within a reasonable time; that Dr. T also examined him and expressed the opinion to him that he would be able to work within about a month or 6 weeks; that when plaintiff was negotiating with the claim agent he told him that his physician had said that he was all right and would be able shortly to go to work, to which the claim agent replied that he had received some letters from them, and that they thought he was well. The letter from Dr. B indicated that plaintiff had a fracture of the right side of the pelvis, but that Dr. B did not consider it a severe one; that he thought plaintiff would be able to leave in 10 days or 2 weeks, and probably would not be able to work for a month or 6 weeks thereafter; that he should get a good result and not have any permanent disability, but, of course, might have a slight limp; that plaintiff was anxious to get back to work, and told the doctor that he would be satisfied if the company would give him the time that he had lost while off duty, providing he was not a cripple and could still do his work; and that the physician did not think he would have any trouble in doing his work. The court said there

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up," and that he was "just as good as ever." Had this been merely an opinion or prophecy as to what might happen in the future or as to the future results of an injury and that foretold by way of opinion or prophecy did not happen or result, what was said could not be treated as in the nature of a mistake of fact. Seymour v. C. N. W. Ry. Co., 164 N. W. 352.

A mistake of fact, to constitute the basis of rescission, must relate to some present or past event, and the vital question to be

was no evidence in the record to show that the doctors knew, or had reason to know at the time of their representation, that plaintiff was not a well man, and there was no evidence to show that their statements to him were anything else than their honest medical opinions as to his condition, based upon the symptoms he had at that time developed and the examinations which they had made of him; that plaintiff did not in any way impugn the good faith of the statements, but contended that, as the statements were made and relied upon by him, and as the verdict of the jury showed that epilepsy was caused by the injury, the settlement was not binding upon him. The court found as conclusions of fact that the accident was the proximate cause of the epilepsy, but that, at the time of the settlement and the making by the physicians of the representations, there were no symptoms of the epilepsy present; that plaintiff relied upon the statements of the physicians as to his condition, and but for them would not have settled at the figure he did; that the representations were made in good faith in an honest belief that they were true and that they were not made for the purpose of inducing a settlement; and that the claim agent, in making the settlement, acted on the letters from the physicians in good faith and in the honest belief that they accurately stated plaintiff's condition. The court held that as there was no evidence of fraud, bad faith or known concealment on the part of the claim agent or the physicians, the trial court erred in submitting the issue of the validity of the release to the jury, and that as the case was fully developed and no contention of fraud was made below, or on appeal, the case should be reversed and rendered for defendant. El Paso & Southwestern Co. v. Kramer, — Tex. Civ. App. —, 141 S. W. 122 (1911).

While assisting other employees of defendant in switching box cars, plaintiff, a brakeman, fell from the top of one of the cars and sustained injuries for which he brought suit and recovered the sum of $4,000 as damages. In bar of plaintiff's right to maintain his suit, defendant pleaded and proved that after plaintiff fell from the car, and in consideration of $450 paid to him, he had executed an instrument in writing releasing it from all liability on account of the injuries, and in a supplemental petition plaintiff alleged that the release was not binding upon him, because at the time of its execution he was intoxicated, and in no condition mentally to understand what he was doing, and that further, he executed it in reliance upon false and fraudulent promises as to future employment made by defendant's claim agent, and false representations as to the extent of his injuries made by defendant's agents and by certain physicians employed by it to examine him for the purpose of determining the nature and

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determined is whether what Dr. Saunders said were statements of fact or merely matters of opinion. If these were statements of fact, it is not very important through what process of reasoning or proof they were arrived at, whether from observation or deductions based on expert or scientific knowledge. The doctor, basing his conclusion on the patient's apparent condition and the history of his ailment, pronounced him then in a condition to go to work, "all healed up," "as good as ever." These statements related to the

extent of his injuries. As to the representations alleged to have been made by a physician, it was shown that plaintiff had been operated upon for a hernia which he claimed to have suffered as a result of the fall from the car, and that, at the time of the negotiations which were concluded by the execution of the release, he was not satisfied that the operation had been a successful one, and there was evidence tending to show that agents of defendant engaged in conducting the negotiations, suggested to plaintiff that he select any two of the physicians then practicing in Ft. Worth to make, at defendant's expense, an examination of his person to determine whether such operation was a successful one or not, and that from a number of physicians named to him he chose two to make the examination, who were called by telephone, came as requested, made the examination, and, after making it, made the statements charged to have been false and to have induced plaintiff to execute the release. The court said that there was no testimony showing that the doctors in question had been in any way connected with defendant, or to have had any communication with its agents in regard to plaintiff or his injuries before they were requested to make the examination, and, therefore, an instruction which authorized the jury to find against defendant on the issue as to the validity of the release, if they believed plaintiff was induced to execute same by false representations as to his physical condition made to him by the physicians, was erroneous. If, the court said, it should be conceded that the testimony in the record made an issue as to whether Drs. K and C were used by defendant's claim agent as instruments to deceive plaintiff, or that they acted together in procuring his execution of the release, the judge had no right to assume, as he did in the instruction, the affirmative of such issue to be true, because in that respect the charge was clearly on the weight of the evidence. The judgment was reversed and the cause remanded for a new trial. St. Louis, S. F. & T. R. Co. v. Bowles, 63 Tex. Civ. App. 23, 131 S. W. 1176 (1910).

While working as a brakeman on a freight train, plaintiff was knocked from the train by a defective waterspout and seriously injured. He was taken to his home, where he was under the care of competent physicians of his own selection, and went to the hospital of the railroad company about 6 weeks after the accident, remaining there under treatment for about 2 weeks, when he returned home, promising the chief surgeon of the hospital, Dr. O, that he would return to the hospital. It was a rule of the hospital that employees under treatment should remain until they were discharged by the chief surgeon, who gave them what was called a clearance, which they took to the general claim agent of the railroad

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present and described his condition in apt language as it then was, and we entertain no doubt in saying that they were statements of facts, and so intended.

In Haigh v. Whiteway Laundry Co., 164 Iowa, 143, 145 N. W. 473, 50 L. R. A. (N. S.) 1091, a statement by the defendant's agent that the tendons of plaintiff's hand were injured, and that her injuries were trifling, was held to be merely a statement of fact.

In Houston & T. C. R. Co. v. Brown (Tex. Civ. App.) 69 S. W.

company. This clearance was a statement of the exact physical condition of the employee, who was expected to take it to the claim agent as a basis for settlement before returning home. Something over a month thereafter, Dr. O wrote to plaintiff, upbraiding him for not fulfilling his promise to return, and shortly thereafter he returned to the hospital, and was examined by Dr. O, who wrote a letter to the general claim agent, making a report upon plaintiff's case, saying that he found a marked deformity of the spinal column, commencing with the twelfth dorsal and involving the first and second lumbar vertebrae, and that there undoubtedly was a diseased condition there, as not only the spinal processes were enlarged, but seemingly the laminae of the vertebrae as well, and, after going fully into the case, concluded to the effect that he could not tell at the examination whether the injury would be permanent or not, but that in the case of a young man 29 years of age, under intelligent treatment, considering the region of the spinal column involved, there was a bare possibility that it would get well, but that in any event it was a serious injury, and one that decidedly menaced his future usefulness. The letter stated that it would take the place of a clearance as plaintiff would report to the claim agent on the next day. Dr. O testified that all of his examinations were made in the interest of the employees as well as the company, and that, while he was employed by the company, his salary came out of the hospital fund which was raised by assessments on all the employees of the company. Plaintiff testified that when Dr. O examined him, told him that his injuries were not serious, and that he would be able to go to work by the 1st of March, that plaintiff then said that it was up to the doctor, and he wanted to know just what he thought, and that Dr. O then said it was nothing bad, and plaintiff would be all right by the 1st of March. A friend who was with plaintiff on the occasion testified that Dr. O told plaintiff that he was not permanently injured, and that his injuries were not going to be serious, and that he would be able to take his place back by March. The claim agent and his stenographer testified that the papers constituting the release agreements were dictated to the stenographer in the presence of plaintiff, and were signed by him, and that they truly reflected the transaction, and further, that the claim agent had no communication with Dr. O at that time, and that Dr. O's letter, which served as a clearance, was the sole information he had before him of plaintiff's condition, while plaintiff testified that the claim agent called Dr. O over the telephone and, after inquiring as to plaintiff's condition, listened for a few moments, and then turned to him and said that the doctor said that plaintiff was not badly hurt, and that he would be able to go

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651, a release was obtained, based upon representations made by a physician representing the railway company that the "bones of his arm had knitted and united together and that his arm was well," and the court held that these were statements of fact. In response to the contention that they were mere expression of opinion, the court said:

"The effect of his statement was that the appellee was a sound man, and that the bones of his arm had knitted together, and that it would be all right.

to work by the 1st of March. The release was for $1,250, which was paid and plaintiff returned to his home. His physical condition did not improve, and in the latter part of February he consulted physicians to see if he would be able to return to work the 1st of March, and was advised that he was permanently disabled from pursuing work in the railroad service requiring physical exertion, and the evidence was undisputed that his injuries were of such a nature that he would be unable to do any work which would require physical exertion, and that the only service in the railroad employ for which he would be fitted would be such a position as flagman at a crossing at a salary of $40 or $45 a month. Upon the release being pleaded to plaintiff's suit for damages, plaintiff filed an amended complaint, admitting the settlement and charging fraud and deceit on the part of defendant's chief surgeon and general claim agent in procuring the settlement. The jury found for plaintiff and assessed damages at $5,000, after allowing credit for the amount paid, and defendant appealed. On the appeal defendant contended that the evidence was not sufficient to show that plaintiff was deceived or misled, or that any fraud was practiced on him in obtaining the settlement. The court said that in discussing that question it must be taken that the jury had accepted the testimony of plaintiff and his witness and rejected that of the physician and the claim agent, and that the sufficiency of the evidence must be tested solely upon the accredited testimony, and that plaintiff's evidence fully met the requirements of the authorities to avoid a release induced by fraud. A special exception was taken to submitting the question of Dr. O being mistaken as to the extent of plaintiff's injuries, to which the court said that if there was room to find that there was such mistake of fact it would be equally effective to set aside the release, and the appellant would not be injured by having the most charitable construction given to the statements of Dr. O. Defendant also contended that, as plaintiff came direct from his own physician, he ought to have known, and must have known, something of his condition outside of anything Dr. O said to him, and that he could not have been misled in that regard. The court pointed out that plaintiff testified that he had been under Dr. O's care from September, and that he did not know his own condition, but relied upon Dr. O, and asked him to tell him the true condition, and the court said that plaintiff certainly had a right to rely upon his good faith, and it did not lie in the mouth of the railway company to say that an employee could not safely rely upon statements of its chief surgeon who occupied the delicate position between it and its employees, as shown by Dr. O's testimony. The court approved an instruction of the trial court, that

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It is true this statement may have been predicated upon his opinion as a medical expert, but the opinion is based upon the facts of which he possessed knowledge. The fact that the statement made by Stewart was not intentionally false does not affect the right of the appellee to have the release set aside if he was misled by the statement and executed the release believing the statement was true. In such a case, innocent misrepresentation may as well be the basis of relief as where such statements are intentionally false."

In Great Northern Ry. Co. v. Fowler, 136 Fed. 118, 69 C. C. A. 106, the company's surgeon made an examination of the complainant

if the jury found "that at the time of making said statements defendant's physician and surgeon either knew that plaintiff was permanently injured and misrepresented that fact, or was honestly mistaken as to the extent of plaintiff's injuries and misled him into signing said release, then plaintiff is not bound by same, and the jury should so find." Judgment for plaintiff was affirmed. St. Louis, I. M. & S. R. Co. v. Hambright, 87 Ark. 614, 113 S. W. 803 (1908).

3. Specialist in company's service.

While plaintiff was working for defendant upon a water tank it collapsed and fell, causing him severe and permanent injuries. In a suit for damages for the injuries sustained defendant answered by a plea of general denial, contributory negligence, assumption of risk, and release and satisfaction for the sum of $650 paid to plaintiff by defendant. The reply contained a denial of matters not therein admitted and an averment that the instrument purporting to be a release was induced by fraud and wrongful conduct on the part of defendant, in that it induced plaintiff to rely upon the statements of a physician selected by it to examine his injury who made an untruthful statement to plaintiff as to the extent of his injury upon which plaintiff relied solely in accepting the compromise and executing the release. The principal injury to plaintiff was a broken arm, and he was taken to a hospital and operated upon, and after about 3 months' treatment, was approached by defendant's claim agent to make a settlement and offered $200, which he refused, telling the agent that he did not know what the condition of his arm was going to be. He was then asked if he would go to St. Louis if transportation was furnished to him and see Dr. McC, which he agreed to do. About a week thereafter he went to St. Louis, accompanied by a Dr. R, a student at the hospital, and met the claim agent, who told him which street car to take to reach Dr. McC, who, the agent said, was one of the best physicians in St. Louis, and that whatever he told him could be depended upon. Dr. McC examined plaintiff for about 30 minutes, and plaintiff then stated to him that he wanted to know how his arm was going to be as he was contemplating making a settlement, and would like to have his honest opinion in the matter, to which the doctor replied that he would guarantee that plaintiff would have a good arm inside of 6 months, and further, after giving directions as to the care of his arm, repeated that inside of 6 months the arm would be perfectly well. The doctor telephoned the results of his examination to the claim agent, and plaintiff returned to the claim agent and reached an agreement as to the amount of settlement, and 3 days thereafter signed the release. At the time of the examination Dr. McC fur-

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and found that they consisted of a wound of the scalp, a contusion of the shoulder, and nothing else, and expressed the opinion that he would be ready to go to work in a couple of weeks. In reliance settlement was made, but the release was rescinded owing to mutual mistake upon a showing that his skull was then fractured, necessitating the removal of a part of his skull which was pressing on the brain. See, also, Lumley v. Wabash Ry. Co., 76 Fed. 66, 22

ther told plaintiff that there was a perfect union of his arm, and advised him to take off the sling and let the arm hang down when he got back to the hospital, stating that its paralyzed condition was on account of the arm being drawn up. The physician who examined plaintiff three or four weeks previous to the trial testified that he found that his arm was broken and disunited; that plaintiff showed him pieces of bone which had worked out; that the separate bones were held together by fibrous matter; that in his opinion, to remedy the matter, the fracture must be opened, the end of the bone cut off and wired together, as it was overlapping, which would shorten the arm three or four inches; and further that, assuming plaintiff's testimony as to the nature and history of his injury, to be true, it would not have warranted a skilled professional man in stating to plaintiff that there was a reasonable certainty of a complete recovery of the injuries to his arm. The testimony of this physician was corroborated by three others. The jury returned a verdict for $12,690. The court said that in so far as the doctor undertook to state existing facts, as he did if he said the bones were then united, the truth or falsity of such statements were for consideration of the jury, and that a physician skilled in determining existing bodily conditions should be held to be making statements of fact, rather than giving a mere opinion, when he undertook to state a then existing condition of the patient. The judgment was reversed and the cause remanded because the court by its instruction to the jury predicated plaintiff's right to set aside the release upon the opinion as to the date of the future recovery of deceased, and not upon the ground that the doctor had stated that the bones were then united, when in truth and fact they were not. As the case was reversed for this reason the court did not discuss the question of the excessiveness of the verdict. Wingfield v. Wabash R. Co., 257 Mo. 347, 166 S. W. 1037 (1914).

B. Shipbuilding company.

In Walsh v. Fore River Shipbuilding Co., 230 Mass. 89, 119 N. E. 680 (1918), plaintiff was injured through the alleged negligence of defendant, and about 3 weeks thereafter executed and delivered to defendant a written release in consideration of the sum of $250, and the payment by defendant of the hospital and treatment bills and his continuance upon the benefit list of the employees' accident association until he was able to resume work or until the amount of benefit reached the limit paid by the accident association, the total payment by defendant for hospital bills and plaintiff's treatment, together with the $250, amounting to $846. Immediately after plaintiff was injured he received first aid treatment in the accident room at defendant's works from Dr. B, a physician in defendant's employ and in charge of its

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C. C. A. 60; Nelson v. Ry. Co., 111 Minn. 193, 126 N. W. 902, 20 Ann. Cas. 748.

In Tatman v. Ry. Co., 10 Del. Ch. 105, 85 Atl. 716, the test is said to be:

"Is the evidence in this case clear and convincing that the complainant was induced to compromise her claim and to execute her release by a mistake of past or present fact material to her contract?"

hospital, and about an hour later he was taken by train to a hospital in Boston where he was thereafter treated by physicians connected with that hospital. Within two or three days Dr. B came to the hospital and talked with plaintiff with reference to a settlement for the injuries which he had sustained, and about a week later again called and talked with him with reference to a settlement, and, after a third visit for the same purpose, told plaintiff to write to him in regard to settlement. Plaintiff wrote to Dr. B, and the latter came to see him again and the release was signed. Plaintiff testified, in substance, that on each occasion when he talked with the doctor at the hospital the latter told him he would be all right in 10 weeks and able to go to work, and that his leg would be just as good as ever, and on the day he signed the release told him all hospital bills would be paid by the company; that he would have a job for life with the defendant and would have the benefit of accident insurance; and that on each occasion when Dr. B called to see him he was suffering acute pain as the result of his injury. Plaintiff contended that he was not bound by the release because of his condition when it was signed and also because it was procured by fraud and false representations of Dr. B, upon whose statements he relied. The court found that plaintiff did not deny that he signed the release or claim that he did not understand its contents, and that the testimony would not warrant a finding that his condition was such that he was incompetent to act at the time it was signed, and that there was no evidence to warrant a finding that any false representations were made as to the contents of the release or that they were fraudulently concealed from plaintiff. The court also found that plaintiff's claim of fraud was not sustained and pointed out that there was no evidence that defendant's physician, Dr. B, treated plaintiff, aside from the first aid treatment rendered immediately after the accident, but that it appeared that on each subsequent occasion when the doctor saw him it was solely with reference to a settlement for plaintiff's injuries; that the plaintiff knew Dr. B was the defendant's physician and was acting for it in the matter of settlement, and there was nothing to show that plaintiff had any right to rely on the statements of the doctor or that the relation of physician and patient existed between them, or that there were any relations of trust and confidence between them. The court found further that, apart from the treatment administered by Dr. B on the defendant's premises, the plaintiff was treated by other physicians, and it did not appear that he did not have ample opportunity to consult with them respecting his condition and prospects of recovery if he desired their opinion, and that there was nothing in the record to indicate that the statements made by Dr. B were made fraudulently or were

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The distinction between a mistake in opinion or prophecy as to the future and one of past or present fact is pointed by Judge Sanborn in Chicago & N. W. Ry. Co. v. Wilcox, 116 Fed. 913, 54 C. C. A. 147, 12 Am. Neg. Rep. 314, in saying:

"* * * It is not every mistake that will lay the foundation for the rescission of an agreement. That foundation can be laid only by a mistake of a past or present fact material to the agreement. Such an effect cannot be produced by a mistake in prophecy or in opinion, or by a mistake in belief relative to an uncertain future event. A mistake as to the future unknowable

other than the honest opinions of a physician given in accordance with his best professional judgment based on existing symptoms. It was held that the presiding judge rightly directed the jury to return a verdict for defendant, and that plaintiff's exceptions to that verdict must be overruled.

C. Mining company.

In Rocky Mountain Fuel Co. v. Bakarich, — Colo. —, 180 Pac. 754 (1919), plaintiff sought to recover damages for injuries received in defendant's mine which resulted in the loss of three fingers of his right hand. He claimed damages in the sum of $10,000 and the verdict of the jury was in his favor for $4,600. As a result of the accident in question plaintiff claimed he sustained numerous and serious injuries in addition to the injury to his hand. He was foreign born, and there was evidence that at the time of the accident his knowledge of the English language was defective. Immediately after the accident he was taken by Dr. H, in the employ of defendant, from the mine to a hospital where he was placed under the care of Dr. C, another of defendant's employees, who amputated the three injured fingers. About three weeks later, and while he was still in the hospital, he signed a release which was introduced in evidence which purported to release the company of all claims then existing or which thereafter might arise for or on account of any and all personal injuries sustained by him on the date in question resulting in the loss of three fingers of his right hand, and releasing and discharging the company from "any and all claims and demands whatsoever as fully as if my said injuries, whether the extent thereof be now known or hereafter ascertained, were all described herein in detail." Dr. C was called as a witness, and testified that plaintiff asked him to take up his claim with the manager of the mine, to which he consented. He said that plaintiff looked upon him as his friend and told him he thought he ought to have $1,000, but that the witness replied that was out of all reason for the injuries he had. It appeared that Dr. C continued to busy himself about the matter, and through him the release in question was procured. Plaintiff said that he could not read English and did not read the release, but that he understood it to be a settlement for lost time only. The court said that Dr. C seemed to have overlooked entirely any other injuries sustained by plaintiff than the injury to his hand, if there were such other injuries, and put himself in the position of representing the plaintiff while actually in the employ of defendant, and that if he was guilty of bad faith in the transaction, and, by reason of his professional position and his attitude towards plaintiff, induced him to place confidence in him, and if

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effect of existing facts, a mistake as to the future uncertain duration of a known condition, or a mistake as to the future effect of a personal injury, cannot have this effect, because these future happenings are not facts, and in the nature of things are not capable of exact knowledge; and every one who contracts in reliance upon opinions or beliefs concerning them knows that these opinions and beliefs are conjectural, and makes his agreement in view of the well-known fact that they may turn out to be mistaken, and assumes the chances that they will do so.''

All that was said by the physician related to the present condition of plaintiff, to him as he then was, regardless of the future,

plaintiff did so, and could not read the release, but depended upon the doctor, defendant could not take advantage of that transaction and plaintiff would not be bound by it, and that there was sufficient evidence to go to the jury on that question. It appeared that the trial court, by its instructions, permitted the jury, should it take a certain view of the evidence, to disregard the release entirely, save as a receipt for $250, the amount for which it was given; that by another instruction they were authorized to consider it as a release for the injuries resulting from the loss of three fingers; and by another instruction the jury was told the plaintiff could be given no damages on account of the loss of the fingers. The court said that the effect of the release, if valid, seemed to have been entirely misconceived by the trial court; that the mention of the loss of three fingers in the release was clearly only a method of designating the particular accident mentioned in the release, and if the release was valid it was a full and complete release for all injuries sustained by plaintiff in the accident, and, if otherwise, it was only a release for plaintiff's claim for loss of time, and it was such not by any specific provision contained therein, but because plaintiff said he signed it with the understanding that it was such a release. The court found further that the trial court erred in not reprimanding plaintiff's attorney for an improper and prejudicial line of argument and in not specifically instructing the jury that it was improper and could not be regarded. The judgment was therefore reversed and the cause remanded for further proceedings in conformity with the views expressed.

In Loveless v. Cunard Min. Co., — Mo. App. —, 201 S. W. 375 (1918), it appeared that plaintiff was working in defendant's lead and zinc mine as a helper in the operation of a drill driven by compressed air pressure. For the purpose of changing his drill machine plaintiff turned off the air at the main air line, but between that time and the time he reached the end of his air hose it had been turned on again by another employee, so that the air pressure was held only by gravel and other accumulations in the end of the hose. When plaintiff picked up the end of the hose the gravel and other particles were driven out with great force, destroying the sight of one eye and injuring the other, and inflicting bruises, scars, and various hurts and injuries. The negligence charged against defendant was in failing to have a valve upon the branch air-line so that plaintiff could have turned the air off from his individual machine. In addition to other defenses, plaintiff pleaded a release and satisfaction, to which plaintiff pleaded that the release did not express the contract agreed upon, and that a fraud had been perpetrated upon him in the execution thereof. The jury brought in a verdict for plaintiff in

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and we are of opinion that his statements were of matter of fact made as such by him, knowing that they would be considered as such in negotiating a settlement between the parties and that in making settlement both parties relied thereon as indicating permanent restoration to the condition of health previous to the injury.

II. The issue as to whether the release was the result of mutual mistake was triable at law. Reddington v. Blue, 168 Iowa, 34, 149 N. W. 933; Seymour v. Ry. Co., supra.

the sum of $6,000, and from that the court deducted $84 mentioned in the release and $69 which defendant had paid on a doctor bill incurred by plaintiff. After unsuccessful motions for a new trial and in arrest, defendant brought the suit up by writ of error. The release purported to discharge defendant "from all claims, demands or causes of action on account of injuries resulting or to result" from the accident in question, and it appeared that, in obtaining such release, an attorney for a surety company which insured defendant informed plaintiff's physician, Dr. C, that he would like to see plaintiff, and plaintiff was so advised. The next day plaintiff called at the attorney's office and the two went immediately to the office of Dr. S, an eye specialist whom the attorney recommended very highly. The specialist and the attorney both examined the injured eye, using instruments, and plaintiff testified that the specialist informed him that he would fix him up all right, and that his eye would be as good as ever in 2 or 3 weeks, while the specialist and the attorney who testified were not positive as to just what was said. After leaving the specialist's office, plaintiff and the attorney went to the latter's office and there the release was signed, plaintiff thinking that the paper he was signing was a receipt for 4 weeks' wages, the draft being for that amount. At the time of signing the release the sight of plaintiff's right eye was totally destroyed and his other eye was injured, and he was not, for that reason, able to read the paper, and he was also at the time suffering great pain. The specialist had just treated the eye, and had given some medicine to relieve the pain, and the attorney admitted that he did not read the instrument to plaintiff or give him a copy, and that he knew at the time the release was signed that plaintiff's eye was out. The attorney and plaintiff both testified that an additional consideration for the release which was not recited was that the doctor's bill would be paid. The attorney testified that his primary object in taking plaintiff to the specialist was to find out the extent of his injuries, and then to make a settlement; that he had been representing insurance companies and making settlements in that district for about 5 years, and averaged about 150 claims a month; and that he usually took a claimant to a doctor to find out how badly he was hurt, and that the specialist in question was one of the physicians to whom he frequently took claimants. The court said that, with these facts, it was not necessary to read between the lines to determine that the attorney and the specialist were "cheek by jowl" with reference to the attorney's purpose in bringing plaintiff to the specialist's office, and that the court was justified in holding that the release did not express the real agreement and was not a bar to recovery. Defendant insisted

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III. The consideration paid for the release was $450, and this was not returned to the releasor or tendered to it prior to the commencement of the suit or at any other time. Ordinarily, as a condition precedent to rescission, an offer to return the consideration received is essential to the maintenance of the action. See v. Coal Co., 159 Iowa, 413, 138 N. W. 825, 141 N. W. 1048.

But where the amount paid was for some specified injury or for loss of time, or the like, and it is sought in the action to recover

that the judgment for $6,000, from which was deducted the doctor's bill and the amount paid to plaintiff under the settlement, was excessive. The court said that the evidence disclosed that the eye of plaintiff had to be removed, and at the time of the trial he was wearing an artificial eye, and was caused considerable pain and suffering, and underwent the operation of removing the eye, and under such circumstances the judgment was not excessive. Judgment for plaintiff was affirmed.

D. Laundry company.

In Haigh v. White Way Laundry Co., 164 Iowa 143, 50 L. R. A. (N. S.) 1091, 145 N. W. 473 (1914), plaintiff alleged that while she was employed in defendant's laundry and while in the exercise of due care her hand was caught and burned in an unguarded mangle, and that by reason of the injuries received she was crippled and disfigured. Among other defenses defendant pleaded that plaintiff and defendant had entered into a written contract adjusting and settling any cause of action which plaintiff had by reason of the matters complained of, and set up a written release whereby, in consideration of $30, plaintiff forever released and discharged defendant from any and all liability which had accrued or might thereafter accrue by reason of the injury. Plaintiff replied that the release relied upon was obtained by misrepresentation and mistake as to the material facts of plaintiff's injury in that defendant, by its local representative, stated and represented to plaintiff at and before making the written release that her injuries were trifling; that the tendons of her hand were not injured; that the injuries would not continue for more than two or three weeks; and that plaintiff would entirely recover therefrom, and her hand would be as well as ever. That plaintiff relied upon the truth of said representations and representations to the same effect made by one Dr. B, who treated plaintiff as a physician in the employment of defendant, and that she believed said representations to be true, whereas in fact they were not true, and the tendons of plaintiff's hand were injured, and her hand was permanently disabled, and she did not recover in two or three weeks, and had never completely recovered the use of her hand, but was compelled to submit to an exceedingly painful surgical operation, including the grafting of a large patch of skin from her body upon the palm of her hand and the loosening of the tendons thereof, and the repair of the sheath of the tendons, and was obliged to submit to a third surgical operation to relieve certain contractions and attachments of the skin and flesh of the fingers and hand. Defendant demurred to the reply on the ground that the allegations contained therein did not set out such representations or mistakes as to material facts, which, if

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for some additional injury not contemplated in the contract of release or for damages consequent on injuries necessarily excluded in computing the consideration paid for the release, as where such payment was for loss of time only, of specific items other than injuries on which the action is based, then and in any such event tender of return of the consideration is not essential to the maintenance of the action. This is for the reason that, as to the amount paid, there

proven, would avoid the release pleaded by defendant. The demurrer was overruled, and from the ruling on the demurrer defendant appealed. The court said that the length of time that would be required for the hand to heal was largely a matter of speculation, of opinion based upon conditions then existing, and an honest opinion given upon that matter should not constitute a fraud, and therefore the mere opinion as to the time when plaintiff would recover from the injury, standing alone, would not have the effect of avoiding the release, but that more than an opinion was given to induce the settlement, as substantive facts were stated as a basis of the opinion, to wit, that the injuries were trifling, and that the tendons of the hand were not injured. These being assertions of distinct facts which had relation to, and direct bearing upon, the extent of defendant's liability to plaintiff, and which, if true, tended to create in the mind of plaintiff the impression that she would entirely recover therefrom and her hand would be as well as ever. The court further said that a positive assertion of a material fact as true, made for the purpose of securing an undue advantage, when it was shown that the party to whom the statement was made relied and acted upon it in good faith as true, was as binding upon the party making it as though he knew it to be untrue. And it was held that inasmuch as the allegations of the reply must be taken to be true, and as there were in it statements, made by defendant, of facts material to be considered in the proper adjustment of defendant's liability, and as it was alleged that those statements were untrue and that plaintiff relied upon them as being true, the demurrer was properly overruled. The cause was affirmed.

E. Pile driver operator.

In Gulf, C. & S. F. R. Co. v. Huyett, 49 Tex. Civ. App. 395, 108 S. W. 502 (1908), plaintiff recovered a judgment for damages for personal injuries resulting from defendant's negligence in operating a pile driver, and the case was previously appealed to the court of civil appeals (Tex. Civ. App.), 89 S. W. 1118, and to the supreme court (Tex.), 5 L. R. A. (N. S.) 669, 92 S. W. 454. A release in consideration of $250 was pleaded by defendant. Plaintiff sought to avoid the release on the ground that it was made upon representations by defendant's physicians in the hospital where he received treatments; that plaintiff was not damaged, and would soon be as good a man as ever, and would soon be able to do any and all kinds of work, and of defendant's claim agent that he had seen the doctor and talked with him in regard to the case, and that the doctor said that plaintiff would soon be all right. The doctor denied making this statement, but admitted telling plaintiff that he would eventually be able to work again. The court affirmed a

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has been no mistake of fact, and the release has the benefit of what he has paid for, and the releasor may not recover therefor again.

The vice is in the release, in that the parties through or by the mistake of fact have been misled in covering by the terms of the release damages consequent on injuries not taken into account in making the adjustment, and such damages alone may be recovered in the absence of a return of the sum received by the release. This

judgment in favor of plaintiff, and approved an instruction given by the trial court as follows: "If you find from the evidence that Dr. Scott, prior to the execution of said release, represented to the plaintiff that his injury was not so great as it really was, and if the plaintiff believed said representations to be true and relied on the same, and if you further believe that the defendant's agent, Cox, knew of said representations, and that the plaintiff relied on the same, and took advantage of said representations, and the plaintiff's confidence therein to settle with the plaintiff for the sum less than compensation for his injury, then the release is not binding on the plaintiff."

F. Wire manufacturing company.

Plaintiff, an employee of a wire company, sustained the fracture of both bones of his right forearm while working in the company's factory, and thereafter made a settlement with the insurer of the wire company for $120. This action was brought against both the wire company and the insurance company for fraud in the settlement and the jury rendered a verdict for $7,500 plus the amount of the settlement, and from judgment thereon the defendant appealed. At the time of plaintiff's injury he was employed in attending wire spools which revolved rapidly upon a bench along a wall and upon which wire was wound after being reduced in size by being drawn through a die. There had been an opening in the wall near where plaintiff worked which admitted steam and moisture which interfered with the drawing of the wire and in which a window had been placed swinging upon pivots in the middle. An open space was left at the top of the window and moisture came through this so as to interfere with the work, and plaintiff gave notice thereof to the carpenter, and later, notice that the place had been fixed by placing a stick in the opening. At the time of plaintiff's injury he noticed that the stick had become loose and was about to fall and in danger of being caught in the revolving spools, and to prevent it from so doing he seized an iron bar and pushed it into place, but in doing so his glove, and then his shirt sleeve, caught in one of the spools and wound his arm around the spool, drawing his body up over the bench and breaking both bones of his right forearm just above the wrist. Upon the question of fraud in procuring the release the evidence showed that when plaintiff was hurt he was asked by the superintendent if he had a family doctor, and when he said "no" the superintendent told someone in the office to call a doctor, naming him; that the superintendent then took plaintiff in a cab to that doctor's office and the doctor, with the assistance of another, took care of the fracture and continued to take care of it for nearly 7 months; that about three or four weeks after the accident plaintiff told the doctor that the

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appears from Reddington v. Blue, 168 Iowa, 34, 149 N. W. 933; Meyer v. Haas, 126 Cal. 560, 58 Pac. 1042; Lumley v. Ry. Co., 76 Fed. 66, 22 C. C. A. 60; Bliss v. Ry. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504; Wabash Ry. Co. v. Brow, 65 Fed. 941, 13 C. C. A. 222.

The plaintiff testified that on June 16, 1915, the day the release was executed, he told the superintendent of the company that he was all right, and Dr. Saunders had so stated to him, and that the grocer was pressing him for payment and was told to go to the superintendent of the wire company and perhaps something could be done; that plaintiff went and was told by the superintendent that the company had insurance, and to go to the agent of the company; that plaintiff met the claim agent of the insurance company in the wire company's office and was asked how long it would be before he would be able to go to work, and upon plaintiff's reply to the effect that he did not know he was told that when he settled it must be in full, and if they waited a few days the doctor would know by that time; that plaintiff then went to the doctor and asked him how long it would be before he could go to work, and was given to understand that he would be able to go to work in 6 weeks; that, when the plaintiff told him the arm was hurting and was sore yet, the doctor finally said he would fix the time at 8 weeks, and plaintiff need say nothing to the wire company or insurance company, but to just keep it under his hat, and that when the claim agent came to town he would tell him himself; that plaintiff again met the agent of the insurance company and the superintendent of the wire company in the wire company's office, and the agent told plaintiff that he had seen the doctor and talked with him and the doctor said plaintiff would be able to go to work at drawing wire in 8 weeks from the time he was hurt, and a settlement was made upon the basis of plaintiff's weekly wage for that period; that plaintiff was uneducated and a person of foreign birth; that the insurance company always called the doctor in question when the injured had no choice; that the insurance company had a contract with the doctor and paid him for the work by contract; and that plaintiff had a false joint in his right forearm at the point of fracture and a surgeon had to operate thereon and put in a plate to hold the fragments of the ulna together. While the doctor, the claim agent and the superintendent all denied making any representations to plaintiff as to the time required for him to get well, the court said that the jury had a right to believe that these representations were made and that plaintiff relied on them and was induced to settle because of them, and said that the only thing they had to consider was whether there was sufficient evidence from which inference might be drawn to sustain such element in the case, and that both as to the negligence and to the fraud the verdict was sustained by sufficient evidence and was not contrary to law. Judgment was affirmed. Indiana Steel & Wire Co. v. Studes, — Ind. —, 119 N. E. 2 (1918).

G. Abattoir company.

While plaintiff was employed by an abattoir company as a helper on one of its wagons, engaged in the delivery

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superintendent responded that the doctor had so reported to him, and that—

> They then "went into the superintendent's office and out to the yard office, and he figured out my time. He showed me what time I had lost and wrote out a check for it, and I signed a receipt, and that was all there was to it. We figured it out by the hours. * * * I was getting 37 cents per hour, and the amount was arrived at by figuring it at 37 cents an hour."

He was to resume work July 1st, following, but was not allowed to do so. This was all the evidence bearing on the issue as to what

of meats, he was kicked and injured by a fractious and dangerous horse. Plaintiff alleged that the horse was negligently furnished and used by the company, without warning to him or any knowledge on his part of its dangerous character and habits; that he received a broken leg and other injuries; that defendant was an insurance company which had issued to the abattoir company a policy of indemnity insurance; that, at the insurance company's instance and on its behalf, the abattoir company employed Dr. G, a physician and surgeon, who took charge and control of plaintiff and undertook the care and treatment of his injuries for and on behalf of the insurance company; that from and after the accident the insurance company took complete charge and control of the case, and assumed to act for the abattoir company; that after being so treated by such doctor for the injuries for some time plaintiff was induced, by the false and fraudulent representations of such doctor, to settle with the abattoir company and execute to it a release purporting to be in full settlement for his injuries; that when he signed the release he believed that he was merely receipting for a sum in gross that would cover his wages during future disability; that after the settlement plaintiff was required to submit to a surgical operation in which his leg was amputated, and he then learned the true nature and condition of his injuries, and brought suit against the abattoir company for damages resulting therefrom; that in the trial of said action the abattoir company successfully interposed the release; that plaintiff had confidence in the doctor and relied on his representations, and by them was induced to make the settlement; that such doctor continued to treat plaintiff for about 6 months after the release was signed, when plaintiff consulted other surgeons, and then learned that there never had been any union of the bones of his leg. This action against the insurance company was for damages alleged to have resulted from the fraud practiced upon him. To this complaint there was an answer in general denial and an affirmative paragraph setting up the 6-year statute of limitations, and plaintiff replied to the plea of limitation setting up facts showing concealment by defendant of appellant's cause of action, on account of which appellant was unable to ascertain the facts giving rise thereto until a time within the statutory period. At the close of plaintiff's evidence the court, upon motion, instructed the jury to return a verdict for defendant, which was done, and judgment was rendered accordingly. Plaintiff testified that defendant's physician, Dr. G, told him from time to time that his leg was doing nicely, and that he had a good union, and it would only be a short time until he would be able to go to work again and be all right; that his foreman had told him about 2 days after

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the $450 for which the release receipted was paid, and the fair inference to be drawn therefrom was that the payment was for loss of time. This being so, there was no occasion for tendering the return of the same as a condition precedent to the maintenance of the action for personal injuries suffered by complainant. Though the release is general, covering injuries of every kind and nature and extending until doomsday, inquiry concerning the nature of the consideration and for what computed was permissible, and, as we

the injury that he would be taken care of; that his wages would continue right along until he was able to go back to work; that his wages were paid for 18 weeks, and at the end of that period Mr. A, president of the abattoir company, and Mr. B, the attorney for defendant, visited him, and Mr. A told him that he was informed by Dr. G that the leg was doing nicely, and that it was only a matter of a short time until he would be able to go back to work, and that they would have to cut off his salary, and made plaintiff a proposition to accept $150, which would cover a period of 15 weeks, and asked him to sign a paper releasing claims; that plaintiff asked time to consider the matter and a few days later went to Dr. G and again asked him what he actually thought of his leg, because the matter was getting serious and he wanted to know about it, to which the doctor replied laughingly that his leg was getting all right and it would be all right, and, upon being told of the company's offer to settle, said the bone would be all right, just take a little time, and that before the 15 weeks were up plaintiff would be in good shape and working again; that about a week later the doctor came to his house, and inquired if he had made any further settlement, and upon being told that he had not, advised him to accept the money, and told him he had a good union in his leg; that two or three days later the attorney for defendant came and inquired if he had made up his mind about the settlement and offered to raise the price $50, making it $200; that he took the $200 and signed the release, but did not read it; that Dr. G continued to treat him for some time; that in the meantime he had gone back to work and had worked 3 weeks on the freight elevator and 3 weeks in the department, trimming meat, during which time the pain in his leg was terrible; that Dr. G continued to treat him, and gave him assurance that his leg was getting along all right; that plaintiff then suggested an X-ray examination, and was told by the doctor that it was absolutely unnecessary; that plaintiff then consulted Dr. O, who took an X-ray picture, and ordered him to a hospital for an operation; that the X-ray picture showed there was no union of the end of the bones, and that every time plaintiff stepped the bone would gradually slip a little farther; that at the hospital they first sawed off the ends of the bones and wired them together, and again put the limb in a plaster cast, which was removed three times in a period extending over about 10 weeks, at which time the wires were removed and it was found that there had been no union, with the result that amputation became necessary; that the first knowledge which plaintiff had that there was no union of the bones was when the X-ray picture was taken. Dr. O testified, in effect, that when he first saw plaintiff he found a non-

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think, was not precluded by the terms of the release, based as it was on a mutual mistake. Having reached the conclusion that on this ground it might be rescinded, the investigation related solely to what must be done to accomplish this, and therefore it was pertinent to the issue to ascertain precisely how and for what the consideration was measured. Such was our conclusion in Reddington v. Blue, supra, and we are content therewith, though decision may be found to the contrary.

union of the bones of his limb; that they were lapped more than an inch; that in a case of a broken bone such as the one involved there should be a union in three or four weeks to such an extent that one could see that he was likely to have a union; that the simplest means of determining whether there had been a union of bones was to use the fingers; that by that means, after the swelling subsides, a fairly definite idea could be formed, and that the X-ray furnished a definite means of determining the matter. Defendant contended that the only fraudulent statements alleged in the complaint or shown in the evidence were those of Dr. G, and that the evidence failed to disclose that he had any connection with defendant at the time such statements were made; that the doctor was not defendant's agent for any purpose, and especially not for the purposes of negotiating a settlement of the claim, and that there was no evidence showing any adoption or ratification of his statements by defendant. The court recognized the general principle that a fraud relied upon must be committed by the party charged, or with his knowledge or authority, or adopted or ratified by him, and that, defendant being a corporation, any fraudulent representations charged against it must have been representations of its agent or agents. The court pointed out that the policy of defendant required the abattoir company to give defendant a written notice and made the insurance company liable for immediate surgical aid, such as was provided at the time of the accident by Dr. G to plaintiff, and that immediately after the accident the abattoir company notified defendant who then took full charge of the case, and Dr. G continued the services up to and beyond the time of the settlement, and received payment for services from defendant during that period. The court said that this evidence furnished ground for inference, at least, that the doctor was the agent of defendant in the treatment of plaintiff, and further pointed out that the president of the abattoir company and the attorney for defendant visited plaintiff and made a proposition of settlement to him, during which they told him that Dr. G had told them that he was doing nicely and would be able to go to work in a short time and that he had a good union, which evidence, the court said, would have at least warranted the jury in inferring that defendant's agents who made the settlement and had at that time not only obtained the opinion of Dr. G, but also used the opinion to induce the settlement and the execution of the release, and, although it was not shown that either of them were informed as to the falsity of the representations of the doctor, the absence of such knowledge would not be of controlling importance. The court further held that, whether defendant expressly adopted and ratified the acts and words of all those whose

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IV. The reply was in two counts, one pleading that the release was procured by fraud, and the other that it was based on mutual mistake; and appellee contends that for this reason neither may be proven. A sufficient response is that the reply was in no manner assailed and all exacted was that the evidence be sufficient to carry either issue to the jury. Nothing appears to the contrary in Seymour v. Ry. Co. In that case no failure to attack pleading is passed upon. Whatever it decides on the consequences of pleading both

representations induced the release or not, it, with knowledge of the facts set up in the reply, defeated plaintiff in his original action from recovering damages which he might otherwise have recovered, and at the same time prevented a judgment against the abattoir company, for which defendant would have been liable on his policy, and that, therefore, under the law, it was chargeable with the fraud alleged to have entered into the inducement of the execution of the release. The defendant further contended that the representations made by Dr. G were merely the expressions of opinion and predictions as to the future, and hence furnished no ground upon which to base fraud. The court said, however, that the representations were not in fact mere expressions of opinion by way of predictions as to the future course of plaintiff's injury, but were representations of a then existing condition, namely, that there was a good union of the bones of the limb, and that the limb was doing nicely, and that, coming from one whose profession and whose relation to plaintiff and his injury were such as to afford him special knowledge on the subject and make him capable of stating with substantial accuracy the condition of the limb as it then existed, plaintiff had a right to rely upon said representations. Upon the further contention of defendant that plaintiff's petition failed to show that he suffered any damage because of the alleged fraud practiced upon him, the court held that depriving one of an existing cause of action by fraudulent representations furnished a new cause of action in which two remedies or courses were open, either of which might be pursued by the injured party, namely, that he might keep what he had received, and sue to recover damages for the fraud, or he might rescind, or offer to rescind, and recover on his original cause of action and, while in the present case plaintiff sought to recover the damages sustained on account of the fraud, and it was necessary that he allege and prove some pecuniary damage, the requirements of the law were met by averments of the complaint, and the evidence tending to support them, which showed that plaintiff surrendered and lost his original cause of action against the abattoir company, and on account thereof suffered the damages alleged. Upon the question of the statute of the limitations, the court held that there was sufficient evidence from which the jury might have inferred that plaintiff never discovered the fraud or who was responsible for it until within the 6-year period, and that his failure to make the discovery was due to the nature and character of the fraud rather than to any lack of diligence on his part. The judgment of the trial court was reversed for its error in giving a peremptory instruction for defendant, and a new trial granted. Bailey v. London Guarantee

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fraud and mutual mistake, it does not hold that such inconsistency may be urged on appeal for the first time.

We conclude that the court erred in withdrawing the issues from the jury. It must not be inferred from what we have said that we question the sufficiency of the evidence to carry the issue of fraud to the jury. Dr. Saunders was the company's surgeon and examined complainant as such. He made the statements with knowledge that what he said would be made the basis of the settlement about to be

& Accident Co., — Ind. App. —, 121 N. E. 128 (1918).

III. Miscellaneous cases.

Plaintiff was injured through the negligence of defendant, and brought suit for damages, to which defendant pleaded that plaintiff had released his claim against defendant. Plaintiff replied, alleging that the release was void because of mutual mistake, due to the mutual belief of the parties that the injury was less serious than it actually was. The jury returned a verdict for defendant and plaintiff appealed from the order of the court denying his motion for a new trial. The court in affirming the order denying the new trial recognized that a release of a claim for personal injuries executed in reliance on fraudulent and false representations of probability of recovery, made to the injured person by an attending physician in the employ of the defendant, was voidable, and that such a release also might be avoided when its execution was due to a mutual mistake of the injured person and defendant's physician who was assisting in procuring a settlement, but that, where the attending physician, in the course of treatment, expressed a mistaken but honest opinion as to the period within which the injured person suffering from a known injury would recover, and where that expression of opinion when made had no connection whatever with the settlement or with negotiations for a settlement, a release executed in reliance on his treatment under the circumstances would be valid, the court saying: "The opinion here expressed had, at the time it was uttered, no connection with, nor reference to a settlement, or to negotiations for settlement. It was made before they had been commenced. That it subsequently became the basis of the settlement is not legally significant. * * * The mistake related to the length of time probably required for recovery for a broken leg. This was not a misrepresentation or a misstatement relating to a past or a present existing fact." Nelson v. Chicago & N. W. R. Co., 111 Minn. 193, 20 Ann. Cas. 748, 126 N. W. 902 (1910).

Plaintiff and her mother were injured by an explosion of powder which was being transported in a car by defendant railroad company and, beyond slight bruises, the injury received by plaintiff was to one of her eyes. She was attended by the physician usually employed by the family, and by another physician, an eye specialist of repute, both of whom were employed for the purpose by the railroad company and by it paid for their services. These physicians told plaintiff, her parents, and the claim agent of the company engaged in settling claims of those injured by the explosion, that the injury to the girl's eye was only a scratch on the surface, and one of them said that

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made. The complainant relied thereon in executing the release and was deceived into signing the same when he would not otherwise have done so. His statements were untrue, and under the rule laid down in Haigh v. Whiteway Laundry Co., supra, it would seem that the evidence was sufficient to carry the issue of fraud to the jury. Oestreich v. Ry. Co., 167 N. W. 1032. See, also, decisions to the same effect collected in a note to that case as reported in 50 L. R.

glasses would bring the eye right. Relying on these representations the parents of plaintiff, who was then a minor, 14 years of age, agreed with the claim agent upon a settlement for the injuries sustained by plaintiff and her mother, and a joint release was executed by plaintiff, her father and mother, and the guardian who had been appointed for plaintiff, and the sum of $3,400 was paid for the release for the injuries to both, without stating in the release either the character of the injuries, or distributing or separating among those entitled thereto the sum paid for the injuries to the two persons. It was agreed, however, between all the parties thereto, including the claim agent, that the sum of $500 was for the injuries to plaintiff, and this sum being part of $3,400 mentioned in the release, was received by her guardian. Afterwards the injury to the eye of plaintiff was found to be different from that which all concerned thought existed at the time of the release. She lost the sight of the injured eye, and another specialist found that the eye, instead of being superficially scratched had been penetrated deeply through four coats, including the retina, and the injured eye was removed. Thereafter suit was brought for plaintiff, then a minor, by her next friend, against the company for damages for the injuries, and after the declaration had been filed in that suit the present bill was filed asking that the defendant be enjoined from using as a defense the release made by herself and others. While the suit was pending plaintiff became 21 years of age, and upon petition was permitted to prosecute the cause in her own name. The court pointed out that a written agreement of settlement and release might not be rescinded for fraud or mistake unless the evidence of the fraud or mistake was clear, unequivocal and convincing, and that, to invalidate a release on account of mutual mistake, the mistake must relate to a past or present fact material to the contract and not to an opinion respecting future conditions as a result of present facts. The court further stated that, where the release given stated the particular injuries compensated for and there were other injuries unknown to both parties to the release, there was such a mistake of fact as would invalidate the release, and equity would give relief against the use of the release to bar the claim for damages for the injury unknown at the time of the release, but that, when the parties to the release dealt at arms' length and the person injured had advice independent of that of the physicians of the releasee, then it might be a sound rule to adopt that a general release for all injuries, known and unknown, received in a particular accident, which release did not specify particular injuries, would be binding though injuries unknown at the time of the release were afterwards discovered. Applying these general principles, the court said: "In the case before this court there was an entire reliance on the

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A. (N. S.) 1091. See, also, Davis v. Central Land Co., 162 Iowa, 269, 143 N. W. 1073, 49 L. R. A. (N. S.) 1219. There was no motion to require plaintiff to elect on which of the issues he would stand, that of mutual mistake or fraud; and therefore, as the evidence sustaining either was sufficient to carry it to the jury, there was error in directing the return of a verdict for defendant.

Reversed.

physicians of the railroad company in the negotiations for the settlement, and but for their statements as to the extent of the injury it is but fair to say that the settlement would not have been made. These statements as to the wound were untrue. An innocent misrepresentation made by the physician of the releasee, relied on by both the releasor and releasee, as to the kind of injury received by the releasor may be effective to avoid a release induced thereby." The court gave, as another ground for the relief sought, the mutuality of the mistake as to the kind of injury sustained by the complainant, and said: "Notwithstanding the general terms of the release, the case before this court is not one where it was sought to compromise and settle a general claim for all injuries resulting from a particular accident, known and unknown, but only those known to exist, as reported by the defendant's physician, on whose reports all parties to the negotiations and release rightly relied. If the physicians honestly supposed that the eye was only scratched on the surface, and not penetrated deeply to the retina, either because their examinations had been superficial, or for other reasons, then the case is one where the release is comprehensive enough to cover a matter of claim unknown to both releasor and releasee, and, therefore, not considered in the settlement. From such mistake, according to settled principles applicable to all mistakes of fact, instead of opinion, equity will relieve. * * * It is undisputed in this case that the releasor and releasee depended on the statements of the physicians of the releasee as to the kind and extent of the injury; that the settlement was induced by these statements, made for that purpose, and that the statements were wrong. Under such circumstances, by all the cases which have been brought to the attention of, or examined by, this court, there exists such a clear mutual mistake as to existing facts, and not as to opinions, as should invalidate the release as a binding settlement, though the release be in form for all injuries received from the accident without specifying the injuries." As the release expressly stated that the liability of defendant was not admitted, and that the settlement was a compromise, the court said that plaintiff, who had offered to repay the $500 if directed by the court to do so, should repay to the defendant that sum or make a legal tender thereof as a condition precedent to the operation of the injunction, for it might result that the complainant would fail in her action at law for damages. A decree was ordered accordingly. Tatman v. Philadelphia, B. & W. R. Co., 10 Del. Ch. 105, 85 Atl. 716 (1913).

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CENTRAL OF GEORGIA R. CO. v. ROBERTSON.

[Supreme Court of Alabama, June 26, 1919.]

— Ala. —, 83 So. 102.

Rehearing denied October 23, 1919.

1. **Carriers of passengers—Degree of care and diligence required.**
The law holds common carriers of passengers to the highest degree of care and diligence which is known to careful, diligent and skilful persons engaged in such business.

2. **Carriers of passengers—Injuries to passenger—Derailment, wreck, etc.—Prima facie presumption of negligence.**
When, during the relation of carrier and passenger, the passenger is in-

CASE NOTE.

Application of rule res ipsa loquitur in action for injury to passenger by derailment.

I. Steam railroads, 822-843.
A. Passenger trains, 822-840.
1. General allegation of negligence, 822-835.
2. Unsafe track, 835-836.
3. Unsafe track, negligent operation, 836-837.
4. Unsafe track, inadequate brakes, 837.
5. Unsafe track, high speed, 837-838.
6. Unsafe track, defective car, 838-840.
B. Mixed trains, 840-842.
C. Freight trains, 842-843.
II. Electric railroads and street cars, 843-855.
A. General allegations of negligence, 843-851.
B. Effect of pleading specific negligence, 851-855.
III. Cable cars, 855-856.

I. Steam railroads.

A. Passenger trains.

1. General allegations of negligence.

Plaintiff was a passenger on one of defendant's trains, consisting of a baggage and a mail car, three passenger cars, a dining car and four sleeping cars. Plaintiff was seated in one of the rear chairs of the middle passenger coach, which was a chair car, following which was one of the coaches, the dining car, and the sleeping cars. The dining and sleeping cars were derailed, from some cause not shown. The car in which plaintiff was riding did not leave the track; emergency brakes were applied and the train was quickly brought to a standstill, but not until after the rear sleeper had become detached and rolled down an embankment. The derailment, together with the violent application of the brakes, produced a severe jerking of the chair car, throwing the plaintiff from her seat and injuring her. Affirming judgment for the plaintiff, the court held that where it was shown that a passenger on a train was injured by a derailment of part of a train, the burden of proof was on the carrier to show that the casualty to the train was not the result of negligence; and that in the absence of such proof the negligent cause of the derailment became an established fact. Bowlin v. Union Pac. R. Co., 125 Mo. App. 419, 102 S. W. 631 (1907).

While plaintiff was a passenger on one of defendant receiver's trains, it

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jured by the car in which he is being carried being derailed, wrecked, etc., or occurrence which would not happen without some negligence on the part of the carrier, this raises the presumption, prima facie only, however, that the injury was proximately caused by the negligence of the carrier, which presumption will authorize a recovery of damages against the carrier for the injuries suffered by the passenger unless the carrier can rebut this prima facie presumption by reasonably satisfying the jury that the derailment or other occurrence causing the injury could not have been prevented by the exercise of the highest degree of care on the part of the carrier, his agents or servants.

3. **Carriers of passengers—Injuries to passenger—Derailment and overturning of coach—Allegations of negligence—Res ipsa loquitur.**

If, in an action by a passenger against a carrier for personal injuries sustained by the former when the coach in which he was riding was derailed and overturned, the negligence be sufficiently charged in general terms only, it will include cases within the doctrine of res ipsa loquitur, but if the plaintiff charges negligence in general terms and then specifies particular acts, it may be doubtful

was derailed and she was thereby thrown violently upon the floor of the car in which she was seated and injured. Affirming judgment for the plaintiff the court held that these facts having been proven, a prima facie case of negligence was thereby made out against the carrier, and it having introduced no evidence tending to rebut it the jury was warranted in finding for the plaintiff. Freeman v. Davis (Tex. Civ. App.), 117 S. W. 186 (1909).

While plaintiff was a passenger on the defendant's train, the car in which she was riding was derailed, wherefrom her hip was bruised and she was otherwise injured. The car was thrown on its side and dragged along a great distance. Affirming judgment of $3,200 for the plaintiff the court held that where a passenger was injured by the derailment of a train, presumption of negligence on the part of the company arose which must be rebutted by evidence; that an instruction, charging the jury, that although the plaintiff must establish his cause by a preponderance of the evidence, they must keep in mind the rule as to the presumption of negligence from the evidence showing that an accident occurred, and further that they must put the facts and circumstances proved by the defendant into the scale against the presumption of negligence, and, in determining the weight to be given, the facts proved should apply the rule that the burden was upon the plaintiff, was a correct statement of the law. Southern Pac. Co. v. Hogan, 13 Ariz. 34, 29 L. R. A. (N. S.) 813, 108 Pac. 240 (1910).

Plaintiff had sustained a fracture of his arm and ankle, but was on a fair way to recovery when, while a passenger on one of defendant's trains, he was thrown bodily against the side of the car by reason of the derailment of the train, thus aggravating his fractures and causing other injuries. Affirming judgment for the plaintiff the court held that the derailment raised a presumption of negligence, and that the utmost effect of evidence tending to show the contrary was to raise a question for the jury. Freeman v. Chicago, M. & St. P. R. Co., 52 Mont. 1, 12 N. C. C. A. 591, 154 Pac. 912 (1916).

Plaintiff was a passenger on one of defendant's trains and was riding in a chair car. Desiring to use the wash room he went to it and found it locked. Being told by the porter that it would be opened directly, he returned to his seat when the chair car, from a cause unknown to the plaintiff, was derailed and thrown to one side, he receiving the injuries complained of. No explanation of the

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whether he is limited to proof and the right to recover to the particular acts so specified.

4. **Carriers of passengers—Injuries to passenger—Derailment and overturning of coach—Allegations of negligence—Res ipsa loquitur.**

When a passenger, suing a carrier for personal injuries sustained by the former when the coach in which he was riding was derailed and overturned, alleges in one count that his "wounds, injuries and damages were the proximate consequence, and caused by reason of the negligence of the defendants, their servants or agents as aforesaid," and in other counts "that the defendants' servants or agents, while acting within the line and scope of their employment, so negligently conducted themselves in and about the business of carrying the plaintiff as such passenger as aforesaid that the plaintiff received the wounds, injuries, and damage set out," held that either allegation was sufficient to avail of the prima facie presumption of negligence or to be within the doctrine of res ipsa loquitur.

5. **Carriers of passengers—Injuries to passenger—Derailment and overturning of coach—Liability—Question for court or jury.**

If, in an action by a passenger against a carrier for personal injuries

accident was offered by the company. Affirming judgment for the plaintiff the court held that under these facts a prima facie presumption arose that the accident was caused by the negligence of the carrier, and to escape liability it must show that the injury was the result of inevitable accident or some cause which human precaution and foresight could not have averted. Siegel v. Illinois Cent. R. Co., 186 Mo. App. 645, 172 S. W. 420 (1915).

Plaintiff was injured by the derailment of defendant railway's car in which he was riding as a passenger. Defendant assailed the plaintiff's petition on the ground that it was not put upon notice whether it would be called upon to answer for negligence in the construction and maintenance of its track, negligence in the employment of its servants, and operation of its trains, or negligence in the use of defective machinery; but it offered no excuse or explanation for the derailment. The court held that plaintiff was not obliged to plead facts not within his knowledge and peculiarly within the knowledge of the defendant and which he was not required to prove to make out a prima facie case; that where the derailment of a train injuring a passenger was unexplained, negligence of the carrier was presumed. The verdict for $3,000 was held not to show evidence of passion and prejudice where it appeared that plaintiff was 45 years old, had been earning $50 a month, and as a result of the accident he sustained three broken ribs; lost greatly in flesh; suffered from rapid heart; had a cough, and could not do ordinary labor. Galveston, H. & S. A. R. Co. v. Garcia, 45 Tex. Civ. App. 229, 100 S. W. 198 (1907).

Plaintiff, a miner, in perfect health, had taken passage on one of defendant's trains, when the seven cars behind the express left the track by reason of which the smoker in which plaintiff was riding was thrown over an embankment, turning on its side, and from the wreck plaintiff emerged with injuries which crippled him for life, and also suffered severely from exposure at the time of the wreck. There was some evidence tending to show that improvement on the defendant railroad had not kept pace with the increase in business. Affirming judgment of $15,000 for the plaintiff the court held that a prima facie case was made out by showing the derailment and that it was incumbent on the carrier to repel by satisfactory proof every imputation of the

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sustained by the former when the coach in which he was riding was derailed and overturned, the defendant shows that the accident was an inevitable one or such as the highest degree of care and foresight could not have prevented or provided against, it is not liable as a matter of law, but, if not so shown without dispute, it is a question for the jury and it is proper for the trial court to decline to take the question from the jury.

6. **Carriers of passengers—Care required—Roadbed, machinery, etc.**

A carrier is not an absolute insurer of the safety of its passengers, but it is bound to use the utmost care, as far as human skill and foresight can go to secure their safety and to prevent possible accidents which may arise from the condition of its roadbed, machinery of all kinds, and all other acts of negligence on the part of it itself, its agents or servants, and this duty extends to safe and properly constructed bridges, trestles, culverts, ties, rails, and the proper and safe spiking of the latter to the crossties.

7. **Carriers of passengers—Skill and care required—Construction, etc., of agencies.**

The law enjoins upon a carrier the utmost skill and care as to original construction, selection, maintenance and operation of its agencies.

slightest negligence, and that it was for the jury to determine, from the evidence in rebuttal, as to whether the defendant had sufficiently overcome the presumption of negligence. Sherman v. Southern Pac. Co., 33 Nev. 385, Ann. Cas. 1914 A 287, 111 Pac. 416, 115 Pac. 909 (1910). Rehearing denied.

Plaintiff's wife was injured by the derailment of a train upon which she was riding as a passenger. The trial of his action for damages to his wife resulted in a verdict and judgment in his favor for $7,541.75. No explanation of the derailment was given by defendant and the court said that plaintiff made out a prima facie case of negligence when he proved that the train was derailed and his wife was a passenger and was injured by the derailment, and that the burden then rested upon defendant to show that the accident could not have been avoided by the utmost care and foresight reasonably compatible with the prosecution of its business. As there was no evidence tending to show that the derailment resulted from an unavoidable accident, the court properly refused to charge the jury on that point. Plaintiff's wife testified that she was confined to her rooms by reason of the injuries for 3 months and did not go downstairs but once in 5 months, and had suffered great pain and agony; that she had attended to a store and performed her household duties previous to her injury, but since had been unable to attend to any work; and that she has constant pain in her side and hip and suffers a great deal. One doctor testified that she was suffering with displacement of the womb, which he attributed to her injury. The court said that if this testimony was to be credited it could not say that the verdict was excessive. Southern Pac. Co. v. Blake, 61 Tex. Civ. App. 396, 128 S. W 668 (1910).

Plaintiff brought suit to recover damages for personal injuries which were inflicted upon her through the negligent derailment of one of defendant's passenger trains upon which she was a passenger. She recovered judgment for $400, from which defendant appealed. It was held tha an instruction given by the court, that if there was a derailment of the car in which plaintiff was a passenger the law would presume negligence on the part of the defendant, but that such presumption might be removed by competent evidence, a railroad company not being held to such a degree of care as would insure the

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8. **Carriers of passengers—Injuries to passenger—Defense—Lack of knowledge of defects.**

Mere lack of knowledge of defects will not excuse a carrier for personal injuries sustained by a passenger unless it has exercised the proper degree of care and diligence to discover and prevent the defects.

9. **Carriers of passengers—Suitable and safe equipments and appliances—Latent defects.**

Carriers are under the highest duty to provide and maintain suitable and safe equipments and appliances; their safety should be established by the very best and surest tests recognized by experts in the business, and nothing can exempt a carrier from liability as for defects therein except that such defects are latent ones which no reasonable degree of skill and diligence would discover or prevent.

10. **Carriers of passengers—Duty to use safety devices.**

The law enjoins upon carriers the duty to use such means of safety as science has made known and demonstrated to be useful, protective, and necessary to safety; they are required to keep pace with the science and art of their business; they are not required to adopt every new device unless it con-

safety of the passenger, while obnoxious to a provision of the statute requiring that the trial judge, in his instructions to the jury, should not charge or comment upon the weight of the evidence, did not require reversal in the absence of evidence explaining the cause of the derailment of the train and showing that it was due to a cause for which defendant was not answerable, the testimony of the train crew that the track was all right and that they could see nothing the matter with the car, without any evidence whatever of an inspection of the track or of the car, being wholly insufficient to rebut the presumption of negligence arising from the derailment itself. The judgment was reversed, however, for error on the part of the trial court in submitting to the jury the question of probable future damages, there being no allegation in the plaintiff's declaration that she would probably suffer either physical or mental pain in the future. Houston & T. C. R. Co. v. Lindsey, 51 Tex. Civ. App. 67, 110 S. W. 995 (1908).

In Texas & P. Ry. Co. v. Mosley (Tex. Civ. App.), 124 S. W. 485 (1909), plaintiff sued to recover for injuries sustained as the result of the derailment of a car in which he was riding. Plaintiff had judgment and one of the assignments of error on the part of defendant was the refusal of the court to instruct the jury that, if the wreck was caused by anything other than the negligence of the defendant, then the fact that there was a wreck and that the plaintiff was injured thereby would not be sufficient to justify them in finding for plaintiff. The court said that because the carrier, as a rule, was in a position more easily to explain and account for a derailment of one of its trains than the passenger was, it was generally held that proof by the passenger of the derailment of the car, and of injury as a consequence suffered by him, raised a presumption that the carrier was negligent, which presumption was one of fact and not conclusive and might be overcome by proof that the derailment was the result of an unavoidable accident or an occurrence which could not have been provided against by the highest practicable degree of foresight. The court further said that the testimony of the engineer and conductor in charge of the train was such that the jury might have believed from it that the wreck was the result of an unavoidable accident, and that, while an instruction embodying the duty of

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tributes to safety, but they must adopt those improved modes known to conduce safety; they must adopt those which are up to the standard of those in general use and which are necessary for the safety of their passengers.

11. **Carriers of passengers—Duty to employ careful and prudent servants—Duty of servants.**

The law requires of railroad companies that they employ very careful and prudent servants, and requires of such servants that they exercise such degree of diligence as very careful and prudent persons take of their own affairs, but infallibility is not expected.

12. **Carriers of passengers—Diligence required in general prosecution of business.**

But for special legislation, railroad companies would be bound only to such diligence in the general prosecution of their business as would be dictated by sound reason applied to the successful use of their necessary privileges.

13. **Carriers of passengers—Speed permitted in Alabama.**

It is still the right of railroads in Alabama to run trains at any speed that is safe for their passengers and freight except under the circumstances when statutory precautions are exacted.

the jury if they so found would have been proper, had a proper charge supplying the omission been requested, the instruction requested was properly refused because on the weight of the evidence and liable to mislead the jury, in that they might have construed it to mean that they were not authorized to infer negligence on the part of defendant from proof showing merely that the train was derailed. The judgment was affirmed.

While plaintiff was riding as a passenger upon one of defendant's trains which was proceeding at the rate of about 30 miles an hour, the forward truck of the tender left the rails and the wheels ran on the cross-ties, the derailment not being discovered by the engineer until the train had proceeded for some distance. The derailed truck struck the switch rails and tore them up, and continuing, struck a bit of track where there were 7 or 8 rotten ties extending for a space of 10 or 12 feet, and here the wheels cut through the ties, sank into the ground, and ran through the ties and the ground until sound ties were reached, when the coupling between the tender and engine was broken and the engine thrown into the air, while the tender and cars ran off the rails and into a ditch, some of the cars being nearly overturned and the others more or less tilted. In addition to a general charge of negligence plaintiff charged that defendant negligently permitted its track and ties to become unsafe and that it carelessly managed the train before and after the derailment. The court said that the happening of the accident having been proven, the rule of res ipsa loquitur applied and the burden of rebutting the presumption of negligence rested on the defendant. Defendant sought to rebut this presumption by showing that the cause of the first derailment was unknown; but this the court held not to be sufficient as the mere inability or failure of a carrier to account for an accident in a res ipsa loquitur case was not a sufficient defense. In addition to the presumption of negligence there was evidence that the engineer ran his engine nearly 1,000 feet before any effort was made to lessen the speed of the train, and there was evidence from which the jury could reasonably infer that the conductor and other members of the train crew were negligent in not noticing the derailment and in taking no steps to stop the train. Plaintiff recovered a judgment for $15,000,

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14. Carriers of passengers—Diligence required.
The law exacts of those using steam power for carriage extraordinary diligence—that which very careful men take in their own affairs.

15. Carriers of passengers—Failure to use safety appliances—Burden of proof.
Impossibilities are not exacted of railroads, but the onus rests on them to show the fruitlessness of employing appliances which were not employed but which ordinarily prevent injury actually suffered.

16. Negligence—Care and diligence—Question of law or fact.
Care and diligence is generally a mixed question of law and fact; when the facts are undisputed and the deductions therefrom indisputable, or the duty is fixed by law and is the same under all circumstances, the question is for the court, but if the facts are disputed or the inference of negligence is a matter of discretion, it must be submitted to the jury.

17. Carriers of passengers—Negligence—Rails, cars and engines.
The law does not contemplate that railroad companies will in general make their own rails, cars, or engines; all that they can reasonably be expected to do is to purchase such cars and other necessaries as they have reason to be-

which defendant claimed was excessive. It appeared that plaintiff was thrown alternately forward and backward in her seat, her breast striking the end of a chair in front of her; that at the time of the accident she had black hair, weighed 212 pounds, and was of great physical ability, while at the trial, 3 years later, her hair was gray, she weighed 102 pounds and was unable to do any housework; that she suffered an injury to her spine; had a cancerous lump in her breast, and had constant medical attention. The verdict was held not to be excessive and the judgment was affirmed. Shaw v. Chicago, R. I. & P. Ry. Co., 173 Ill. App. 107 (1912).

While the train of the defendant was running at the rate of 30 miles per hour the truck of the tender left the rails. The tender and the first coach were wrecked and the track at the place of the accident was torn and damaged and the plaintiff was injured. The evidence adduced by the defendant failed to show the cause of the accident. Affirming a judgment for $2,500 for the plaintiff the court held that when a passenger was injured without his own fault by the derailment of a train, the carrier, in order to rebut the presumption of negligence, must show that the accident resulted from circumstances against which human care and foresight could not guard; and that in the absence of an explanation of the physical cause of the accident, the court was unable to say that it resulted from circumstances against which human care and foresight could not guard. Reems v. New Orleans G. N. R. Co., 126 La. 511, 52 So. 681 (1910).

Plaintiff was injured while riding as a passenger upon defendant's train when the engine and part of the train were derailed. Defendant offered evidence tending to show that the derailment was caused by the deliberate act of some unknown person in removing the angle bars from some of the rails and some of the spikes from the ties, and while it conceded that the case was one for the application of the doctrine of res ipsa loquitur it contended that plaintiff, although she had the legal right to compel defendant to assume the burden of explaining the cause of the accident, could not rely for recovery upon what it called the bare presumption which arose from the mere fact of the accident which resulted in her injury, and that, inasmuch as it established that the derailment was caused by vandalism and not by any agency

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lieve will be safe and proper, giving them such inspection as is usual and practicable as they buy them; when they make such an examination and discover no defects, they do all that is practicable, and it is no neglect to omit attempting what is impracticable; they have a right to assume that a dealer of good repute has also used such care as was incumbent on him, and that the articles purchased of him which seem right are right in fact.

18. **Carriers of passengers—Unavoidable accidents—Liability.**
The law has never attempted to hold carriers of passengers liable for anything which they could not avoid by their own diligence.

19. **Carriers of passengers—Injuries to passenger—Derailment and overturning of coach—Presumptions of negligence—Sufficiency of evidence to rebut.**
In an action by a passenger against a carrier for personal injuries sustained by the former when the coach in which he was riding was derailed and overturned, the derailment being due to a "transverse fissure" in a rail, held that the evidence rebutted all presumptions of negligence, on the part of the defendant, proximately causing the injuries, and that the general affirmative charges requested by the defendant should have been given.

under the control of defendant, there being no evidence offered tending to disprove any item of its evidence as to the physical facts found to exist immediately after the derailment of the train, the facts established by the defendant must stand as admitted and no conclusion was reasonably possible other than that defendant was not negligent. The position taken by the plaintiff was that the derailment was in itself such evidence of negligence that it gave rise to a conflict of evidence when controverted and that it became a matter for the jury to determine whether or not the evidence of the railroad company counterbalanced that offered by the plaintiff. The court held that when plaintiff showed that the train had been derailed and, because of such derailment, she was thrown against the side of the car and injured, she had, without further proof, offered sufficient evidence of the carrier's duty and of its neglect to perform its duty, so that a prima facie case was made, whether it be said that it was based upon the presumption or inference of negligence arising from the fact. It was none the less evidentiary and the carrier was called upon to meet the facts and inferences by showing that it was not guilty of negligence, and that defendant having offered its evidence, the question whether it made a stronger case than plaintiff made was for the jury to say under proper instructions by the court, and that the whole question of whether there was negligence became one for determination by the jury. Judgment for plaintiff was affirmed. Chicago, M. & St. P. Ry. Co. v. Irving, 148 C. C. A. 328, 234 Fed. 562 (1916).

Plaintiff was injured in a derailment of the car in which he was traveling as a passenger over defendant's railroad and brought this suit for damages sustained. Defendant introduced evidence tending to show that when the derailment occurred its train was running in the daytime over a straight track through a level country, a little behind time, but not at an excessive or unusual rate of speed, when three of the four cars in the train jumped the track and turned over, and further introduced evidence that the engine and cars, roadbed and track on the day and at the place of the derailment were all in good and proper condition, that its train was being properly managed and run at the time, and that, after several examinations, defendant was unable to ascertain the cause of the derailment. Plaintiff introduced evidence to show that the roadbed was

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Action by a passenger against a carrier for personal injuries sustained by the former when the coach in which he was riding was derailed and overturned. Judgment for plaintiff. Reversed and remanded.

For appellant—Barnes & Walker.

For appellee—J. Reese Murray and Erie Pettus.

MAYFIELD, J. The action is by a passenger against a common carrier to recover damages for personal injuries alleged to have

not ballasted; that there were rotten or decayed ties at or near the point of derailment, and that the roadbed was not properly inspected. The jury was given an instruction on behalf of plaintiff to the effect that, although they believed from the evidence that the engine and car making up the train in which plaintiff was a passenger were inspected by the proper employees of defendant and all the equipment thereof was passed upon and believed to be in good order by them, and the ties, track and roadbed at the place of derailment had been inspected within a reasonable time and been passed upon by the employees as in fit and proper condition, nevertheless if they believed from the evidence that plaintiff was a passenger upon the car and the car was derailed and jumped the track, and by reason thereof plaintiff was injured, that raised a presumption of negligence upon the part of defendant, and the burden was upon it to show that the derailment of such car was not caused by its negligence, and if from the evidence there was an absence of explanation by the defendant as to the cause of the said car being derailed, the presumption of negligence which arose upon proof of the derailment was sufficient to maintain the plaintiff's action. In holding that this instruction was erroneous the court said that in many cases, as in this, the rule res ipsa loquitur applied, but whether the evidence relied on by plaintiff to make out a cause of action was the accident itself, from which arose a presumption of negligence, or was direct evidence of negligence, the burden of proof as to the defendant's negligence remained upon the plaintiff throughout the trial, and that the instruction was also objectionable because it told the jury that if defendant had not shown the cause of the accident, then, without regard to what else had been shown, the presumption of negligence which arose from the proof of the derailment entitled plaintiff to recover, and they must so find for the plaintiff. The court said that, to rebut the presumption of negligence arising from the derailment, defendant was not bound to satisfactorily account for the cause of the accident, as sometimes accidents occurred which were inexplicable, and to hold that a carrier of passengers must, under all circumstances, show what caused the accident to rebut the presumption of negligence arising from the accident itself, would, in such cases, impose an impossibility upon the carrier and render it practically an insurer. Norfolk-Southern R. Co. v. Tomlinson, 116 Va. 153, 81 S. E. 89 (1914).

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been received in consequence of the carrier's negligence, or the negligence of the carrier's agents or servants acting within the line and scope of their authority. The evidence without dispute showed the relation of passenger and carrier, and the alleged injury during the existence of the relation.

The evidence also showed without dispute that the injury was due to the derailment and overturning of the coach during transit in which the plaintiff was being carried.

There was much evidence to show the cause of the derailment of the train, most of it being to show that the wreck was due to a defective rail, and that the defect was a latent or hidden one not open to discovery or detection by the best, most prudent and care-

Plaintiffs, two girls, the older being 12 years of age, were passengers on a train which was wrecked, the coach in which they were riding rolling down an embankment and landing on its side in several feet of water, both girls being badly frightened, bruised and scratched, the older receiving injuries to her head which impaired her hearing and sight, the younger receiving a cut on her left knee, which left a permanent scar. No explanation of the cause of the accident was made at the trial. Affirming judgment of $500 for the older and of $250 for the younger plaintiff, the court held that proof that the plaintiffs were injured upon one of defendant's trains by the derailment and overturning into the water, of the coach in which they were riding, established a prima facie case against the railroad company, in the absence of any explanation of the cause of the wreck. Lamden v. St. Louis Southwestern R. Co., 115 Ark. 238, 170 S. W. 1001 (1914).

While plaintiff was a passenger on defendant's train a portion of the train, and especially the coach in which plaintiff was being carried as a passenger, was suddenly and violently thrown from the track and brought to a sudden stop and tilted to almost the point of capsizing, and by reason thereof she was violently and forcibly thrown down between the seats, whereby, she alleged, she was injured in the bones, cartilages, ligaments and muscles of her right leg and was bruised and wounded in and about her body and limbs, and her nervous system was greatly shocked. She recovered a judgment for $7,500, from which defendant appealed. One of the assignments of error was the giving of an instruction which practically required defendant to prove that the train, coach and coaches were not overloaded; that its roadbed, tracks, train, coaches, equipment and appliances were safe and sound, and that the train and coach were being run and operated by the exercise on the part of defendant of the highest degree of skill, knowledge, foresight, care, discretion and examination of its roadbed, tracks, trains, coaches and appliances. The court held that the recital of these particular matters was unnecessary, saying: "It is demanded of a railroad company carrying passengers to carry them safely, and it is responsible for all injuries to the passengers arising from even the slightest negligence on its part, and when a passenger suffers injuries in consequence of the breaking down or overturning or derailment of the coach in which he is riding, the prima facie presumption arises that such casualty

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ful inspection and test known to the profession of railroading, or those employed in manufacturing or dealing in steel rails. Most of the evidence went to show that the defect was a "transverse fissure," and that such was a latent defect, and could not be discovered by any known test.

The evidence rebutted any cause of the derailment other than the broken rail. Not in every case of injury to a passenger does a presumption of negligence on the part of the carrier arise from the happening of the injury. In Georgia Pac. R. Co. v. Love, 91 Ala. 432, 8 South. 714, 24 Am. St. Rep. 927, this court, limiting the application of certain expressions used in Louisville & N. R. Co. v. Jones, 83 Ala. 376, 3 South. 902, said, quoting the language of the

was caused by negligence on the part of the carrier, and the burden is on the latter to repel such presumption and to show that the injury was a result of inevitable accident or some cause which human precaution or foresight could not have averted." As defendant did not undertake to make any such defense the inclusion of the matter included in the instruction was improper, possibly misleading, to a certain extent, although hardly reversible error. The judgment was reversed for error in the admission of testimony as to plaintiff's injuries. Jackmann v. St. Louis & H. Ry. Co. (Mo. App.), 187 S. W. 786 (1916).

While plaintiff was a passenger upon defendant's railroad train the engine became derailed, causing the train to come to a sudden stop, and throwing plaintiff out of his seat against the seat in front of him and upon the floor, producing, as he alleged, a hernia. Plaintiff introduced none but his own testimony, which proved the accident as alleged in his petition, and that as a result of his fall from his seat, caused by the sudden stop, a hernia had been produced, from which he suffered great pain. Defendant did not attempt to explain the cause of the accident, but contented itself with an attempt to show that plaintiff was not injured thereby. Defendant had judgment and plaintiff appealed, alleging that a certain instruction to the jury was erroneous because it placed upon plaintiff the burden of proving that defendant did not exercise the highest degree of care in the operation of its trains, notwithstanding the fact that plaintiff proved the wreck of the train and his injuries. In reversing the judgment and remanding the cause, the court said that there was no evidence whatever of any failure of defendant to exercise the required amount of care except the mere fact of the wreck itself, and the jury very probably did not know that that fact was evidence of negligence, and therefore may have found against the plaintiff upon the idea that no negligence was proved, whereas, as matter of law, plaintiff had introduced evidence that proved the negligence, and therefore the instruction in question was erroneous and prejudicial. Warren v. Cumberland R. Co., 175 Ky. 92, 193 S. W. 1037 (1917).

While plaintiff was a passenger on one of defendant's trains one of the axles under the tender broke and the coach next to it, in which plaintiff was riding, left the track, and the front end of the car went over the embankment forming the roadbed while the rear end remained attached to the next coach which did not leave

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Supreme Court of Missouri in Dougherty v. Missouri R. Co., 81 Mo. 325, 51 Am. Rep. 239, that—

> "Where the vehicle or conveyance is shown to be under the control or management of the carrier or his servants, 'and the accident is such as, under an ordinary course of things, does not happen if those who have the management use proper care,' it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

It is sometimes stated that the fact that a passenger is injured on a carrier's train raises the presumption of negligence, and casts upon it the burden of showing that it was not guilty of negligence. But it is evident that there are cases in which that broad statement cannot be made, for example, a case in which the plaintiff's evidence shows his injury to have resulted probably from some unavoidable

the track. After leaving the track the coach stood upright at an angle of about 45 degrees, and the seats in the coach were nearly all torn loose and the passengers were thrown or slid down to the front end of the car. In an action for damages for the injuries sustained plaintiff recovered judgment, from which defendant appealed, alleging as error the denial of its motion for judgment notwithstanding the verdict because there was no evidence of negligence on the part of defendant and the denial of a motion for a new trial because excessive damages were allowed. Upon the question of negligence the court said that the law presumed that accidents such as the one complained of were attributable to the negligence of the carrier and the burden of proof was on the carrier to rebut that presumption. While the testimony on the part of defendant tended to show that its roadbed was in good condition, its cars and equipment properly inspected and its train carefully operated, there was other testimony tending to show that its train was operated at a high rate of speed and that the roadbed was rough and uneven. The court therefore said it could not say as a matter of law that the defendant exercised that high degree of care which the law exacted from those engaged in carrying passengers by the dangerous agency of steam and there was no error in denying defendant's motion on that ground. Upon the question of damages the evidence showed that the actual physical injuries suffered by plaintiff were slight and for a considerable time after the accident he considered them so; that they consisted of a grazed shin, a bruise on the knee and a bruise on the hip; that he was never in a hospital or confined to his bed, and that no serious consequences had developed from those particular injuries. He claimed, however, that about 3 weeks after the accident he was taken with a pain in his side, and that this pain seized him whenever he attempted to raise his arm above his shoulder, by reason whereof he was unable to follow his customary calling of a painter and decorator. Five surgeons in all testified at the trial, two for plaintiff and three for defendant, but their testimony was substantially the same, to the effect that there were no objective symptoms and that they were compelled to rely entirely upon plaintiff's statement as to the existence, nature and extent of the pains and injuries from which he was suffering. No witness was questioned or testified as to the probable duration of the pain or disability, if they in fact existed, and there was no

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cause—some cause outside the ordinary supervision and control of the carrier. Cent. of Ga. R. R. Co. v. Brown, 165 Ala. 495, 496, 51 South. 565.

Mr. Hutchinson thus states the rule and cases to which the presumption of negligence arises, and this rule has been repeatedly followed by this court as to several instances stated by Mr. Hutchinson:

"Where it is shown that an accident happened upon a railway, from which a passenger sustained an injury, by the breaking down or the overturning of the vehicle, or by a derailment of the train or of some of the cars, or by a collision between two trains or between two cars, or by an unusual jerk or jolt of the train, or by the parting of the train, or by the breaking down of a bridge, or by the falling of some of the appliances within the vehicle, or by

testimony that would warrant the jury in finding that the injuries were permanent. Under these circumstances the court said that the verdict returned by the jury was grossly excessive, and a new trial was ordered unless plaintiff would consent to the reduction of the judgment from $4,000 to $1,000. Pate. v. Columbia & P. S. R. Co., 52 Wash. 166, 100 Pac. 324 (1909).

Plaintiff, accompanied by some children, had boarded defendant's train, and while in the act of paying the conductor his fare the coach in which he was riding fell through a bridge into the waters of a creek which had become violent because of an unusually heavy rainstorm. The engine, tender and all other coaches remained on the track. Plaintiff got himself and children out of 3 or 4 feet of water in the fallen coach on the top of said car, from which place they were rescued and taken to land. He was cut and bruised in various places. The defendant pleaded act of God and unavoidable casualty, and requested the court to instruct the jury to return a verdict in its favor. Affirming judgment of $946 for the plaintiff, the court held that in a suit by a passenger for injuries occasioned by the derailment and wreck of a train, proof of such derailment and wreck, the circumstances thereof, and the injury occasioned thereby made a prima facie case of negligence and cast upon the carrier the burden of showing that it was not negligent; and that if such presumption was met by evidence of the defendant tending to exonerate itself from any negligence the question of whether such evidence was sufficient for this purpose is, ordinarily, a question to be determined by the jury. Midland Valley R. Co. v. Hilliard, 46 Okla. 391, 148 Pac. 1001 (1915).

Plaintiff was a passenger on one of defendant's trains which had a defective equalizer. It was near the oil box, and to some extent covered with dust so the break in it was not discovered by the inspectors. The equalizer dropped down and dragged along until it struck a switch rail and prized and opened it to such an extent as to cause the derailment of four coaches, including the one in which plaintiff was riding. When the car began to jolt he grabbed the back of the seat, and as he did so the car turned over, throwing him against the side and top of it and injuring his knee. Affirming judgment for the plaintiff to the sum of $5,250, the court held that the fact of the derailment and wreck made a prima facie case of negligence against the defendant, which was bound as a carrier of passengers to the highest

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an obstruction, which the carrier has placed too near the track, striking the side of the train, a prima facie presumption will arise that the accident was due to the negligence of the company or its servants. So, where it is shown that the injury was caused by a spark from one of the company's locomotives, or by a block of coal which was thrown from the tender of an engine while it was passing the depot platform, or by the explosion of a locomotive boiler, the law will presume from the mere happening of the injury that the company was guilty of negligence."

See Hill's Case, 93 Ala. 514, 9 South. 722, 30 Am. St. Rep. 65; Jones' Case, 83 Ala. 376, 3 South. 902; Mallette's Case, 92 Ala. 209, 9 South. 363.

The law holds common carriers of passengers to the highest degree of care and diligence which is known to careful, diligent, and skilful persons engaged in such business. When the passenger

degree of practicable care, consistent with the operation of its road, in the inspection and equipment of its cars. St. Louis Southwestern R. Co. v. Leflar, 104 Ark. 528, 149 S. W. 530 (1912).

2. Unsafe track.

Plaintiff was a passenger on one of defendant's trains, and the car in which he was riding left the rails and ran for about 700 feet upon the ties, plaintiff receiving injuries to his spine, hip and chest. It appeared from the evidence that most of the ties were of soft wood, and some of oak. The ties were in ballast at the place of the derailment, the track was straight, and of new 80-pound rails. No tie was loosened on account of the derailment, but the spikes were bent back and forced down into the ties. Six days before the accident the track had been regauged and again spiked upon the old ties, because one of the rails had been pushed out. The negligence charged was failure to maintain the track in proper condition. Defendant contended that it was guilty of no negligence, and that it should have a directed verdict. Affirming judgment of $1,998 for the plaintiff, the court held that the plaintiff having shown the derailment of the train in which he was riding as a passenger, and injuries resulting to himself therefrom, made a prima facie case, and the burden was thrown upon the defendant to show that the injuries did not result from a want of care on his part; that whether this prima facie case was overcome by the evidence was a question for the jury and not for the court. Chicago, R. I. & P. R. Co. v. Brandon, 77 Kan. 612, 95 Pac. 573 (1908).

In Norton v. Galveston, H. & S. A. Ry. (Tex. Civ. App.), 108 S. W. 1044 (1908), plaintiff brought an action to recover for injuries received as the result of the derailment of defendant's train upon which he was riding as a passenger, the ground for recovery alleged in the declaration being that the rails had not been properly spiked to the ties nor the ground properly tamped. The court said that it was proper to tell the jury that if those grounds had not been established plaintiff could not recover, as, having chosen to particularize the grounds of negligence, he could not recover on others, and if he wished to avail himself of the presumption of negligence arising from the derailment, no matter how caused, he should have pleaded negligence generally. A judgment for defendant was reversed because the court committed to the jury the issue as to whether the train had been derailed by wreckers where the evidence merely raised a suspi-

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during the relation is injured by the car in which he is being carried being derailed, wrecked, etc., or occurrence which would not happen without some negligence on the part of the carrier, this raises the presumption, prima facie only, however, that the injury was proximately caused by the negligence of the carrier, which presumption will authorize a recovery of damages against the carrier for the injuries suffered by the passenger, unless the carrier can rebut this prima facie presumption by reasonably satisfying the jury that the derailment or other occurrence causing the injury could not have been prevented by the exercise of the highest degree of care on the part of the carrier, his agents or servants.

There are cases in which the doctrine of res ipsa loquitur ap-

cion that the derailment was so caused.

Plaintiff, while a passenger on defendant's train by right of a ticket regularly purchased, sustained severe injuries by reason of a derailment overturning the coach in which plaintiff was riding and lodging her in a parcels rack. Plaintiff showed by competent evidence that the derailment was proximately caused by the decayed and rotten condition of the crossties and the defective, careless and negligent manner in which the rails were spiked to the ends of such crossties. Affirming judgment of $3,000 for the plaintiff, the court held that, under these circumstances, the plaintiff had made out a prima facie case which raised a presumption of negligence, and that the burden was upon the carrier to overcome such presumption to the satisfaction of the jury; and that an instruction to the jury to this effect was a correct statement of the law, it being immaterial whether the rule of res ipsa loquitur was waived by pleading specific negligence, as sufficient negligence was shown to make out a prima facie case. Missouri, O. & G. Ry. Co. v. Vandivere, 42 Okla. 427, 141 Pac. 799 (1914).

3. **Unsafe track, negligent operation.**

In Abilene & S. Ry. Co. v. Burleson, — Tex. Civ. App. —, 157 S. W. 1177 (1913), plaintiff recovered in the lower court a judgment for injuries received in a derailment of one of defendant's cars while he was riding therein as a passenger. Upon appeal defendant objected to an instruction that if the jury believed the defendant's train was derailed, as alleged, then the burden was on defendant to show that it was not caused through the negligence of defendant, and also to an instruction that if the jury believed the train was derailed, as alleged, the fact of such derailment was prima facie evidence of the negligence of defendant. The court said that the fact of derailment was not disputed, and that the first charge shifted the burden of proof on the issue of negligence to the defendant, whereas it was well settled that the burden of proof on the whole case never shifted from the plaintiff and that the second charge was plainly a comment upon the weight of the evidence because it assumed, as a matter of law, that the mere fact of derailment established in the first instance the important issue of the negligence charged, whereas, while there was a presumption of negligence from the happening upon a railway of an accident from which a passenger sustained an injury by the breaking down of a carriage or the running off

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pears. The circumstances in such cases are said to speak the negligence of the carrier. If, however, it is shown that the derailment or other occurrence causing the injury to the passenger was an inevitable accident, as the defect causing the wreck or derailment was a hidden or latent one that could not have been discovered or provided against though the highest degree of care and prudence had been exercised; that the carrier rebuts the prima facie presumption, and acquits himself of actionable negligence—it is often a difficult question to determine whether or not a plaintiff is entitled to the benefit of the presumption offered by this doctrine, though the proof shows a case within the influence of the rule. This is often so rendered difficult by the form of the pleadings,

of the train or by the spreading or breaking of the rails, the presumption was one of fact and not of law, and that it might well be doubted in the present state of the decisions whether it should be given in a charge to the jury, and that it certainly should not be given where, as in this case, there was a reasonable explanation of the derailment attempted by evidence tending to show that the derailment was caused by a bolt which locked a switch having been taken out by some unknown person. Under these circumstances the court said the issues of negligence should have been left to the jury without the influence of the erroneous charges given, and the judgment was reversed.

4. Unsafe track, inadequate brakes.

Plaintiff's husband, a mail clerk, while engaged in the performance of his duties, was killed by reason of the derailment of the mail car which, with the locomotive, plunged into a river. The theory of the defendant was that some unknown person had placed a large iron nut on the north rail of the track near the bridge, and that when the front wheel of the engine reached the nut it mounted it, and the flange of the wheel, rising above the edge of the rail, ran onto the ball of the rail and along the top of the same for some distance and then dropped off on the ties, and ran along there, when the trucks turned, and the ties were then displaced until the engine was overturned and precipitated into the gorge below, and that therefore the accident was unavoidable, produced by the act of a stranger, and that consequently the court erred in refusing to instruct the jury to return a verdict in defendant's favor. Affirming judgment of $5,000 for the plaintiff, the court held that a prima facie case had been made out by the plaintiff; that it was correct to present the stranger theory to the jury; that where a prima facie case was made out for injuries sustained through the derailment of a train, it devolved upon the railroad company, in order to be relieved of liability, to show that the accident could not have been avoided by the exercise of the utmost human prudence and foresight; and that instructions placing upon it this burden were without error. St. Louis & S. F. R. Co. v. Posten, 31 Okla. 821, 124 Pac. 2 (1914).

5. Unsafe track, high speed.

Plaintiff, a mail clerk on defendant's fastest train, was severely injured by reason of the train leaving the track and the mail car in which plaintiff was engaged being hurled down an embankment. There was

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whether the allegation embraces such evidence. If the negligence be sufficiently charged in general terms only, then of course it will include cases within the doctrine res ipsa loquitur; but if it charges negligence in general terms, and then specifies particular acts, it may be doubtful whether the plaintiff is limited to proof and the right to recover to the particular acts so specified. See note to 24 L. R. A. 788, and 51 Am. St. Rep. 555, and cases cited.

The first count alleges negligence in the most general terms, as follows:

"And the plaintiff avers that his said wounds, injuries, and damage were the proximate consequence, and caused by reason of the negligence of the defendants, their servants or agents as aforesaid."

evidence tending to show that the derailment was due to the act of a stranger, one K, who, it was alleged, had removed the spikes from the ties and disconnected two rails at the point of the derailment within a short time before the arrival of the train. While the court reversed judgment for the plaintiff on the ground that the declarations of K should have been admitted in evidence, it held that, as mail clerk, plaintiff was a passenger; that upon proof of injury to him by a derailment, a prima facie presumption of defendant's negligence arose which shifted the burden of proof upon it to establish the fact that it had exercised due care; that such burden of proof was not satisfied by defendant's showing that the probabilities were equal that the accident had or had not resulted from its negligence. Weber v. Chicago, R. I. & P. Ry. Co., 175 Iowa 358, L. R. A. 1918 A 626, 151 N. W. 852 (1915).

Plaintiff brought this action for the death of her husband, who was severely injured by the derailment of one of defendant's trains. The petition charged that the husband was a passenger on said train; that through the negligence of the defendant in operating the train at a dangerously high speed over a track in an unsafe condition said train was wrecked, thrown from the track and upon its side; that the husband was thereby thrown head foremost, striking the edge of a seat and car window, receiving injuries from which he later died. Affirming judgment of $7,500 for the plaintiff the court held that, under the doctrine of res ipsa loquitur, where a passenger was injured by the derailment of a train, the presumption was that such wreck was caused by some negligence of the carrier, and the burden of proof was put upon the carrier to rebut this presumption of negligence and establish its due exercise of care.. Powell v. Union Pac. R. Co., 255 Mo. 420, 164 S. W. 628 (1914).

6. Unsafe track, defective car.

Plaintiff was a passenger on one of defendant's trains which, while going downgrade at the rate of 50 miles an hour, was derailed and thrown down an embankment, by reason of which the plaintiff was severely injured. The complaint alleged negligence in three respects, namely, defective track, defective axles, and excessive speed. Affirming judgment for plaintiff the court held that it was not error to overrule the demurrer to the plaintiff's complaint, for the relation of passenger and carrier and injury to the passenger having been established, the rule of res ipsa loquitur applied, notwithstanding the

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The other counts were more specific, but somewhat general; the negligence being thus described:

> "That the defendants' servants or agents, while acting within the line and scope of their employment, so negligently conducted themselves in and about the business of carrying the plaintiff as such passenger as aforesaid that the plaintiff received the wounds, injuries, and damage set out in the first count of the complaint."

Either allegation is sufficient to avail of the prima facie presumption of negligence, or to be within the doctrine of res ipsa loquitur. The real troublesome question is as to whether or not the defendant's evidence showed without dispute that it was guilty of no actionable negligence proximately contributing to the injury.

fact that several causes had been alleged to have produced the derailment; that such specific allegations merely limited the grounds on which defendant was obliged to defend. Southern R. Co. v. Adams, 52 Ind. App. 322, 100 N. E. 773 (1913).

Plaintiff was a passenger upon defendant's railroad train when a derailment occurred and she was injured by a suitcase which was thrown from the rack on the opposite side of the car, and in a suit for damages, recovered judgment. Plaintiff alleged negligent running of the train, unsafe roadbed and track, unsafe cars, and negligent permitting of suitcases in the parcel racks. Among other grounds of error defendant cited the failure of the trial court to grant its motion for a verdict because, on the evidence, the derailment was the result of some accident against which defendant could not guard and for which it was not liable, and because defendant was not an insurer of the safety of plaintiff while a passenger, and the evidence failed to show negligence on its part with relation to any of the duties it owed to plaintiff as a passenger. The court held that, though these grounds of the motion could not be sustained as the derailment itself was prima facie evidence of such negligence and want of care, and while in such case the burden of proof did not shift from plaintiff, negligence was proven prima facie by proving the fact of the derailment, which gave the case to plaintiff on that point unless defendant met it by counterproof sufficient not to overbalance the proof afforded by the derailment, but to equalize it. There was evidence on the part of plaintiff tending to show that the derailment was caused by the defective condition of the ties and the worn condition of the rails, while defendant introduced evidence tending to show that the derailment was due to expansion of the rails from the excessive heat, and it was held that, under these circumstances, it was for the jury to say, in the light of all the testimony, whether the relation of cause and effect existed, as claimed by defendant, between the accident and the asserted exonerating facts and circumstances, and that, on all the evidence, the court could not direct a verdict for defendant, and the motion for a directed verdict was properly overruled. The case was reversed and remanded on other grounds. Parker v. Boston & M. R. R., 84 Vt. 329, 2 N. C. C. A. 346, 79 Atl. 865 (1911).

Two children brought this action by their guardian ad litem to recover for the death of their father by the derailment of the train upon which he

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In other words, did it show that the accident was an inevitable one, or such that the highest degree of care and foresight could not have prevented or provided against? If so, it was not liable as a matter of law. If not so shown without dispute, then it was a question for the jury, and the trial court properly declined to take the question from the jury. There is no material conflict in the evidence. If true, was it sufficient to rebut the prima facie presumption of negligence?

Carriers are not absolute insurers of the safety of their passengers. They are, however, bound to use the utmost care, so far as human skill and foresight can go to secure their safety, and to prevent possible accidents which may arise from the condition of its

was a passenger. There were three allegations of negligence: first, a defective roadbed; second, defective locomotive and tender; and third, unskilful management of the train. Defendant claimed that these charges being of specific negligence, the rule of res ipsa loquitur, which presumed negligence from the mere fact of the wreck, did not apply. Affirming judgment of $2,000 for the plaintiffs, the court held that this contention could not be maintained, and that the fact that the wheels of the passenger car left the rails and ran along the ties, without any showing of defective wheels or trucks, made a strong prima facie showing that the track or roadbed was defective. Williams v. Chicago, B. & Q. R. Co., 169 Mo. App. 468, 155 S. W. 64 (1913).

In Wade v. Houston & S. R. Co., 139 La. 759, 72 So. 220 (1916), plaintiff sustained an injury to his side by being thrown against a seat and upon the floor of the coach in which he was riding as a passenger, when it was derailed. The petition alleged that the derailment was caused by a defective track, defective trucks and equipment of the coach, and high rate of speed of the train. The trial court found that the evidence for defendant did not show or explain the cause of the derailment, and it was held that where no cause for a derailment of a passenger coach was proven the presumption was that the railroad company was negligent. The principal question arose over the amount of damages, the jury awarding plaintiff $6,600. The court on appeal concluded that the injury to plaintiff was not serious, and that the award of the sympathetic jury was grossly excessive, and ordered that the verdict and judgment below be reduced to $500, and as thus amended, be affirmed.

B. Mixed trains.

Plaintiff was a passenger on a mixed train of passenger coaches and box cars. The box cars jumped the track, severely jolting the coaches so that plaintiff, who had arisen from his seat to get a drink of water, was pitched across the aisle and knocked down, sustaining injury. Evidence was introduced tending to show that the derailment was caused by the swaying from side to side of a top-heavy box car. There was also some evidence tending to show defective ties in the roadbed; also that plaintiff had been drinking. Affirming judgment of $658 for the plaintiff, the court held that establishment of the fact of derailment and injury to the passenger cast upon the carrier the burden of proving that the injury was not caused by want of care on its

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roadbed, machinery of all kinds, and all other acts of negligence on the part of the carriers themselves, their agents or servants. This duty extends to safe and properly constructed bridges, trestles, culverts, ties, rails, and properly and safely spiking them to the crossties. Carriers now use dangerous agencies such as steam, electricity, etc.; hence the law enjoins upon them the utmost skill and care as to original construction, selection, maintenance, and operation of their agencies. Mere lack of knowledge of defects will not excuse the carrier unless he has exercised the proper degree of care and diligence to discover and prevent the defect. An appliance or machinery not obviously dangerous, which has been in constant use and uniformly proved safe, may be construed without

part, and that the defendant, having made no effort to overcome its presumption of negligence, was chargeable with negligence. Arkansas Midland R. Co. v. Rambo, 90 Ark. 108, 117 S. W. 784 (1909).

The defendant company, a common carrier, was operating a mixed train of passengers and freight cars, and three of the freight cars left the track while moving at the speed of about 15 miles an hour, resulting in a severe shakeup of the passenger coach upon which the plaintiff was riding, resulting in personal injury to him by being thrown forward against a car seat. Plaintiff based his complaint upon the defendant's negligence in the operation of the train, and then introduced evidence tending to show negligence with respect to the condition of its roadway; he also charged wilful and wanton wrecking of the train, and based his right to recover mainly upon the prima facie presumption of the carrier's negligence raised by law in view of an unexplained derailment of the carrier's cars. The evidence rebutted any presumption of defective cars, foreign obstructions or excessive speed. Affirming judgment for the defendant, the court held that an allegation of negligence in the operation of defendant's train was not broad enough to cover any negligence with respect to the condition of its roadway; that there was nothing tending in the slightest degree to show wilful or wanton misconduct on the part of the defendant or its servants, proof of which must be affirmative, and that this proof could not be supplied by the presumption of law relied upon by the plaintiff. Knight v. Tombigbee Valley R. Co., 190 Ala. 140, 67 So. 238 (1915).

In Houston & T. C. R. Co. v. Cheatham, 52 Tex. Civ. App. 1, 113 S. W. 777 (1908), which was an action for personal injuries alleged to have been sustained by plaintiff while a passenger on defendant's road by a derailment of its mixed train, and in which the plaintiff obtained a verdict and judgment for $1,750, there was evidence that the ties at the place in question were in a bad condition so that they would not hold the spikes, and also that the train was being operated at a dangerous speed considering the condition of the road, and it was alleged that the court erred in submitting to the jury issues upon those points. The court held that there was no error in the submission of both issues, and that, apart from that, the derailment being shown, negligence was presumed as a matter of law, and it devolved upon the defendant to rebut the presumption. The judgment was affirmed by deducting

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imputation of negligence, where proper care and diligence has been used as to inspection.

Carriers are under the highest duty to provide and maintain suitable and safe equipments and appliances; their safety should be established by the very best and surest tests recognized by experts in the business, and nothing can exempt him from liability as for defects therein, except that they are latent ones which no reasonable degree of skill and diligence would discover or prevent. Because accidents like the one in question are almost certainly fatal and dangerous to human life, the law enjoins the duty on the carrier to use such means of safety as science has made known and demonstrated to be useful, protective, and necessary to safety.

therefrom $50, which the jury found for medicine and medical attention, because there was nothing in the evidence to show that either of the items were reasonable charges, such deduction being made in accordance with a remittitur by plaintiff, and, as reduced, the judgment was affirmed.

C. Freight trains.

Plaintiff's intestate M, in company with other young men, took passage on defendant's freight train which had a passenger coach attached in front of the caboose which was at the rear of the train. Having been informed by the conductor that the caboose in which they were riding was not for passengers, and it being hot in the coach, several of the young men, including M, climbed to the top of the caboose, apparently without the knowledge of the conductor. Suddenly, while moving along at a reasonable rate of speed, the caboose was detached from the train, and derailed, and turned down a slight embankment, precipitating M to the ground and so injuring him that he died two days thereafter. Reversing judgment of $10,000 for the plaintiff, the court held that M, by climbing on top of and riding on the caboose, was guilty of contributory negligence; that the evidence did not show any wilful misconduct or neglect by the carrier, as was alleged, and that the fact that the train was derailed while M was a passenger was at most only presumptive evidence of some negligent act or omission by the carrier. McLean v. Atlantic Coast Line R. Co., 81 S. C. 100, 18 L. R. A. (N. S.) 763, 128 Am. St. Rep. 892, 61 S. E. 900 (1908).

Plaintiff having regularly purchased a ticket from defendant, took passage on one of its special trains consisting of an engine, an oil car, a flat car loaded with a traction engine and other machinery, a flat car on which were two cords of sawmill slabs, a box car loaded with dynamite powder, and a flat car on which plaintiff and two other men sat. Plaintiff was warned by defendant's agent of the danger of riding on this special train, but finally upon plaintiff's solicitation was allowed to take passage. The train was derailed, and, owing to the concussion, the dynamite exploded, severely and permanently injuring the plaintiff. Affirming judgment of $5,760 for the plaintiff, the court held that he did not assume the risk arising from the car loaded with dynamite; that from the proof that plaintiff, a passenger, while riding on a car provided for him, was injured by a derailment, a presumption of negligence arose, and that the burden of proving absence of negligence was

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They are required to keep pace with the science and art of their business, not to adopt, however, every new device unless it contributes to safety, but they must adopt those improved modes known to conduce safety; they must adopt those which are up to the standard of those in general use, and which are necessary for the safety of their passengers.

This court has thus formulated some of the duties required of railroads as common carriers of passengers which are applicable to this case:

"There have been such advancements in science, for the control of steam, and improvements in the machinery and appliances used by railroads, for the better security of life, limb, and property, it would be inexcusable to continue

then on the carrier. Roberts v. Sierra Ry. Co. of California, 14 Cal. App. 180, 111 Pac. 519 (1910), aff'd 111 Pac. 527 (1910).

Plaintiff recovered a judgment for $12,000 damages for personal injuries alleged to have been caused by the negligence of defendant resulting in the derailment of a train, in the caboose of which he was riding under orders of defendant, for which he was employed. The court held that the only conclusion that any one of ordinary intelligence could reach from the evidence was that the train upon which plaintiff was riding was thrown from the track and wrecked by a cyclone, which in law would be an act of God, for which defendant was not liable, and said that, under such evidence, the presumption of negligence which ordinarily obtained from the fact of a derailment did not arise when the evidence that showed the derailment proved its cause to be one that could not be anticipated and provided against, which would cast the burden of proving defendant's negligence upon plaintiff. The judgment was reversed and judgment rendered for defendant. Galveston, H. & S. A. Ry. Co. v. Trier, 100 Tex. Civ. App. 434, 100 S. W. 1177 (1907).

Plaintiff procured a shipping contract for the transportation of a horse on defendant's railway, which contract on its face contained strong indications that he was entitled to free passage on the train for the purpose of caring for the horse. He loaded the horse into the car with the assistance of a trainman, and then presented himself in the caboose of the train and the conductor saw his livestock contract and made no objection to his riding, although the pass on the reverse side of the contract had not been signed and made effective. After the train had proceeded about 40 miles it was derailed, and plaintiff was thrown from his seat in the caboose, striking his head and rendering him unconscious for a short time. No attempt was made by the defendant to explain the accident. Affirming judgment for the plaintiff, the court held that plaintiff was a passenger, and that the above facts established a prima facie case of negligence; and that after the prima facie case of negligence had been established by the evidence the burden was cast on the defendant to show that it had not been negligent. St. Louis & S. F. R. Co. v. Nichols, 39 Okla. 522, 136 Pac. 159 (1913).

II. Electric railroads and street cars.

A. General allegations of negligence.

Plaintiff was injured by the derailment of one of defendant's trains,

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the use of old methods, machinery, and appliances, known to be attended with more or less danger, when the danger could be reasonably avoided by the adoption of the newer and which are in general used by well-regulated railroads. Not that it is required of them to adopt every new invention useful in the business, although it may serve to lessen danger, but it is their duty to discontinue old methods which are insecure, and to adopt such improvements and advancements as are in ordinary use by prudently conducted roads engaged in like business and surrounded by like circumstances. L. & N. R. R. Co. v. Allen, 78 Ala. 494.'' Richmond & Danville R. R. Co. v. Jones, 92 Ala. 218, 9 South. 276.

The cases on this subject were reviewed in the case of Caldwell, etc., Co. v. Watson, 183 Ala. 326, 62 South. 859, and the rules as applicable to master and servant restated. In that case, the majority of the court held that there was evidence tending to show that the machine in question was defective, and that therefore it

due apparently to a defect in the car or a switch. The facts given were meager, but, affirming judgment for the defendant, the court held that, while the fact that plaintiff was injured by the derailment of defendant's train when riding in such train as a passenger made a prima facie case against the defendant, yet this did not necessarily change the burden of proof; and the carrier having given evidence from which the jury could find that it had used due care in the construction, equipment and maintenance of the railway, the burden of proof was not shifted, but remained on the plaintiff to establish the carrier's negligence on all the evidence, of which the presumption of negligence on proof of the derailment and injury formed only a part. Carroll v. Boston Elevated R. Co., 200 Mass. 527, 86 N. E. 793 (1909).

The interurban car upon which plaintiff was riding as a passenger was derailed and she was thrown violently from her seat forward to the floor and severely injured. One of the counts in the declaration in a suit for damages for the injuries so sustained alleged that plaintiff was a passenger upon defendant's car, that the car was derailed, and by reason of the derailment the plaintiff was injured. The court upon motion of defendant required plaintiff to file a bill of particulars to that count, which she did in these words: ''That in said count the plaintiff relies upon the presumption of negligence arising from the derailment of the defendant's car, the reason for the derailment charged in said count, so far as said count is concerned, not being known to the plaintiff, and she relies upon the presumption of negligence which the law creates in such cases.'' This count also went further, and charged that defendant conducted itself carefully and negligently, and the court said that the language of that count charging carelessness and negligence was to be regarded as surplusage, as the count, without that language, was sufficient to make out a case of presumptive negligence, and that, where the relation of passenger and carrier existed and there was a derailment resulting in an injury to the passenger, presumption of negligence on the part of the carrier arose, and all that was necessary for the declaration to allege in such a case was the relation of passenger and carrier, the derailment and the injury by reason thereof, and, where this was done by a plaintiff, there was sufficient proof upon which the jury might render a verdict for plaintiff, and whether or not the defendant had shown by a preponderance of the evidence that it was free from the charge of negli-

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was a jury question as to whether or not the master should have furnished another, notwithstanding the same type may have been used by others. This did not as matter of law acquit the master of negligence. The writer of this opinion dissented in the above case, on the ground, however, that in his judgment there was no evidence to show a defect; that the difference in the two classes of machines did not constitute a defect.

Here there is no conflict in the evidence; no evidence of a defect except a latent one which all the evidence shows could not be discovered by all known tests; and hence no room to apply the rule announced in the case last cited.

The law requires of railroad companies the employment of very

gence was a question for the jury, and therefore it was not error for the trial court to refuse defendant's request for a peremptory instruction directing the jury to find a verdict in its favor. Defendant contended that the verdict of the jury was excessive. The evidence, the court said, plainly showed that plaintiff was about 30 years of age and in the possession of all her faculties, enabling her to earn for her services as a clerk in one of the departments of the United States government at Washington $900 per annum at the time she sustained the injuries; that she suffered a fracture of the hip, causing her continuous and intense pain; that this injury was permanent; that at the time of the trial her broken limb was one-half inch shorter than the other; that she would always limp, and as time went on the shortening of the limb would increase. In view of these facts the court said that the verdict for $7,500 was not excessive, and the judgment was affirmed. Washington-Virginia R. Co. v. Bouknight, 113 Va. 696, Ann. Cas. 1913 E 546, 75 S. E. 1032 (1912).

Plaintiff, while a passenger on defendant's street car, was injured by reason of such car coming to a violent stop after it had been derailed. The allegations of negligence contained in plaintiff's petition were general. The defendant insisted that, though the fact of the derailment of the car stood admitted, there was not a scintilla of evidence showing any negligence or carelessness on the part of the company, and that, therefore, a verdict against it was unjustified. Affirming judgment for the plaintiff, the court held that it was not incumbent upon the plaintiff to offer testimony to show the particular defect in the construction or operation that caused the accident; that proof of being a passenger, and that there was an accident from which an injury resulted, was all that it was necessary for plaintiff to establish; that the rule of demonstrative evidence of negligence applied in such cases, the court quoting as follows: "The principle is generally expressed in the Latin formula 'res ipsa loquitur,' 'the thing itself speaks.' The meaning was thus expressed by Erle, J., in giving his judgment in a noted case: 'Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.' This definition has met with such approval at the hands of judges in subsequent cases that i·

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careful and prudent servants, and of these servants that degree of diligence which very careful and prudent persons take of their own affairs; but infallibility is not expected. Gothard v. A. G. S. R. R. Co., 67 Ala. 114; Cook v. Cent. R. R. Co., 67 Ala. 533; Tanner v. L. & N. R. R. Co., 60 Ala. 621; M. & M. Ry. Co. v. Blakely, 59 Ala. 471. But for special legislation railroad companies would be bound only to such diligence in the general prosecution of their business as would be dictated by sound reason applied to the successful use of their necessary privileges, and it is still the right of railroads in this state to run trains at any speed that is safe for their passengers and freight, except under the circumstances when statutory precautions are exacted. N. & D. R. R. Co. v. Comans, 45

has become, so to speak, a legal classic. The meaning is not that the mere happening of an accidental injury is, of itself and in the abstract, presumptive evidence of negligence; it is that, in the numerous cases which fall within the above definition of the principle, the fact of the accident, when viewed in connection with the circumstances under which it took place, tends to demonstrate negligence, subject to explanation.'' Muskogee Electric Traction Co. v. McIntire, 37 Okla. 684, L. R. A. 1916 C 351, 133 Pac. 213 (1913).

While decedent was riding upon one of defendant's cars which was greatly overcrowded, there being about 140 passengers on the car which had a seating capacity for 44, standing upon the front angle bar on the outside of the front vestibule and holding on through the window of the car, the car left the track and collided with a car on another track coming from the opposite direction, and decedent's legs were so crushed that he died the next day. It was undisputed that plaintiff had a transfer slip entitling him to ride upon that line, but the conductor testified that he had refused to take the transfer from deceased and others in similar positions, and had told him to get off the car as it was dangerous out there. On the other hand there was testimony that the conductor accepted the transfer slip and gave deceased another, as he desired. There was no attempt to exonerate the company from responsibility for the accident by showing that it was caused by something beyond its control or that the occurrence could not have been prevented by the exercise of the highest degree of care consistent with the practical operation of the road, and the court said that where a car or train of a carrier was derailed or collided with another of its trains, or with some object under the control of the carrier, a presumption of negligence arose and placed upon the carrier the burden of exoneration. There was a judgment for defendant and plaintiff appealed. It was held to be error to instruct the jury that plaintiff was required to prove the negligence of defendant by a preponderance of the evidence before he could recover in a case where such negligence was conceded by the defendant. The court found that deceased was a passenger, and said that, even in refusal of the conductor to accept a transfer ticket, and the fact that the conductor ordered deceased to leave his position of danger and get off the crowded car, the car not being stopped for that purpose, would not of itself conclusively show the nonexistence of the relation of passenger and carrier. Hickey v.

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Ala. 437. The law exacts of those using steam power for carriage extraordinary diligence; that which very careful men take in their own affairs. A. G. S. R. R. Co. v. McAlpine, 71 Ala. 545; Gothard v. A. G. S. R. R. Co., supra; Tanner v. L. & N. R. R. Co., supra. Impossibilities are not exacted of railroads, but the onus rests on them to show the fruitlessness of employing appliances which were not employed, but which ordinarily prevent injury actually suffered. A. G. S. R. R. Co. v. McAlpine, 75 Ala. 113; E. T. V. & G. R. R. Co. v. Bayliss, 75 Ala. 466.

Care and diligence is generally a mixed question of law and fact. When the facts are undisputed and the deductions therefrom indisputable, or the duty is fixed by law and is the same under all

Chicago City Ry. Co., 148 Ill. App. 197 (1909).

Plaintiff, a 7-year-old child, was a passenger, in company with his father, on one of the defendant's street cars. The car was derailed, the front end going into a ditch, and the infant plaintiff sustained the personal injuries of which he complained. The lower court directed a verdict for the defendant, and on appeal this decision was reversed, the court holding that the fact that plaintiff was injured by the derailment of the street car raised a presumption of negligence on the part of the carrier under the doctrine of res ipsa loquitur. Braun v. Union R. Co., 115 N. Y. App. Div. 566, 100 N. Y. Supp. 1012 (1906).

This was a suit for personal injuries received by plaintiff by reason of the derailment of one of defendant's electric cars on which plaintiff was a passenger. The gist of plaintiff's petition and amendment thereto was that, while plaintiff was on defendant's electric car as a passenger, "the said car jumped the track by reason of the carelessness and negligence of the defendant, its agents, servants and employees, and plaintiff was thereupon and thereby violently thrown out of her seat and received serious and permanent personal injuries." Affirming judgment of $2,500 for the plaintiff, the court held that if the relation of carrier and passenger was shown to exist when the injury was received in a derailment, the petition need only allege that the car was derailed by the carrier's negligence and that plaintiff was injured thereby, the burden being on the carrier to show that it was not negligent. Patterson v. Springfield Traction Co., 178 Mo. App. 250, 163 S. W. 955 (1914).

This was an action brought by the plaintiff to recover from the defendant street railway damages for personal injuries caused by the defendant so running one of its cars, in which the plaintiff was a passenger, that, in making a curve on one of the city streets, the car ran off the tracks, and in consequence thereof the plaintiff was thrown from his seat to the floor of the car and badly injured. The court instructed the jury that from the fact that plaintiff, a passenger, was injured by the derailment of the car, a presumption of negligence on the part of the defendant arose; but that this presumption might be rebutted by proof that the accident was not caused by any negligence of the defendant. There was a verdict of $100 for the plaintiff. Braunstein v. People's R. Co., 2 Boyce's (Del.) 55, 78 Atl. 609 (1910).

Plaintiff was a passenger on one of defendant's street cars which was de-

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circumstances, the question is for the court. But if the facts are disputed, or the inference of negligence is a matter of discretion, it must be submitted to the jury. A. G. S. R. R. Co. v. Jones, 71 Ala. 487; M. & C. R. R. Co. v. Lyon, 62 Ala. 71; E. T. V. & G. R. R. Co. v. Bayliss, 74 Ala. 150.

There are two lines of cases in this state somewhat analogous to the case under consideration. One class is the injury to animals or persons on the track of the railroad, where the statutes provide that such proof makes out a prima facie case of negligence, and casts the burden on the railroad to rebut the presumption thus arising. The other class, where property on or near the railroad right of way is ignited by sparks emitted from passing engines, that

railed when traveling at an ordinary rate of speed by reason of striking a brick which had been placed on the rail by a school boy. The motorman did not see the brick until he was 30 feet away from it, when he tried to check the car, but it was too late, the car leaving the track and crashing into a telephone pole, severely injuring the plaintiff and causing a miscarriage of a child about 3 months advanced towards birth. Affirming judgment of $7,500 for the plaintiff, the court held that, it appearing that the injury arose from apparatus wholly and entirely under the control of the defendant, and furnished and operated by it, there was no error in overruling the demurrer to the plaintiff's complaint, because the plaintiff had made out a prima facie case of negligence against the defendant, and the burden was cast upon the defendant to show that the accident was not the result of that want of care and vigilance which the law made obligatory on the defendant to bestow. O'Gara v. St. Louis Transit Co., 204 Mo. 724, 12 L. R. A. (N. S.) 840, 11 Ann. Cas. 850, 103 S. W. 54 (1907).

In Bury v. Detroit United Ry., 198 Mich. 447, 164 N. W. 460 (1917), plaintiff was injured while a passenger upon one of defendant's street cars due to the derailment of a car running on a parallel track and its collision with the car in which plaintiff was a passenger. Evidence was introduced by plaintiff showing that the track at the point of the accident was in poor condition, and tending to show that the street cars were being operated at a dangerous speed, considering the condition of the track. Defendant offered evidence to show that the condition of the roadbed was the fault of the city and not of the railway company. Defendant had judgment, and upon appeal this judgment was reversed and a new trial granted because of error in the instructions. The court said that derailment of a car in and of itself was not evidence of negligence, and the inference of negligence was not to be drawn from the mere fact of an accident, and if other circumstances, with the fact that an accident occurred gave rise to an inference of negligence, the inference might be rebutted by showing appliances in proper condition and order, and that the servants of defendant did all that a high degree of care and prudence required in the conduct of the business, and that in the opinion of the court the testimony supported an inference of negligence of defendant which was within the allegations of the declaration, and that the jury was not clearly advised about the high degree of care and prudence re-

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the law on proof of such facts raises the presumption of negligence, which the railroad is required to rebut. In the first class of cases, the rules as to sufficiency of proof was first avowed by Stone, C. J., in McAlpine's Case, 75 Ala. 113, and Bayliss' Case, 75 Ala. 466, and have been since followed.

"The rule governing the duty and liability of railroads is that their employees must bestow on the service that degree of care and diligence which very careful and prudent persons give to their own affairs of similar magnitude and delicacy. * * * The railroad is not liable for every injury it may inflict. It is only liable for such damages as are done to persons, stock, or other property which result from a failure to comply with the requirements therein expressed, or from some other negligence on the part of such company or its agents. * * *

"'It is the duty of railroad companies to employ the best machinery and appliances which are in use, and the failure to employ them, in view of

quired of defendant's servants, and especially did not appreciate, from any instruction given, that the very condition of the roadbed for which the city was responsible might be found to measure the degree of care owed to plaintiff's intestate.

While plaintiff was a passenger in defendant's trolley car it took a switch, causing the rear truck to take a different track from that taken by the front truck, jerking the car and throwing plaintiff against the seats, causing alleged injuries for which she claimed damages in the sum of $25,000. The court instructed the jury that if they found from the evidence that the splitting of the switch was the result of an accident, and without negligence on the part of the defendant, the verdict should be for the defendant. There was a judgment for defendant, and plaintiff appealed, and in holding that this instruction was improperly given the court said: "The splitting of the switch by the defendant's car was, in effect, a derailment. True, none of the wheels were off the rails, but the hind wheels were on the wrong rails, going in the wrong direction. Such derailment comes under the rule res ipsa loquitur, and throws the burden on the defendant of showing lack of negligence on its part." Both parties proved the splitting of the switch and the derailment, and defendant made no effort to explain it or to weaken its effect, and the court said that there was nothing then on that point to submit to the jury, and they could very well have been instructed to find that such splitting of the switch was caused by defendant's negligence, as the law under such circumstances presumed that it was negligence and not accident. The judgment was reversed and the cause remanded for a new trial. Craig v. United Rys. Co. of St. Louis, — Mo. —, 185 S. W. 205 (1916).

Plaintiff was a passenger on defendant's interurban car which was so crowded that many of the passengers, including the plaintiff, were obliged to remain on the rear platform. In going down a grade at a rate of speed unusually high, the car left or was thrown from the track at a switch, and plunged forward some 20 feet, the jar throwing the plaintiff against the railing of the rear platform, resulting in serious injury. Defendant did not explain the cause of the derailment, and objected to an instruction charging the jury that the law presumed negligence from the mere fact of derailment, and that this presumption could not be overcome by evidence that the derailment was brought about by some cause which the highest degree of care on the part

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the hazardous agencies they control, the dangers necessarily incidental, is a want of the care and diligence a man of ordinary prudence would observe. The omission to provide them is a violation of the duty enjoined by law; and, if there be no more in the particular case than the omission and consequent injury, the court may, as matter of law, declare there is actionable negligence. The proposition must, however, be accepted with limitations and qualifications.'

"There is a correlation to the high degree of care and diligence exacted of those employed in the control of the steam engine. We have seen they are required to give to the service that degree of diligence which very careful and prudent persons bestow on their own affairs of like magnitude and delicacy. The corporation they serve should be held liable for their actual or imputed dereliction to the same extent, and only to the same extent, as individuals would be held liable for the same conduct, under the same circumstances, and producing the same result. If jurors properly observe their sworn duty, they, in rendering their verdicts, will be governed alone by the testimony allowed to be given to them, and by the charge of the presiding judge. This is the sum and interpretation of their oath, and they have no discretion, save to weigh the testimony impartially, that they may arrive at the facts and render

of the defendant could have prevented. The court held that this instruction was not erroneous. When plaintiff was thrown against the railing of the platform her side was bruised and a lump formed under the skin and was there at the time of the trial; her weight had been reduced from 130 to 110 pounds; from a condition of vigorous health, earning her own living by work in a book-bindery, plaintiff had become unable to do any work because of intense pain, and was unable to sleep soundly, and physicians testifying for her stated that her sexual organs were disordered by the accident, that her womb was displaced and one of her ovaries torn loose; that a cure could be effected, if at all, only by a dangerous operation, and that, if left in her present condition, she would be an invalid, and, if she should marry, her prospects of bearing children would be greatly lessened if not destroyed. In view of this evidence the court held that the verdict for $5,100 was not excessive. Louisville St. Ry. Co. v. Brownfield (Ky. L. Rep.), 96 S. W. 912 (1906).

Plaintiff was a passenger on defendant's interurban electric car, and while it was running at a speed of 10 or 12 miles an hour it became partly derailed by the rear truck taking a switch track, which had the effect of swinging the car partly around until it struck a car in a work train standing on the switch track. Plaintiff was sitting by the window on a seat near the end of the rear section of the car and the force of the collision was such as to throw her violently against the seat in front of her, and she was wedged between the seat, her body badly bruised, and such other injuries received as to partially disable her and cause her much suffering. Just as the car struck the switch plaintiff saw several of the workmen or crew of the work train standing by and saw one man throw the switch. The principal question in the case was whether it was one that might depend for support on the rule of res ipsa loquitur, inasmuch as the petition charged general negligence, defendant contending that plaintiff's testimony that she saw the switch thrown placed the case outside the rule of res ipsa loquitur. This contention was not sustained by the court on appeal. Defendant contended that if the collision might have occurred without its negligence a prima facie case was not made out under the rule of res ipsa loquitur, but the court said that while the presumption of negligence under that rule was not conclusive, the evidence must satisfy the jury that the carrier was not guilty of negligence, and said it was

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a conscientious verdict. Anything less than this, in any jury trial, is a palpable wrong, a mockery of justice, and a disgrace to the administration of the law. Natural persons and corporations, the richest and the poorest, the highest and the humblest, are alike equal before the law, have the same, and only the same, rights, and are under the same, and only the same, liabilities. There is no room or place in the jury box for prejudice or partiality.'' A. G. S. R. R. Co. v. McAlpine, 75 Ala. 113.

''The law, by imposing on railroads the duty and burden of disproving all acts of negligence, when they are shown to have inflicted an injury, is certainly exacting enough, without loading them down with additional burdens that are neither proved nor provable. Corporations, under the same measure of proof, are entitled to the same verdict and judgment as individuals are entitled to. Less than this is not a verdict according to the evidence.'' E. T., V. & G. R. R. Co. v. Bayliss, 75 Ala. 466.

The rule as to the burden and sufficiency of proof in five cases has been thus stated: In an action against a railroad company for

difficult to follow defendant's course of reasoning whereby it sought to show that plaintiff was not entitled to the judgment, as she was a passenger, there was a collision, and she was hurt, such facts not being denied, and the records showed the trial court properly laid down the recognized rules of law governing such cases. The court further held that the verdict for $1,500 was not excessive and judgment for plaintiff was affirmed. Kilroy v. Kansas City & K. V. Ry. Co. (Mo. App.), 195 S. W. 522 (1917).

B. Effect of pleading specific negligence.

While plaintiff was riding as a passenger upon one of defendant's interurban electric cars the car was derailed and he sustained injuries for which he brought suit. There was a verdict in favor of defendant for costs, and plaintiff appealed. Plaintiff complained of an instruction placing the burden of proof upon plaintiff to show that he was injured by the negligence of defendant in some one or more of the particulars set out in his declaration, on the ground that if he had shown only that he was injured by reason of the derailment of the car upon which he was a passenger, and that said accident and derailment was so unusual and of such a nature that it could not well have happened without defendant being negligent, a presumption of negligence on the part of the defendant would arise, and the burden would then be cast upon defendant to rebut that presumption, and to do so defendant must establish that the accident was not caused by any negligence on its part in the particulars charged by plaintiff, or that in all such particulars defendant exercised a high degree of care required of it. Plaintiff's objection to the instruction was that it placed the burden upon the plaintiff of showing the exact cause of the accident. The court sustained plaintiff's contention, saying that proof that plaintiff was a passenger upon the derailed car, and that he was free from contributory negligence, made out a prima facie case against the defendant, and a presumption arose that the accident was the result of some negligence upon defendant's part. The judgment was reversed. Lewis v. Cedar Rapids & I. C. Railway & Light Co., 183 Iowa 725, 167 N. W. 588 (1918).

The plaintiff, while a passenger on one of defendant's electric cars, received personal injuries by reason of a derailment of the car. He alleged as negligence of the defendant, first, that the motorman operated the car at too high a rate of speed; and second, that the car was defective and

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destroying property by fire negligently emitted from the engine, where the complaint shows that the fire originated from the sparks thus emitted from defendant's engine, it makes out a prima facie case, though where the defendant railroad company shows that its engine was properly equipped with the best practical appliances for arresting sparks, and was in good order, and carefully managed, it rebuts the prima facie case. Nothing further appearing, the defendant is entitled to the general affirmative charge. L. & N. R. R. Co. v. Marbury Lbr. Co., 125 Ala. 237, 28 South. 438, 50 L. R. A. 620; Malone's Case, 109 Ala. 509, 20 South. 33; A. G. S. R. R. Co. v. Taylor, 129 Ala. 238, 29 South. 675; Reese's Case, 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66.

unsafe for service. The testimony as to these points was conflicting. Affirming judgment for the plaintiff the court held that from the derailment of the car a presumption arose that it occurred by the negligence of the carrier, and placed upon it the burden of accounting for the derailment and of showing that it was without negligence on the part of its servants. Sloan v. Little Rock Ry. & Electric Co., 89 Ark. 574, 117 S. W. 551 (1909).

Plaintiff, while a passenger upon one of defendant's street cars, was injured when the car was overturned, and brought this action for damages for injuries sustained, alleging, in addition to a general charge of negligence, that the car was run at a dangerous rate of speed; that the car was overloaded; that the equipment was out of repair; that the body of the car was negligently attached to the truck; that the tracks were constructed with a sharp and dangerous curve; that incompetent employees were employed; and that the car was equipped with an insufficient and dangerous brake. The proof made by the defendant showed that something went wrong with the machinery of the car, as the brake seemed to take hold when applied, the car slackened speed, and then gained speed and started forward, when a jerk was caused by the current being reversed, turning the wheels backwards, and the car left the track on the curve and turned over. The court said that the evidence produced by defendant in place of rebutting the presumption of negligence which arose from the rule of res ipsa loquitur which was applicable to the case, would appear to produce a positive conviction that the brakes were not in working order or that the motorman had permitted the car to get too close to the curve at too great a speed, so that when the power was reversed on entering the curve, the momentum of the heavy car overloaded with passengers impelled the car straight ahead while the truck followed the track. Plaintiff secured a verdict and judgment for $4,750, which defendant contended was excessive. It appeared that plaintiff was a student at college; that when taken out of the car at the time of the accident he was dizzy and covered with blood, and was taken to a physician's office where the wounds were dressed, there being a long gash over his eye extending to the bone, with several other wounds on his head and blood coming from his ear, and a hemorrhage on the eyeball; that the injury to the head was such that when he undertook to study to any extent his temperature went up; that the year pre-

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In the case under consideration, the defendant's proof met the requirements of the law in all respects as to the road, track, train, and all appliances which could have contributed to the injury, and also met the requirements as to competency, skill, and care of the servants and agents having anything to do with the accident.

There was no material conflict in the evidence of defendant's witnesses, and the plaintiff offered none on the subject. In other words the evidence shows without conflict and to a reasonable certainty that the accident was an inevitable or unavoidable one, for which the defendant is not and ought not to be liable.

The evidence shows without conflict, and to a reasonable certainty, that the wreck of the train which injured plaintiff was due

ceding the accident he had earned over $500 by tending furnaces and cutting lawns, and that he had been obliged to give up that kind of work and the next year had earned only $125; that according to testimony by physicians the sight of the right eye was affected so that he had only two-fifths of the normal sight of that eye, and that the condition of his eye was caused by some injury. Plaintiff claimed that the injury to his eye was such that he was not able to study as before the injury, and his graduation was postponed a year. The evidence of plaintiff tended to show that his eyes were weak before the accident, and that a physician had prescribed glasses for him 18 months before that time, and the court held that in view of his admissions as to the condition of his eyes before the accident, extracted from him reluctantly on cross-examination, the judgment was excessive. A remittitur of $2,500 was required, a judgment for the balance affirmed. McGrew v. Chicago & Milwaukee Elec. R. Co., 142 Ill. App. 210 (1908).

Plaintiffs recovered a judgment against defendant for the sum of $18,001.35 for personal injuries suffered while one of said plaintiffs was a passenger upon one of defendant's cars, through alleged negligence by reason of which the car was derailed and overturned while rounding a curve. Plaintiffs' complaint, in addition to a general charge of negligence, alleged that the car left the track on account of the sagging or giving way of one of the rails of the track, coupled with the negligent operation of the car, which consisted in going over the curve at a high rate of speed. No demurrer was filed to the sufficiency of the complaint, but defendant answered, denying the averment, and upon the trial plaintiffs proved the facts of derailment and overturning of the car while the injured plaintiff was a passenger upon it, and the consequent injuries, and rested her case. No motion for nonsuit or other objection to the sufficiency of plaintiffs' showing was made, but defendant proceeded to introduce evidence tending to show an entire absence of negligence on its part and to support its claim that the injuries to said plaintiff were the result of an unavoidable accident, and upon producing such evidence defendant rested its case, whereupon plaintiffs offered proof to rebut the evidence which defendant had presented. The court instructed the jury that plaintiffs had established a prima facie case against defendant if they had shown that the injury was caused by the overturning of the car while said injured plaintiff was be-

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to a latent defect known as a "transverse fissure," and that science and art have discovered no means of detecting it.

The law does not contemplate that railroad companies will in general make their own rails, cars, or engines, and they purchase them in the market of persons supposed to be competent dealers, just as they buy their other articles. All that they can reasonably be expected to do is to purchase such cars and other necessaries as they have reason to believe will be safe and proper, giving them such inspection as is usual and practicable as they buy them. When they make such an examination, and discover no defects, they do all that is practicable, and it is no neglect to omit attempting what is impracticable. They have a right to assume that a dealer of good re-

ing carried as a passenger by defendant without fault on her part, and that in such case there was a presumption that the accident was caused by the negligence of defendant, and the duty was then upon defendant to show that the accident happened from inevitable accident or from some cause beyond the power of human care or foresight to prevent. Defendant urged that the giving of the instruction was error because plaintiffs, having alleged specific negligence on defendant's part, the rule of res ipsa loquitur did not apply, and hence plaintiffs were bound in the first instance to prove that the accident was caused by specific acts of negligence alleged in their complaint. The court, in answer to this contention, said that the averment of plaintiffs' complaint was fairly open to the construction that both general negligence on the part of the defendant in the management and operation of its car, and also specific acts of negligence on its part in maintaining a defective track and in rounding the curve at a dangerous rate of speed, were mingled in the same averment, and that the case was evidently tried upon that theory, as was shown by the fact that when plaintiffs rested, defendant at once had assumed the burden of proving the absence of any negligence on its part, and made no objection to plaintiffs' countershowing upon the ground that it should have been made in the first instance, and that, in view of those facts, defendant could not assail the case thus made for the first time by a motion for a new trial or the assignment of error in appellate court on the ground of failure of proof. Defendant also objected to a part of another instruction with regard to the burden of proof in which the court instructed the jury that defendant had to show: "That the overturning of the car was the result of inevitable casualty which human foresight and care could not prevent, for the law holds it responsible for the slightest negligence, and will not hold it blameless except upon the most satisfactory proofs." The court of appeals pointed out that this instruction was adopted from the former decision in which the precise instruction was approved by the supreme court, and as in addition, the court very fully and carefully instructed the jury on every phase of the subject, it could not see how the jury could have been misled to defendant's injury. The nature of plaintiff's injuries was not stated in the report, but the court said that they were satisfied that the evidence was ample to justify the verdict, not only as to the defendant's negligence, but as to the nature and extent of the

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pute has also used such care as was incumbent on him, and that the articles purchased of him which seem right are right in fact. Any other rule would make them liable for what is not negligence and put them practically on the footing of insurers. The law has never attempted to hold passenger carriers for anything which they could not avoid by their own diligence.

Here it was shown that the rail in question was purchased from competent and reliable dealers, and that it was subjected to the best known tests; and that they failed to reveal the defect. The other part of the roadbed, crossties, etc., were shown to be in good condition, and that frequent and usual inspections were made by competent agents, and no defect or danger discovered.

injuries suffered by the plaintiff, and the judgment was affirmed. A motion for rehearing in the supreme court in banc was denied, the court saying that such denial, however, should not be taken as a complete approval of the instruction quoted, as the true rule was that, where the accident was of such a character that it spoke for itself, as it did in this case, and raised a presumption of negligence, the defendant would not be held blameless, except upon a showing, either of a satisfactory explanation of the accident, that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on its part inhered, or of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but was due to some unpreventable cause, although the exact cause was unknown. The court said, however, that while the instruction in question was open to criticism in the particular indicated, it could not have misled the jury, when considered in connection with the other instructions given upon the subject. Bourguignon v. Peninsular Ry. Co., — Cal. App. —, 181 Pac. 669 (1919).

III. Cable cars.

Plaintiff's husband, while a passenger on one of defendant's cars on defendant's cable road, was injured by reason of the front car coming to a sudden stop which caused the trailer, in which plaintiff's husband was riding, to leave the track, and threw him against the stove in the car, injuring him so that he died 8 months later. The cause of the sudden stop and derailment was left in the dark. Affirming judgment of $5,000 for the plaintiff, the court held that the plaintiff could assume that the derailment was caused by negligence, and if the company did not show its want of negligence, or that the accident was caused by an independent cause, it should be conclusively presumed that the accident was caused by its negligence; that plaintiff had a right to plead negligence generally and rely upon the doctrine of res ipsa loquitur; that allegations of defective appliances and negligent management of the car were a general allegation of negligence. McDonald v. Metropolitan St. R. Co., 219 Mo. 468, 16 Ann. Cas. 810, 118 S. W. 78 (1909).

While plaintiff was riding upon one of defendant's grip cars which was attached to trailers, the car left the tracks and stopped suddenly, and plaintiff was thrown down between the seat and the standard of the car to the pavement, sustaining the injuries

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That the train was being handled by competent and skilful and careful agents or servants and they are acquitted of all possible imputable negligence as to the track, ties, etc. If the defendant in this case did not rebut the negligence imputable to it on account of the accident, then it is difficult to see how it would be possible so to do.

It would do no good to discuss the evidence further. It has been read and studied carefully, and we hold it rebutted all presumptions of negligence proximately causing the injury.

The general affirmative charges requested by the defendant as to each count should have been given.

Reversed and remanded.

for which he brought suit. Defendant's main contention was that plaintiff did not prove the negligence averred in the declaration that defendant had negligently and unskilfully constructed and maintained its tracks with defective turnouts and appliances belonging thereto, and the court instructed the jury to find for defendant. On appeal the court was of the opinion that the jury might reasonably have inferred from the evidence, in the absence of any explanation by defendant, that the car ran from the track or between the rails because the track, including its appurtenances, was in an unsafe condition, and that it was error to instruct a verdict for defendant, the court saying that the evidence was that plaintiff was a passenger; that the car ran off the track, and that plaintiff was thereby injured, and there was no evidence that the accident was occasioned or contributed to by any fault or want of ordinary care of the plaintiff; that it was not a usual circumstance for a street car moving on a track in a reasonably safe condition to suddenly leave the track in such a manner as to injure a passenger, but, on the contrary, it was a very exceptional circumstance. Judgment was reversed. Hill v. Chicago City Ry. Co., 126 Ill. App. 152 (1906).

F. A. D.

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BRUENN v. NORTH YAKIMA SCHOOL DISTRICT No. 7, YAKIMA COUNTY.

[Supreme Court of Washington, April 25, 1918.]

101 Wash. 374, 172 Pac. 569.

1. **Negligence—Contributory negligence—Rule of proof.**
The rule that, while contributory negligence is an affirmative defense and to be proved as any other affirmative defense by the party pleading it, such defense may be established by the testimony of the plaintiff upon either direct or cross-examination, is a rule of proof and not a rule of pleading.

2. **Instructions—Duty of trial court—Issue not within pleading.**
It is not incumbent on the trial court, in charging the jury in a personal injury action, to submit to them any issue not within the pleading.

3. **Witnesses—Examination—Conclusion as to negligence.**
In an action against a school district for personal injuries sustained by a child while playing on a teeter board on a public school playground, held that a question to a witness as to whether the school district was in the exercise of reasonable care in providing apparatus of the character involved was clearly inadmissible since it called for a conclusion to be reached by the jury and not by any witness.

4. **Appeal and error—Review—Exclusion of evidence on question not submitted to jury.**
In an action against a school district for personal injuries sustained by a child while playing on a teeter board on a public school playground, held that the exclusion of testimony that a teeter board constructed as was the one involved was not in itself a dangerous instrumentality, was not error when the court eliminated from the consideration of the jury the question of the original construction of the teeter board and submitted to it only the question of failure or inadequacy of supervision.

CASE NOTE.

Liability of school districts, boards or officers for negligence of themselves or their agents.

I. Personal injury, 857-869.
A. Students, 857-864.
1. Negligence of employees, 857-860.
a. In general, 857-858.
b. Pail of hot water, 858-860.
2. Defect in balustrade, 860-861.
3. Playground apparatus, 861-863.
4. Gymnasium equipment, 863-864.
B. Employee using defective scaffold, 865.
C. Third person, 865-869.
1. Injury by employee on motorcycle, 865-867
2. Struck by falling flag pole, 867-868.
3. Hurt in collapse of grand stand, 868-869.

II. Student deprived of plant facilities by fire, 869-870.

III. Personal liability of board members, 870-871.

I. Personal injury.

A. Students.

1. Negligence of employees.

a. In general.

Plaintiff, a student attending defendant university, was injured by the negligence of its servants. A demurrer to plaintiff's complaint was

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5. **Appeal and error—Review—Weight of evidence.**
In an action against a school district for personal injuries sustained by a child while playing on a teeter board on a public school playground, held that, although the weight of the testimony was to the effect that the child was not injured at the time or place claimed, such question was not one for the Supreme Court to decide, the jury having decided otherwise and the lower court having denied a new trial.

6. **Negligence—Injuries sustained by child on playground—Action—Sufficiency of evidence.**
In an action against a school district for personal injuries sustained by a child while playing on a teeter board on a public school playground, held, on a review of the evidence as to the supervision of the playground, that the claim that the verdict was contrary to the evidence would have to be rejected.

7. **Statutes—Construction—Retroactive operation.**
Retroactive statutes are generally regarded with disfavor, and, where it does not clearly appear that such was the legislative intent, the court will not give the statute a retroactive effect where to do so would impair existing rights.

8. **School districts—Negligence—Action—Statute prohibiting maintaining of action—Effect on judgment in Supreme Court on appeal.**
Respondent on an appeal from a judgment against a school district for personal injuries sustained by a child on a public school playground, which judgment was rendered approximately a year prior to the taking effect of Laws 1917, p. 332, ch. 92, providing, in effect, that no such action should be brought or "maintained" against any school district, held not to be maintaining an action in the Supreme Court within the meaning of such statute.

9. **Damages—Personal injuries—Child—Excessiveness.**
A verdict for $5,000 for personal injuries sustained by a child who suffered much pain, underwent a number of operations and was permanently injured, held not to indicate passion or prejudice.

Action against school district for personal injuries sustained by child on public school playground. Judgment for plaintiff affirmed.

sustained on the ground that the university devoted to the higher branches of learning was to be considered as discharging a governmental function. The land upon which the university was situated had been granted by the United States government and it was maintained by an endowment from a private individual. Reversing the order sustaining the demurrer, the court, upon appeal, held that a university, created by the legislature to carry out the purposes of a private donor and the United States, with others who might contribute, was not a corporation administering governmental activity, in so far as any question of liability for negligence of its servants resulting in injury to others, was concerned. Hamburger v. Cornell University, 184 N. Y. App. Div. 403, 172 N. Y. Supp. 5 (1918).

b. Pail of hot water.

Plaintiff, a child attending a school in defendant district, was injured by reason of the upsetting of a bucket of hot water which was allowed by the teachers to stand on a hot furnace register in the center of the school room. The scalding water ran over her legs and feet and lower part of her body, burning her severely. The defendant contended that it was at the time engaged in performing a governmental function and that for the negligent performance of such a function it was not liable. Reversing judgment sustain-

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The following are the pleadings in the action:

Second Amended Complaint.

Comes now the plaintiff, leave of the court having been first obtained, and files herein her second amended complaint and alleges:

1.

That the said plaintiff, Horatio Bruenn, is a minor under the age of 14 years, to wit, of the age of 8 years, and that heretofore, to wit, on the 4th day of December, 1915, an order was entered by the Superior Court of Yakima County, State of Washington, Thomas E. Grady, Judge, appointing Susie Bruenn, the mother of said minor, his guardian ad litem, for the purpose of prosecuting this action.

2.

That the defendant, the North Yakima School District No. 7, Yakima County, state of Washington, is a municipal corporation organized, created and existing under and by virtue of the laws of the state of Washington governing public schools and by virtue of said laws is entitled to sue, and can be sued in the courts of the said state.

3.

That on or about the 10th day of November, 1914, the defendant maintained and operated for public school purposes and as a part of its general school system in, and for, the said district No. 7, and within the corporate limits of the city of North Yakima, a certain school building and school grounds known as the Lincoln School, and prior to the said date had caused to be constructed for the use of the children attending school certain playground paraphernalia and appliances, such as swings, crossbars, teeter boards and other appliances of like character for the use of the children in attendance upon said school to play upon and amuse themselves; that the said playground paraphernalia aforesaid mentioned, so used for amusement and play, was located upon the playgrounds of the said Lincoln School, being then and there a part of the general school system of said defendant and under the supervision and direction of said School District No. 7.

ing a demurrer to plaintiff's complaint the court held that this contention was correct, but that under a statute, providing that an action might be maintained against a school district "for any injury to the rights of the plaintiff arising from some act or omission of such district," the defendant was liable; that the statute applied to governmental duties as well as other duties, since the statute was designed to remove the limitations of the common law and make the district responsible generally for an omission of duty. Redfield v. School Dist. No. 3 of Kittitas County, 48 Wash. 85, 92 Pac. 770 (1907).

Plaintiff, 12 years of age, attending a school of the defendant district, fell into a pail containing hot water, caustic acid and chemical compounds, which had been placed in the corridor for the purpose of scrubbing the schoolrooms, and was injured. Plaintiff was at the time passing from one schoolroom to another, pursuant to directions given to her by her teacher. Affirming judgment of dismissal, holding the negligent act complained of a governmental function, the court said: "It is a well-established principle in this state that a municipality, while performing the duty imposed upon it under the requirements of section 3 of article 10 of our Constitution, which provides for the establishment of district schools, which shall be free and without charge for tuition

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4.

That on said date and prior thereto, the defendant carelessly and negligently, without due regard for the safety of the children, furnished and allowed to be used by the children attending school, including this plaintiff, a large, heavy teeter board; that the use of said board by the small children attending school, including this plaintiff, to play upon and amuse themselves, was dangerous and hazardous to life and limb; that said board was not fastened securely to any permanent foundation, but was permitted by the said defendant to be carried from place to place by the school children, and allowed to be used and played upon in any manner the said school children saw fit, the defendant carelessly and negligently failing to take any precaution for the safety of the said children, and failed and neglected to furnish an adult attendant to supervise the use thereof and guard against injuries; that on said date the said plaintiff, Horatio Bruenn, while engaged in play upon one of the said teeter boards furnished by said defendant, in company with other children, and without any adult person present to supervise the use of said board by the said children and guard against injuries, and while said board was laid upon a swing without being securely fastened, sustained injuries as a result of falling under said board, the weight from the other end thereof having been removed; that at the time of said injuries sustained by the said Horatio Bruenn, he was astride of the said board, and when the children sitting on the other end thereof jumped therefrom, the board was caused to fall with great force and weight to the ground, carrying the said Horatio Bruenn with it, and the board with great force and weight came in contact with plaintiff's foot and ankle resulting in permanent and painful injuries; that the lower end of the tibia of the foot of the said plaintiff, where it articulates with the bone of the ankle, was fractured and broken; that as a result of said fracture an abscess formed almost immediately upon the foot of the said plaintiff at the place where same was fractured, and became swollen to such an extent that it was necessary to lance the same; that the said leg and ankle became diseased as a result of the fracture and abscess, and the plaintiff was confined to his bed for a number of months, and was placed in a hospital in the city of North Yakima under the care of a physician, and was forced to undergo a number of serious and painful operations as a direct result of his said injuries; that it became necessary to remove nearly all of the tibia of plaintiff's leg on account of infection and disease which set in as result of said fracture and abscess, and on account thereof the plaintiff is permanently injured and has

to all children between the ages of 4 and 20 years, shall not be liable for injuries to children attending such school occurring by reason of the negligence of servants necessarily employed by such municipality or school district in carrying out what have been designated as the governmental duties so imposed by law upon it. * * * Until changed by the Legislature, we feel bound to follow it.'' Juul v. School Dist. of City of Manitowoc, 168 Wis. 111, 169 N. W. 309 (1918).

2. Defect in balustrade.

Plaintiff, a boy 8 years of age, was severely injured while a pupil at one of the schools maintained by the defendant, as the result of falling a distance of about 18 feet down a central, open space around which a stairway ran, leading to successive stories from the basement to the top of the building, with a balustrade, over which he fell. The balustrade was about 30 inches high on the side exposed to the opening. The basic negligence charged consisted, in effect, of the fact that the balustrade was not high enough to properly safeguard children using the stairs while attending school. Affirming judgment sustaining a demurrer to plaintiff's complaint, the court held that the duty of providing means of education, at the public expense, by building and maintaining schoolhouses, employing teachers, etc., was

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been rendered a cripple for life; that his leg has been shortened from two to three inches, and will be permanently shortened; that the same has wasted away and is diseased and weakened, and the plaintiff will never be able to make free use of said limb, and will be permanently prevented throughout his life from engaging in manual labor where it will be necessary to use said limb to any extent.

5.

That as aforesaid the injuries are permanent to the said plaintiff and will last throughout his lifetime, and on account of the said accident and the negligence of the defendant, and the injuries sustained as a direct result thereof, there has been incurred expenses for physician and surgeon bills in the sum of $261, and that another operation is imminent and necessary in order to complete the surgical treatment believed to be necessary by the physician and surgeon attending said plaintiff and for the purpose of insuring plaintiff's recovery, which said operation will cost the estimated sum of $100; that the said plaintiff, at the present time and more than a year after the accident is compelled to walk with the aid of crutches, all to his damage in the sum of ten thousand three hundred and sixty-one dollars ($10,361).

6.

That the plaintiff, by his guardian ad litem, prior to bringing of this action, filed his claim with the school board of School District No. 7, and the same was considered by the said school board at a regular meeting thereof on the 6th day of December, 1915, and that the directors of the said defendant disallowed said claim for damages and refused to pay any sum whatsoever to this plaintiff on account of his damages sustained.

Wherefore the plaintiff, by his guardian ad litem, prays judgment against the defendant for the sum of ten thousand three hundred sixty-one dollars ($10,361), together with his costs and disbursements in this action expended.

Answer to Second Amended Complaint.

Comes now the defendant, School District No. 7, Yakima County, Washington, and for answer to plaintiff's second amended complaint, admits, denies and alleges as follows:

a public duty, being a governmental function, in the discharge of which the local body, as the state's representative, was exempt from corporate liability for the faulty construction, or want of repair, of its school buildings, or the torts of its servants employed therein. And this was the rule, regardless of the fact that the building was permitted to be used at times for public gatherings with and without rent, and in part for the purpose of profit. What the public had a right to expect of them was that in the construction of their works after the plans were fixed upon, and in the management afterwards, due care should have been observed; but negligence is not to be predicated of the plan itself. Daniels v. Board of Education City of Grand Rapids, 191 Mich. 339, L. R. A. 1916 F 468, 158 N. W. 23 (1916).

3. Playground apparatus.

Plaintiff, a child 9 years old, attending a school of the defendant district, was injured while making use of a sliding apparatus, maintained on the playground for the use of pupils of the school by the defendant district. It was 14 feet high, and the use intended to be made, and which was made of this apparatus by the children was to climb up a ladder to the top between two banisters, and then slide down iron pipes, resting their legs and arms on the pipes. On the morning in question, a

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1.

The defendant admits the facts set forth in paragraph 1, paragraph 2 and paragraph 3 of plaintiff's second amended complaint.

2.

The defendant denies each and everything set forth in paragraphs 4, 5 and 6 of plaintiff's second amended complaint, except that defendant admits that a doctor bill was incurred by the plaintiff as therein alleged in the amount of two hundred sixty-one dollars ($261).

3.

The defendant admits paragraph 7 of plaintiff's second amended complaint.

For appellant—Harold B. Gilbert, John F. Chesterley, N. K. Buck and McAulay & Meigs.

For respondent—Guy O. Shumate.

MAIN, J. Action to recover damages for injuries claimed to have been sustained while the minor plaintiff was at play on the public school playground. Verdict and judgment for plaintiff in the sum of $5,000.

The injury to the minor plaintiff is alleged to have taken place in November, 1914; the minor plaintiff at that time being between seven and eight years of age. It is alleged that just prior to 1 o'clock on the day of the injury some of the small boys had taken a teeter board from its own upright and placed it across a swing, upon which the plaintiff and a number of other small boys seated them-

short time before the commencement of the school session for the day, plaintiff, while unattended by any other than her young playmates, climbed up the ladder with a view of sliding down the inclined iron pipes on the opposite side. When near the top she fell to the ground, fracturing her skull and being otherwise seriously injured. The negligence charged against the defendant was that the apparatus was inherently dangerous to children of the age of the plaintiff, and that defendant negligently maintained the apparatus on its school grounds accessible to plaintiff and children of similar tender years and experience. Affirming judgment for the plaintiff, the court held that under these circumstances the question of defendant's negligence was properly submitted to a jury, and they, having decided against the defendant, their verdict should not be disturbed; that the admission of testimony, showing that a less dangerous apparatus was serving substantially the same purpose on other school grounds, was not prejudicial error. Holt v. School District No. 71, King County, 102 Wash. 442, 173 Pac. 335 (1918).

The plaintiff, a child 9 years of age, while attending a public school conducted by the defendant district, was injured by the breaking of a swing maintained by the district as a part of the playground equipment. In fastening the swing to its support an iron ring was used which

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selves and began to teeter. Shortly after engaging in this form of play the school bell rang, when the boys on the opposite side of the teeter suddenly sprang from it, permitting the side on which the minor plaintiff sat to rapidly descend, striking him upon the ankle, and causing the injury complained of. The ground of negligence complained of, and upon which the verdict seems to have rested, was either lack or inadequacy of supervision. We shall notice the errors in the order in which they have been presented:

First. It is claimed that the court committed error in refusing to instruct the jury upon contributory negligence. This assignment is based upon the evidence of the boy that while sitting upon the board he had his legs crossed beneath him; it being maintained by appellant that the crossing of the boy's legs was the proximate cause of the injury, and that such evidence was sufficient to take the question of contributory negligence to the jury. The court below refused to so charge, upon the ground that contributory negligence was not pleaded. It is true that in a number of cases we have held that while contributory negligence was an affirmative defense, and to be proved as any other affirmative defense by the party pleading it, such defense might be established by the testimony of the plaintiff upon either direct or cross-examination. This, however, is a rule of proof, and not a rule of pleading. It was not incumbent on the lower court, in charging the jury, to submit to them any issue not within the pleading. For this reason refusal to submit such issue cannot be held error.

passed through the eye of a staple. The use of the swing caused the ring to move in the staple eye, creating a friction which gradually wore it down at the point of contact, and it was the giving way of this ring at this point that caused the accident. Affirming judgment of $750 for the plaintiff, the court held that the jury was justified in finding the school district liable, saying: "Since the school district installed the swing, they were charged with the duty of keeping it reasonably safe for the uses for which it was intended. This involved the duty of inspection, and a failure to perform the duty in an ordinarily prudent manner was negligence." The court further held that a pupil injured by the breaking of the ring of the swing having been under no duty of inspection, and having used the swing in the manner intended, could not be held guilty of contributory negligence. Kelley v. School District No. 71, King County, 102 Wash. 343, 173 Pac. 333 (1918).

4. Gymnasium equipment.

Defendant school district, in the basement of one of its schools, maintained two ladders for the use of the school children in physical exercise. One was 7 feet high placed perpendicularly against the wall, the other horizontally connecting with the first and extending out over the basement floor for a distance of about 30 feet.

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The second error is claimed on the exclusion of testimony. Appellant called a teacher of long experience in school playgrounds, and offered to show that a teeter board constructed as the one upon this playground was not in itself a dangerous instrumentality, and that the school district was in the exercise of reasonable care in providing apparatus of this character. The offer was denied. The second part of the offer was clearly inadmissible, calling for a conclusion to be reached by the jury, and not by any witness. The first part, while a question of fact, was not material to the issue submitted to the jury. The instructions are not included in the record sent up. The lower court, however, in passing upon appellant's offer, announced that he would eliminate the question of the original construction of the teeter board from the jury, and submit to them only the question of failure or inadequacy of supervision. If the court so instructed the jury, and, since there is no contention to the contrary, we will assume it did, the denial of the offer, as not within the issue of negligence to be submitted, was not error.

Third. The verdict is said to be contrary to the evidence. The evidence supporting the verdict is very weak. The weight of the testimony, in our judgment, is to the effect that the boy was not injured at the time or place claimed, but was injured during the forenoon recess, while playing upon the teeter board when in its regular position. That, however, is not for us to decide. The jury has decided otherwise, and the lower court has denied a new trial. We must therefore accept the fact, as found by the verdict, that the

The ladders were not intended for the use of smaller children, they being cautioned not to use them. The lockers in which all the children kept their clothes and lunches were in the basement where the ladders had been placed. One day when school was dismissed, plaintiff, a child of 6 years, marched out with the other children, went into the basement, and noticing the ladder, she climbed upon it and fell, as the result of exhaustion, breaking her arm. From a judgment of $500 for the plaintiff, after an order overruling a motion for nonsuit, the defendant appealed. Affirming the judgment, the court held that the questions of the negligence of the defendant and the contributory negligence of the plaintiff were for the jury; that the school district, a quasi-municipal corporation, and a mere arm of the state for the administration of its school system, in providing exercise ladders was acting in a governmental capacity and hence was not liable under the common law, though an injury resulted therefrom through the negligence of its officers or agents; but that Rem. and Bal. Code, § 951, authorizing action against a school district for injury to plaintiff's rights arising from some act or omission of the school district abrogated the common-law rule of its nonliability for negligence in the performance of governmental duties. Howard v. Tacoma School Dist. No. 10, Pierce County, 88 Wash. 167, Ann. Cas. 1917 D 792, 152 Pac. 1004 (1915).

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injury occurred in the manner and at the place testified to by the boy. This assignment also necessitates a review of the evidence as to the supervision of the playground. The principal and two of the teachers testified to supervision of the playground on all days between 12:40 and 1 o'clock, which would include the time of the injury. No particular remembrance was had of the day of the accident, no complaint having been made at the time it is alleged to have occurred; testimony being to the effect that supervision was had on every day of the school year. The little boy, however, says he saw no teacher on the playground. This is negative testimony, and of little value. If, as accepted by the jury, the accident occurred in the manner and at the time testified to by the little boy, and at the time, as contended by appellant, a teacher was present, then the jury might have found that the supervision was inadequate or negligent, in permitting the boys to take the teeter board from its own upright and use it in connection with the swing. If the teacher knew it, it was negligence to permit it; and, if she did not know it, it was negligence not to have observed it. For these reasons this claim of error must be rejected.

This opinion, up to this point, was written by the late Judge Morris, after the case was heard by the department to which it was first presented. Upon the hearing en banc, the opinion, as above set forth, was adopted by the court.

The principal question presented upon the hearing en banc was the effect which the act of the Legislature (chapter 92, page 332,

B. Employee using defective scaffold.

Plaintiff was employed by defendant board of education to paint one of its school buildings. The scaffold upon which he was working, by reason of a defective guy hook, gave way, precipitating him to the ground, and causing him to fall a distance of some 35 feet, whereby he sustained severe and permanent injuries. Affirming judgment sustaining a demurrer to plaintiff's complaint, the court held that under a city charter providing that school inspectors should be a body corporate, known as the board of education, and in that name might sue and be sued, and hold and convey real and personal property, such board was a municipal corporation; and that municipal corporations were not liable for the negligence of their servants when in the exercise of duty in connection with the governmental capacity of the corporation, unless made so by statute, and there being no such statute, the defendant board was not liable. Whitehead v. Board of Education of Detroit, 139 Mich. 490, 102 N. W. 1028 (1905).

C. Third person.

1. Injury by employee on motorcycle.

Defendant school district maintained a stock room, in which it stored supplies for its schools, and engaged one B to deliver parcels on

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Laws of 1917) in 1917 had upon a judgment which had previously been rendered against a school district. That act consisted of one section, which is as follows:

"Section 1. No action shall be brought or maintained against any school district or its officers for any noncontractual acts or omission of such district, its agents, officers or employees, relating to any park, playground, or field house, athletic apparatus or appliance, or manual training equipment, whether situated in or about any schoolhouse or elsewhere, owned, operated or maintained by such school district."

The act was approved by the Governor on March 12, 1917, and took effect during the month of June, following. The judgment in this case was rendered on the 19th day of June, 1916, approximately one year prior to the time when the act became effective. There are three possible classes of actions to which the statute might apply: First, causes which had arisen, but upon which no action had been instituted, or causes that might arise in the future; second, actions which had been instituted, but had not gone to final judgment, when the statute took effect; and, third, actions in which a final judgment had been entered when the act became effective.

It is the contention of the appellant that the act applies to all three classes of actions. It is the contention of the respondent that the act does not apply to those actions in which a judgment had been previously entered. The act provides that no action shall be "brought or maintained." By the use of the two words brought or maintained it was evidently the legislative intent that they should not be given a synonymous or equivalent meaning. Had the word "brought" not appeared in the statute, it may be that the word "maintained" could then be given the meaning as only preventing

a motorcycle to different school buildings in the city, the motorcycle belonging to the defendant. After working hours and while not engaged in carrying packages for the school district, using the motorcycle for his own convenience, namely, to save carfare home, B collided with the plaintiff, 14 years old, who was injured, and who by his guardian ad litem brought this action against the school district. There was a rule of the school board in force in the stock department that no motor vehicles should be used for any other purpose than school district purposes, with which rule B was familiar at the time of the accident. Reversing judgment for the plaintiff, the court held that under these circumstances reasonable minds could not differ that B, at the time of the accident, was not acting in the scope of his employment in any capacity, and hence the jury were not justified in holding the defendant liable, saying: "It is well settled by all authorities that the act complained of must have been done while the servant was engaged in doing some act under authority from his master, not that while engaged in the act he is em-

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the institution of actions, and as not applying to those which had been previously begun. This was the view entertained by the Supreme Court of the state of Maine in Burbank v. Inhabitants of Auburn, 31 Me. 590. The act which the court was considering in that case contained only the word "maintain," and it was held not to apply to actions which had been previously brought. The doctrine of that case, however, cannot be applied to the statute now before us. It is the duty of the court to ascertain, so far as it can, the meaning which the Legislature intended to convey, and give it effect. The word "brought" obviously applies to all actions which had not been instituted prior to the time the act took effect, whether the cause of action had arisen at that time or not. The question then arises whether the word "maintained" applies both to causes of action which had been previously instituted, but which had not gone to judgment, and to actions in which a final judgment had been entered at the time the act took effect. Retroactive statutes are generally regarded with disfavor, and where it does not clearly appear that such was the legislative intent the court will not give the statute a retroactive effect, where to do so would impair existing rights. Moore v. Brownfield, 7 Wash. 23, 34 Pac. 199; In re Heilbron's Estate, 14 Wash. 536, 46 Pac. 153, 35 L. R. A. 602. In the case last cited it was said:

"To construe the statute therefore as retroactive would require us to hold that it impaired existing rights, and we ought not to incline to such a construction, where it does not clearly appear that such was the legislative intention. Retroactive statutes are generally regarded with disfavor, and we think that the act under consideration must be construed as prospective only. In Sutherland on Statutory Construction, § 464, the learned author says: 'A statute should not receive such construction as to make it impair existing rights, create new obligations, impose new duties in respect of past transactions. unless such

ployed in the master's business, but the act must have been in the furtherance of the master's business, and such as may be fairly said to have been so expressly or impliedly authorized by the master." Babbitt v. Seattle School Dist. No. 1, 100 Wash. 392, 170 Pac. 1020 (1918).

2. Struck by falling flag pole.

Plaintiff's father, as he was passing along a public highway in a city, was struck by a flag pole, about 70 feet in length, which had been allowed to rot, and which fell from the roof of a high school adjacent to the highway. He died from the injuries inflicted, and action was brought against both the city and the board of education. The complaint against each was dismissed, whereupon plaintiff appealed, and it was held that the complaint stated no cause of action against the city, since by law, the care and control of property acquired by the city for school purposes was given to the board of education; but that the complaint stated a cause of action against the board of education, the court saying: "If it erected or maintained

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plainly appear to be the intention of the Legislature. In the absence of such plain expression of design, it should be construed as prospective only, although its words are broad enough in their literal extent to comprehend existing cases.'"

At the time the above-mentioned act was passed the respondent had an existing right in the judgment which had previously been obtained against the school district. As already pointed out, there is a class of actions to which the act could apply other than those in which a final judgment had been entered. There being a field in which the statute may operate, without applying it to actions in which a judgment had already been entered, we think it was not the legislative intention that it should apply to the latter class of actions, and thus destroy existing rights arising out of a final judgment.

But it is argued that, since the action was pending on appeal subsequent to the time when the statute took effect, the word "maintained" is applicable. This contention does not seem to us sound. When a person obtains a final judgment in the superior court, he has nothing further to do. He has obtained his judgment, and is out of court. True, when the appeal is taken, notice must be given him; but this notice is not process, and he is not required to appear in the appellate court. If he does not, no default can be taken against him. It is the common practice for respondents to appear in this court and present their causes, and from the court's standpoint it is quite desirable that they should do so. But, if they do not, no default is entered, and the cause is considered upon its merits. In the case of North Star Trading Company v. Alaska-Yukon-Pacific Exposition, 68 Wash. 457, 123 Pac. 605, the court had under consideration a statute which provided that no corporation should

this flag pole, which was unfit for the purpose in that it was rotten and never should have been selected for such use, in a position to endanger the lives of those lawfully in the vicinity of the building, with notice, as alleged, and as stated in the opening, that it was in an unsafe condition, it is clearly liable, either upon the theory of having erected or of maintaining a nuisance, depending upon whether the original erection was unsafe, or the flag pole was maintained with actual knowledge that it was in a dangerous condition, or upon the theory of negligence, depending upon its failure to perform its statutory duty to provide for 'prompt and efficient' repairs." McCarton v. City of New York, 149 N. Y. App. Div. 516, 133 N. Y. Supp. 939 (1912).

3. **Hurt in collapse of grand stand.**

Plaintiff, having paid admission to the football game between two rival universities, was injured by the collapse of the platform on which he was standing. He brought this action for injuries sustained against the athletic association of the university on whose field the game had been

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be permitted to "commence or maintain" an action without first alleging and proving that it had paid its annual license fee last due. It was there held that a corporation, even though it had not complied with the statute as to the payment of its license fee, could defend an action brought against it, and in so doing was not maintaining an action within the meaning of the statute. If to defend an action in the superior court, where, if no appearance has been made, a default may be taken, is not maintaining an action within the meaning of the statute, it would seem reasonably to follow that respondent in this court, by appearing and resisting assignments of error, is not maintaining an action.

The cause now before us was tried to a jury, and consequently is not tried here de novo. The appellant by its assignments of error claims that the trial court has committed errors of law. The respondent's position is that no errors were committed. The appellant has the affirmative of the argument, and the respondent the negative. In Glasser v. Hackett, 37 Fla. 358, 20 South. 532, it was held that a writ of error, which corresponds to an appeal in this state, is in the nature of a new suit. In Miller v. Union Mill Co., 45 Wash. 199, 88 Pac. 130, the court had under consideration the effect of the act of 1905 (Laws 1905, p. 164), which repealed the factory act of 1903 (Laws 1903, p. 40), upon causes of action which had risen under the law of 1903 prior to its repeal. The law of 1903 required employers to safeguard dangerous machinery, and deprived such employers of the defense of assumption of risk. It was there held that the repealing act did not operate retroactively, or affect causes of action that arose under the law of 1903 prior to its repeal.

played. The association was under the control of the regents of the university, owned no property, had no stockholders, and the field belonged to the university. The treasurer of the university had always acted as the treasurer of the athletic association. Reversing judgment for the plaintiff, the court held that the athletic association was a branch or department of the university, and hence was not a proper party defendant in this action. George v. University of Minnesota Athletic Ass'n, 107 Minn. 424, 120 N. W. 750 (1909).

II. Student deprived of plant facilities by fire.

A medical college brought suit upon a promissory note executed in payment of tuition by the defendant, who by way of answer, as a defense, alleged failure of consideration, in that the building of the medical school was destroyed by fire caused by the negligence of the officers of the school in allowing combustible material in the school building, by reason of which fire defendant student was deprived of the use of large equipments of said college and was

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The case of Ettor v. Tacoma, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061, and 228 U. S. 148, 33 Sup. Ct. 428, 57 L. Ed. 773, is distinguishable in two respects: First, in that case the action had not gone to judgment when the repealing act became effective; and, second, the later act there was an act which repealed the prior act under which the action was being maintained. In the present case, as already pointed out, the action had gone to judgment long before the act took effect. In addition to this, the statute makes no reference to any previous statute, and it operates as a repealing act by implication only. As held in Redfield v. School District No. 3, 48 Wash. 85, 92 Pac. 770, and Howard v. Tacoma School District No. 10, 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917 D, 792, a right of action existed against the school districts by virtue of sections 950 and 951 of Rem. & Bal. Code. That statute is only repealed by the act of 1917 to the extent to which the two acts are necessarily inconsistent. Had the latter act expressly repealed the former, it may be that, under the doctrine of the Ettor Case, supra, the action would be terminated at whatever point it was, even though pending on appeal.

compelled to follow the faculty around from building to building and from room to room in order to finish the term; and further that by reason of said fire his books and instruments worth $140 were destroyed. Affirming judgment of $65, the amount of the note, for the plaintiff, the court held that defendant's answer was properly stricken upon general demurrer. Albright v. University School of Medicine, 19 Ga. App. 525, 91 S. E. 921 (1917).

III. Personal liability of board members.

Defendant board of education engaged a contractor to install a heating plant in one of its schools and he executed a bond for the faithful performance of his contract. The board failed to require the insertion of a provision in the bond, binding the contractor to make payment to all persons supplying labor and materials in the construction of said heating plant. Plaintiff supplied materials, the contractor failed to make payment for them and afterwards became insolvent and this action was then brought against the board of education as a corporate body and also against the members of such board as individuals, plaintiff pleading a statute requiring a bond to be taken with such a provision as the board had failed to insert in the bond given by the contractor, the statute making a public or quasi-public corporation failing to take such a bond liable for any default in payment for materials. Reversing judgment for the defendants as a corporation, the court held that, although no common-law liability rested upon the school board, it being a quasi-municipal corporation charged with the performance of public or governmental functions as agents of the state, for damages caused by neglect to perform such functions, the neglect consisting in an act of omission, the school board as a corporation was

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The case of Haynes v. Seattle, 87 Wash. 375, 10 N. C. C. A. 450, 151 Pac. 789, is distinguishable in this. There the statute applied to "pending" actions, and was held to be applicable to an action pending on appeal. As already pointed out, while the present case was pending on appeal, the respondent, within the meaning of the statute, was not maintaining an action here. The case of Spear v. Bremerton, 95 Wash. 264, 163 Pac. 741, is, we think, not applicable to the present situation.

One other question remains, and that is whether the damages are excessive. The jury awarded a verdict of $5,000, and after motion for new trial was overruled judgment was entered for this sum. If the boy's present condition was proximately caused by negligence attributable to the appellant, as the jury had a right to find, then the verdict was not in such amount as to indicate passion or prejudice. The boy suffered much pain, underwent a number of operations, and was permanently injured. The leg that was injured will be shorter than the other, and, the probabilities are, will not grow in proportion to the rest of the body.

The judgment will be affirmed.

liable because of the statute; and affirming the judgment for defendants as individuals the court held that the statute imposed the duty and liability on the corporation alone, and not on its officers individually. Plumbing Supply Co. v. Board of Education, Independent School Dist., City of Canton, 32 S. D. 129, 142 N. W. 260 (1913), modified on rehearing, 32 S. D. 270, 142 N. W. 1131 (1913). F. A. D.

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KNEASS et ux. v. CREMATION SOCIETY OF WASHINGTON.

[Supreme Court of Washington, September 23, 1918.]

103 Wash. 521, 175 Pac. 172.

Dead Bodies—Contract to cremate body and keep ashes until called for—Loss of ashes—Right to recover for mental anguish and suffering.

In the absence of physical injury and pecuniary loss, parents cannot recover against a cremation society for mental anguish and suffering caused by the loss of the ashes of plaintiffs' infant child by the society in violation of its contract to cremate the child's body and keep the ashes until they were called for.

Action against cremation society contracting to cremate corpse and keep ashes until called for. Judgment for plaintiffs on each of two causes of action. Appeal by defendant from part of judgment allowing damages on second cause of action. Reversed.

For appellant—Peterson & Macbride.

For respondents—Oscar G. Heaton and Cole & Dolby.

MOUNT, J. In November, 1913, an infant child was born to Mr. and Mrs. Kneass. Three days later the child died. Its body was sent to the Cremation Society of Washington to be cremated. At that time Mr. Kneass was informed that the charges for the cremation, with an urn or permanent receptacle for the ashes, would be $12. He was also informed that the ashes of the infant would be safely cared for until called for. Mr. Kneass paid the cremation society $12 for the cremation of the body, and three years later called for the ashes of the infant, which could not be found. Thereafter, another call was made for the ashes and a further effort failed to find them. Later, and in January, 1917, Mrs. Kneass called the cremation society over the phone and was then informed that the ashes could not be found, and that no further effort would be made to find them. Thereupon Mr. and Mrs. Kneass brought this action for damages. The complaint alleged two causes of action, to the effect: First, that the defendant agreed that it would safely

NOTE

Negligence in respect of cremation of corpse as actionable.

Plaintiff made an oral contract with defendant for the cremation of her husband's body and the return to her of the ashes in an urn, inscribed with the name of the deceased and the time and correct date of the cremation of the body, and the delivery

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keep the ashes until called for by the plaintiffs; that the plaintiffs paid the defendant $12 for said cremation and an urn; that, upon demand, defendant refused to deliver the ashes or the urn; and that by reason thereof the plaintiffs were damaged in the sum of $2,500. For a second cause of action the same facts were alleged, and the complaint then alleged further:

"That because and by reason of their love and affection for said child, and its remains, and because and by reason of all the acts of negligence and carelessness of said company in losing or destroying, or permitting to be lost or destroyed, or converting to their own use and benefit, the said urn and the said ashes of the said infant daughter, Elizabeth Kneass, so that plaintiffs have no knowledge of the last resting place of the remains or ashes of said deceased child, they have suffered great distress of mind, worry and mental agony, and their rest and peace of mind has been almost wholly broken up and destroyed in so much that the physical health and welfare of plaintiffs has been seriously impaired and threatened; all to the damage of the plaintiff in the sum of five thousand dollars ($5,000)."

For answer the defendant admitted receiving the body of the infant child at the time alleged; admitted that it received $12 for the cremation thereof and for an urn; admitted that the ashes had been lost; but denied any act of negligence. On these issues the case was tried to the court and a jury. The jury returned a verdict of $200 in favor of the plaintiffs on the first cause of action and $300 upon the second cause of action. Upon motion for a new trial and for judgment notwithstanding the verdict, the court required the plaintiffs to remit all but $12 upon the first cause of action, and denied a motion for a directed verdict, and entered judgment for $12 upon the first cause of action and $300 upon the second. The defendant has appealed from that part of the judgment allowing damages upon the second cause of action.

Appellant argues at length that the trial court should have sustained its objection to any evidence under the second cause of action because respondents have undertaken by the complaint to split one cause of action into two causes. It will not be necessary, we think, to consider this point, because if two causes of action are stated, and we should conclude that both should be stated as one, the result would be the same. The main point made by the appellant is that there can be no recovery of damages arising from mental anguish or distress of mind as a result of negligence when not accompanied by

of a certificate stating the time and correct date of cremation, and the fact that the urn delivered to plaintiff contained such ashes. The body was delivered to defendant and some time thereafter an urn was delivered to her containing an inscription which gave not only an impossible date, but one which stated the death as occurring at a time when her husband was still alive, and she brought suit alleging failure on the part of

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physical injury. The appellant relies upon the case of Corcoran v. Postal Telegraph-Cable Co., 80 Wash. 570, 142 Pac. 29, L. R. A. 1915 B 552, where we held, in substance, that there could be no recovery on account of the nondelivery of a telegram which resulted in mental anguish, where no physical injury or pecuniary loss resulted. The respondent relies upon O'Meara v. Russell, 90 Wash. 557, 156 Pac. 550, L. R. A. 1916 E 745, and Wright v. Beardsley, 46 Wash. 16, 89 Pac. 172. In Corcoran v. Postal Telegraph-Cable Co., supra, we took occasion to review at length the authorities of this and other courts upon the question here presented; and after a painstaking consideration of many authorities and much of the law upon this question we there concluded that the rule supported by the great weight of authority was that no damages could be recovered for mental suffering flowing from an act of negligence where there was no physical injury to the plaintiff. In that case, in referring to the case of Wright v. Beardsley, supra, we said:

"The plaintiffs were allowed damages for mental suffering unaccompanied by physical injury, flowing from the wrongful and improper burial of their infant child by the defendant. This decision we regard as the extreme proper application of the rules of law allowing damages for mental suffering alone, and we are constrained not to extend the doctrine beyond the application of the particular facts there involved. The acts were regarded by the court as willful, and the wrong consisted in the violation of the rights of the parents to have decent interment for their infant child. It was also a physical invasion of the plaintiff's rights."

It will be seen that the rule in the Wright Case was based upon a wilful wrong and the physical invasion of the plaintiff's rights. To apply that case to this would be to extend the rule in that case. The case of O'Meara v. Russell, supra, was written after the decision in the Corcoran Case. In the O'Meara Case the facts were that an explosion caused a stump to be thrown through the air and against the home of Mrs. O'Meara while she was standing in the door and saw the stump coming towards her; that, through fear and effort to protect herself and escape the threatened danger, she suffered injury to her person and to her nervous system. That was a case where physical injuries resulted to the plaintiff at the time, and we in effect held that the injury caused by the fright and shock was not psychological, but was physical, and for that reason sustained

defendant to deliver to her the ashes of her husband in an urn properly inscribed and accompanied by a certificate as their contract called for. The court charged the jury, in effect, that although they might find that the defendant cremated the body of the deceased, and delivered the ashes to plaintiff, she still might recover for mental anguish, resulting from such false certificate, up to the time of the trial, and under such instruc-

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a recovery. We are of the opinion that the O'Meara Case is plainly distinguishable from this case because the fright and shock caused the physical injury at the time. In the case now before us there is no allegation that there was any physical injury. The allegation is that the plaintiffs—

"have suffered great distress of mind, worry and mental agony, and their rest and peace of mind has been almost wholly broken up and destroyed in so much that the physical health and welfare of plaintiffs has been seriously impaired and threatened. * * *"

It is apparent from this allegation that whatever physical injury has resulted to the health of the respondents has been from mental worry and agony, and not from physical injury. In the O'Meara Case the mental anguish was the result of physical injury at the time. The respondents claim in their brief that there was wilful disregard of the respondents' rights, but the only evidence in the record of any wilful disregard of the respondents' rights is the fact that after the appellant had made two or three unsuccessful efforts to find the ashes of the infant child it told the respondents it would have nothing further to do with the matter. The record conclusively shows that, at most, the appellant was negligent in not keeping these ashes where they could be found at any time. No other negligence is alleged or claimed; so that it is apparent, both from the evidence and from the allegations of the complaint, that there was no wilful or wanton conduct on the part of the crematorium society in losing the ashes. The evidence tends to show at least that the loss was caused by reason of the length of time the ashes were kept—three years after cremation, and no call for them within that time—and that probably the label was lost from the urn, and for that reason the ashes could not be identified. We are of the opinion that the rule announced in Corcoran v. Postal Telegraph-Cable Co., supra, is the rule properly applicable to the facts in this case, and that under that rule there could be no recovery for mental suffering and anguish caused by negligence where no physical injury was inflicted and no pecuniary loss resulted.

We are satisfied, therefore, that the trial court should have re-

tion the jury found that the ashes were those of plaintiff's husband and found for her damages in the sum of $2,500 for mental anguish, this verdict being reduced to $1,500 by the trial court. In reversing the judgment the court said it could conceive of no tangible basis for any such allowance of damages; that a person might only recover damages for mental suffering which was the natural and proximate consequence of

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fused the evidence offered under this cause of action, and should have granted judgment notwithstanding the verdict thereon.

That part of the order appealed from is therefore reversed.

MACKINTOSH, J. (concurring). I am forced to the conclusion that this court has heretofore adopted two irreconcilable positions in actions seeking to recover damages for injuries alleged to have resulted in mental suffering. The case of Wright v. Beardsley, 46 Wash. 16, 89 Pac. 172, allowed recovery for mental suffering arising from the wrongful and improper burial of the plaintiff's child. Corcoran v. Postal Telegraph-Cable Co., 80 Wash. 570, 142 Pac. 29, L. R. A. 1915 B 552, denied recovery for mental suffering arising from the wrongful and improper handling of a telegram notifying the plaintiffs of the death of their child. The Corcoran Case does not in terms overrule the Wright Case, but in effect it does so, although the opinion, in referring to the Wright Case, attempts a distinction on the ground that the act there complained of was a physical invasion of the plaintiff's rights. In the case of O'Meara v. Russell, 90 Wash. 557, 156 Pac. 550, L. R. A. 1916 E 743, a recovery was allowed for injuries resulting from fright, the court attempting to distinguish that case from the Corcoran Case on the ground that fright was accompanied by physical injuries resulting therefrom; the complaint in that case having alleged that:

"The plaintiff did suffer great mental and physical pain and fright, and because of said fright and in her attempt to escape from the threatened danger she was compelled to, and did, flee from said house, and became and was injured in and about her nerve centers, and her nervous system was greatly shocked and injured."

Science teaches, and our common experience confirms it, that every severe mental disturbance, whether it takes the form of fright or anger or sorrow or nostalgia, or any other violent emotional expression, has a concomitant physical result, the manifestation of the physical accompaniment being governed by the condition of the subject and by the intellectual control which he has of himself. The greater the will power which a subject may possess, the less will be the physical effect of the mental disturbance. If these statements are true, there is no such thing as acute mental pain

some wrongful act or neglect on the part of the one sought to be charged and that, independent of some corporeal or personal injury or breach of duty, there could be no mental suffering for which recovery might be had; that if the jury had found that plaintiff had been deprived of her husband's remains by reason of misconduct on defendant's part, then she would have been entitled to damages for injury to feelings proxi-

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and suffering without some physical effect, in many cases not subject to ocular proof, but present in all cases and only differing in degree; and it follows that every allegation of mental pain and suffering impliedly includes the physical effect which accompanies it.

The Corcoran and O'Meara Cases are therefore in conflict as a matter of fact, though the distinction is sought to be made upon the ground that in the O'Meara Case there was an allegation of physical pain and suffering, while there was no such allegation in the Corcoran Case. If this is a true ground for distinction, then the case at bar falls directly within the O'Meara Case, for in the case at bar, the allegations of the effect of the defendant's acts are set forth in the complaint, as quoted in Judge Mount's opinion, and I am unable to distinguish them from the allegations in the O'Meara Case. In both cases it was alleged that physical injuries had been inflicted by and as a result of the mental pain and suffering; and it is beyond my power of discrimination to differentiate between the physical effect which may result from sorrow and the physical effect which may result from fright. If there is no such difference, then the case at bar cannot be distinguished from the O'Meara Case. Attempting to distinguish it the writer of the opinion says:

> "We are of the opinion that the O'Meara Case is plainly distinguishable from this case because the fright and shock caused the physical injury at the time. In the case now before us there is no allegation that there was any physical injury."

The latter statement is not borne out by the quotation from the complaint referred to. The attempt to distinguish upon the ground that the physical injury was coincident with the fright in one case, and was not coincident with the sorrow in the other, is not convincing, and would seem to put a premium upon those who have little control over their emotional demonstrations.

In my opinion the O'Meara Case should have fallen within the rule of the Corcoran Case, for the reason that the physical result of mental pain and suffering cannot be separated from the mental pain and suffering itself, and that it always accompanies mental pain and suffering to some extent; and the case at bar, being "on all fours" with the O'Meara Case, is correctly decided when it repudiates the doctrine of that case and follows the Corcoran decision. I concur

mately flowing from defendant's wrongful acts, because of the right that she would have, to the possession for the purpose of burial or other disposal of the remains of her husband's body; but that, inasmuch as the jury specifically found that she had suffered no loss, but on the contrary received from defendant the ashes of her deceased husband, such verdict destroyed any basis for a recovery of damages for mental suf-

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in this result, but feel that the opinion should expressly recognize that the doctrine announced in the O'Meara Case is improper, and expressly overrule that case, as it has actually been overruled.

fering. As the verdict manifestly resulted from erroneous instructions upon the basis of damages, the judgment and order denying a motion for a new trial were reversed and a new trial granted. Stahl v. William Necker, Inc., 184 N. Y. App. Div. 85, 171 N. Y. Supp. 728 (1918).

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ARKANSAS MACHINE & BOILER WORKS v. MOORHEAD.

[Supreme Court of Arkansas, October 21, 1918.]

136 Ark. 18, 205 S. W. 980.

Bailment—For work—Repair of steam engine—Negligence—Liability of machinist.

One holding himself out as a machinist and accepting employment to repair a steam engine is presumed to know the nature and the character of the

CASE NOTE.

Liability of person holding himself out as competent craftsman for loss or damage due to negligent or unskilful performance of work in his trade undertaken for reward.

I. Cleaning, repairing, etc., clothing, 879-881.
A. Sponging and examining cloth, 879.
B. Cleaning dress, 880-881.
II. Dyeing cloth, skins, etc., 881-883.
A. Redyeing silk, 881-882.
B. Dyeing skins, 882-883.
1. Action for damages, 882.
2. Defense to suit for services, 882-883.
III. Shoeing mule, 883-885.
IV. Testing and repairing crank shaft, 885.
V. Repair and launching of boat, 885-888.
A. In connection with storage, 885-887.
B. Caulking vessel on marine railway, 887-888.
VI. Plating jewelry, 888.
VII. Remodeling organ, 888-889.

I. Cleaning, repairing, etc., clothing.

A. Sponging and examining cloth.

Plaintiffs brought an action to recover damages for breach of contract, whereby they delivered to defendant 12 pieces of cloth to be examined and sponged, it being contended that when the goods were returned they were damaged. The trial justice awarded judgment in favor of plaintiff for $100 damages. On this appeal the court said that there was no evidence in the case to sustain the award; that the proper measure of damages in such a case was the difference between the value of the goods in the condition in which they were delivered and their value in the condition in which they were returned; that plaintiffs offered testimony to show that when the goods were returned they were worth 14 or 15 cents a yard, but there was no proper evidence to show what they were worth when they were delivered to the defendant for sponging. To prove the value of the goods before delivery, plaintiffs offered in evidence, and the trial justice received over objection and exception, a paper purporting to be a receipted bill, showing that a certain company had sold cloth to plaintiffs, and the amount which the plaintiffs had paid. The court said this bill was wholly incompetent, and should have been excluded, and, as there was no other evidence of the value of the cloth before it was delivered to defendant, the judgment must be reversed. Miller v. Levy (N. Y. Misc.), 104 N. Y. Supp. 368 (1907).

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work he is about to do and the results likely to follow a negligent performance of his work, and is therefore liable for the damage proximately resulting from a negligent and unskilful performance of his work.

Action for damages resulting from the negligent repair of an engine. Judgment for plaintiff. Affirmed.

For appellant—Young & Wilson.

For appellee—E. W. Moorhead and J. E. Ray.

B. Cleaning dress.

Plaintiff, a dressmaker, delivered to defendant, the owner of a cleaning establishment, a dress of the value of $160, and at the same time told defendant that she required it in three or four days as she had sold it for $160 to a customer on condition that it should be delivered within a certain time. Plaintiff claimed that four days thereafter the dress was returned, but the lace yoke was entirely spoiled, and that she told the girl who delivered it that she could not use it and that she must take it back and fix it up, which the girl promised to do. The next day plaintiff went to defendant's store and insisted to a little girl in charge there that the dress must be delivered that evening, but was informed that it had been sent to a cleaning establishment in Brooklyn, and plaintiff did not see the dress until it was returned in the same damaged condition about two weeks thereafter, when she again refused to accept it as the customer would no longer take it, and it was valueless unless accepted by the customer. The pleadings were oral, for conversion and damages for breach of contract, but thereafter a bill of particulars was served stating that the claim was for breach of contract and negligence. The case was tried without any election of remedies, and the jury were charged that they could find for plaintiff on either theory up to the full value of the dress, $160. The court said that if the recovery was based upon the theory of negligence, then the charge was clearly erroneous as the negligence occurred before the first return of the dress, and on that date plaintiff could have put in a new yoke as well as the defendant, and delivered the dress before the date it was required by the customer, in which case no special damages could have been recovered, and the measure of damage was the cost of repairing or replacing the yoke; and that if the recovery was based upon the theory of breach of contract to perform in a workmanlike manner and then to return the dress in good condition, that contract was also broken by the first return of the dress in damaged condition, and the same measure of damages would be the rule. The trial justice, however, submitted to the jury the question whether defendant complied with the contract by sending the dress in the condition in which it was when it was first returned or whether the contract or arrangement was a continuing one which included what happened after that date. This instruction, the court said, was clearly incorrect because, if defendant had broken its contract by sending the dress in the condition in which it was upon its first return, that would not make the contract or arrangement a continuing one, and as plaintiff demanded, not that the dress

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SMITH, J. This action was instituted to recover the damage suffered by appellee through the negligence of an employee of appellant in making certain repairs on an engine, as a result of which negligence the engine blew up and wrecked itself. The negligence complained of—

"consisted in defendant failing to drill a sufficient number of holes of a sufficient depth, and in not putting in a sufficient number of cap screws, and in not putting in properly the cap screws that were put in to hold the broken piece in place, in that the hole was not drilled into the broken piece as it should have been, but was only made like a shallow dent, against which the cap screw

be returned to her in the same condition that it was delivered to defendant, except for proper cleaning, but that the defendant should pay for the damages occasioned by the breach of contract through the necessity for the insertion of a new yoke, and that, if the girl who delivered the dress, or the little girl in charge of defendant's store, had real or apparent authority to agree to such a demand, a new contract might have then come into existence, but that no such authority had been shown. The court said, further, that even if the charge was entirely correct the judgment should still be reversed because it appeared that the jury did not comprehend the charge and brought in its verdict on an erroneous view of the law; that, having been charged on the theory of breach of contract or of negligence that they might bring in a verdict up to the sum of $160 or such sum as they thought fit under the circumstances of the case to compensate the plaintiff for the loss that she had suffered, they brought in a verdict for $65 and the dress, and the court then told them that if they found for plaintiff they must find in a given sum, and had nothing to do with the disposition of the dress. Thereupon, after consulting with his client, the counsel for plaintiff said: "My client desires me to say that she has no use for ....." when the court interrupted him and repeated its instruction as to the measure of damages. Shortly thereafter the jury returned with a verdict for $100. The court said the jury was thus evidently misled by counsel or by some other circumstance into the error of believing that the plaintiff was not entitled to the dress, and the verdict should have been set aside and a new trial granted. The judgment was reversed and a new trial ordered. Adams v. Kline (N. Y. Misc.), 119 N. Y. Supp. 280 (1909).

II. Dyeing cloth, skins, etc.

A. Redyeing silk.

In Heyman v. Barretts, Palmer & Heal Dyeing Establishment (N. Y. Misc.), 156 N. Y. Supp. 418 (1915), plaintiff sought to recover damages for negligence on the part of defendant in redyeing 15 pieces of taffeta silk, alleging that by reason of the negligence of defendant, its servants and agents the silk became cracked and unmerchantable due to the method employed by defendant in the process of dyeing and to the poor material and dyes used by it, and that by reason thereof the merchandise had been rendered worthless. Plaintiff recovered judgment, and in reversing the same the court said that no evidence was offered to prove negligence in the process or in the use of materials and dyes, but that plaintiff merely proved that he delivered the goods to defendant to be dyed and that they were returned

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was placed, but which allowed the broken piece to slip upward, thereby causing the flywheel shaft to jump out of the bearing boxing and destroying the engine almost completely.''

The engine was in use by appellee in pumping water for the cultivation of a rice crop, and there was a prayer for the damage to the engine, and damage to the rice crop occasioned by the delay in securing a new engine. The court below eliminated any question of damage to the crop, and submitted only the question of damage to the engine. There was a verdict for $150, and a judgment accordingly,

with holes and breaks, showing a tenderness in the goods, and that negligence could not be predicated merely upon the condition of the goods when returned as it might have resulted from the fact that, owing to the quality and texture of the goods, they deteriorated when subjected to a careful and skilful process of dyeing with good materials and dye. The court added that as upon another trial the plaintiff might be able to prove the negligence of the defendant it would call attention to the fact that a wrong measure of damages was applied at the first trial and that, inasmuch as the goods were returned to the plaintiff and all were not rendered unsalable, the measure of damages was not the value of the goods as a total loss, but the difference in the value of the goods properly dyed and in their value as the work was done. The judgment was reversed and a new trial ordered.

B. Dyeing skins.

1. Action for damages.

In Cohn v. Reliable Fur Dressing & Dyeing Co. (N. Y. Misc.), 133 N. Y. Supp. 446 (1912), an action for damages for failure to skilfully dye skins, the court held that the evidence, which was not set out in the opinion, was sufficient to go to the jury, but that the verdict was excessive and should have been reduced, inasmuch as plaintiff sued for damages to 40 skins and testified that their sound value when he delivered them to defendant was $9 or $10 each, and a dealer in skins called by plaintiff testified that the skins in their damaged state were worth from $2 and $2.50 each, and the records showed that the verdict was for plaintiff for $10 each for 30 skins, $300, the court saying that, as the action was on defendant's contract to dye skilfully and not for conversion, defendant was liable only for the loss resulting from its negligence and the jury should have allowed for the value of the skins in their damaged condition. The judgment for plaintiff and the order denying a new trial were reversed and a new trial ordered with costs to appellant to abide the event unless plaintiff stipulated to reduce the judgment by deducting therefrom $75.

2. Defense to suit for services.

Plaintiff sued for services in dyeing skins for defendant at the agreed price and reasonable value of $251.55. Defendant admitted the allegations of the complaint, except as to the services in dyeing 41 fox skins at the agreed price and reasonable value of $14.35, and set up as a counterclaim damages sustained by reason of plaintiff's carelessness and improper workmanship in dyeing the 41 skins, alleging that the skins were rendered worthless and unmarketable, and that

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and we have before us on this appeal only the correctness of this judgment.

As grounds for reversal, it is insisted that there was no proof of negligence, and that an erroneous measure of damages was given in an instruction on that subject. An instruction given at the request of appellant told the jury:

"That the plaintiff must show by a preponderance of the evidence that the damage was caused by the negligent work of defendant or its employees, and that said breach or damage was the direct result of the negligence on the part of said defendant or its employees."

their reasonable value at the time was $269.58. It appeared at the trial that the 41 skins were received under an agreement that they were to be dyed "Isabella light, 12 foxes of above lot to be dyed at owner's risk." It appeared that they were injured by the dyeing, but were not rendered worthless, even defendant conceding that they were worth $1.50 to $2 apiece, and other witnesses produced by him testifying to higher values in their injured state. The trial justice thereupon gave judgment for defendant for $269.58, but when, upon motion for a new trial, plaintiff pointed out that he was certainly entitled on the pleadings to a judgment on his complaint, the trial justice deducted the conceded amount due to plaintiff, and modified the judgment to read: "Judgment for defendant on his counterclaim for $32.38. Property in evidence to go to the defendant." It was held that, as the counterclaim did not allege a conversion, and the action was not tried upon the theory of conversion, and the judgment expressly provided that the property still belonged to the defendant, the measure of damages should have been the difference between the value of the skins, if uninjured, and their value in their present condition, and while, at the close of the testimony, defendant's attorney made his pleadings conform to the proof, he pointed out no specific amendment which he desired and, under the circumstances, judgment for the full value of the skins as claimed by defendant, without any deduction for their value in the damaged condition, was not in accordance with the pleadings, proof, or conduct of the parties at the trial, and a new trial should be ordered. Inasmuch as a new trial was necessary, the court did not consider it necessary to determine whether, under the vague testimony as to the nature of the damage, the plaintiff could hold defendant for any loss sustained on the 12 skins to be dyed at the owner's risk, and said that doubtless upon a new trial the parties would show, with more definiteness, both the technical meaning of the terms in the trade and the nature of the damages to those specific skins. The judgment was reversed, and a new trial ordered. Gutschneider v. Pirosnick (N. Y. Misc.), 123 N. Y. Supp. 190 (1910).

III. Shoeing mule.

In Miller v. Ben H. Fletcher Co., 142 Ga. 668, 83 S. E. 521 (1914), plaintiff sought to recover damages for the loss of a mule, which he took to defendant's blacksmith shop, where defendant was accustomed to shoeing horses and mules for his customers, it being alleged that, although defendant, as a keeper of a public blacksmith shop, owed the duty to exercise due and ordinary care in

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Abner Underwood, the engineer who operated the engine, testified that he was present when the agreement between appellee and appellant's representative was made for the repair of the engine, and that the repairs were not made as agreed upon. The testimony is not undisputed, either as to the omission or as to the result of this omission; but these conflicts have been resolved against the contention of appellant, and the testimony of Underwood as to the cause of the injury is sufficient to support the verdict.

On the question of the measure of damages, the court told the

discharging the work of shoeing horses and mules, he conducted the work, through himself, his servants or agents so as to cause plaintiff's mule to be thrown down or fall down while being shod, thereby killing it so that it became a total loss to plaintiff. Defendant demurred to the petition, because it did not allege any specific act of negligence, because it did not allege in what negligent way the petitioner's mule was being shod, because it failed to allege any specific fact or facts or acts of negligence sufficiently definite to put defendant on notice to enable him to make his defense, and because no fact or facts of a wrongful or negligent character were set out with sufficient definiteness and no specific tortious act was alleged, and no tortious act or omission was alleged, and it was not alleged in what way or manner or in what respect defendant was wanting in proper care and diligence in and about shoeing the mule. The trial court overruled the demurrer, and defendant took exception. In affirming the judgment of the trial court it was held that the petition, when considered in its entirety, was an action ex delicto, founded on a breach of duty springing from a violation of the contract of bailment; that the petition contained allegations sufficient to show a contract of bailment for the purpose of having work performed on the thing bailed; that the contract was of such a character as to raise a duty upon the part of the bailee to exercise ordinary care for the safety of the animal while in the bailee's possession, and the employment of skill in performance of the work; that the petition, in substance, alleged a breach of the duty by failure of the bailee to exercise ordinary care in carrying out the object of the bailment, and damages flowing to the bailor as a result; and that the petition was sufficient, without regard to the necessity for setting forth special acts of negligence, to withstand a general demurrer. It was further held that the allegation that defendant, as bailee, conducted the work, by himself, his servants, and agents, "so as to cause said mule to be thrown down or fall while being shod, thereby killing" it, when considered in connection with all the other allegations of the petition, one of which was, in substance, that in performing the work, the defendant, his servants and agents violated his legal duty to exercise ordinary care, amounted to an allegation of a specific act of negligence arising from misfeasance, and was equivalent to alleging that it was negligence for the animal to be thrown down while being shod, and that the defendant, his agents, and servants, committed such an act of negligence as to cause the death of the mule, resulting in its total loss to the plaintiff, and that, so construed, the petition was

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jury that if appellant undertook to repair the engine, and "if there was no agreement to fix it any certain way," that there was an implied agreement that the work should be done in a skilful and workmanlike manner, and that if the repairs were made in an unskilful, careless, and faulty way, and that said negligence was the cause of the explosion, the plaintiff would be entitled to recover the damage to the engine. It was shown in the testimony that appellant made a charge of $1 per hour for the labor of its machinist, and that a total charge of $11 was made.

not subject to any of the grounds of special demurrer.

IV. Testing and repairing crank shaft.

Plaintiff received defendant's motor car crank shaft to test it or to straighten it and during the work cracks or seams appeared in the shaft. Defendant was notified, and thereupon a new crank shaft, ordered by defendant, was made and delivered by plaintiff. Defendant stopped the check which he had sent to plaintiff in payment for the shaft, and in this action, brought to recover upon the check, defendant counterclaimed and the court awarded to it damages for the value of the first crank shaft and for the loss in the matter of extra time and labor required for assembling the parts to fit the new crank shaft, and as these damages were in excess of plaintiff's claim defendant gained the judgment. On appeal the court said that, though it were proved to the satisfaction of the court that the crank shaft was cracked by the plaintiff in the attempt to straighten the bend or kink found in it, that fact alone could not support the judgment, as the judgment must rest upon proof that satisfied the court that it was negligent. The experts called by defendant were asked what was the best or the very best way to do the work and, although their answers did not indicate the method employed by the plaintiff, they did not tend to charge it with negligence for, the court said, "The test of plaintiff's liability was not whether it followed the best fashion, but whether its method of repair involved failure to employ ordinary care and skill required in such work." The judgment was reversed and a new trial ordered. P. H. Gill & Sons Forge & Machine Works v. Detroit-Cadillac Motor Car Co., 139 N. Y. App. Div. 205, 123 N. Y. Supp. 621 (1910). A motion for reargument was denied, 140 N. Y. App. Div. 897, 125 N. Y. Supp. 1140 (1910).

V. Repair and launching of boat.

A. In connection with storage.

In Webster v. Beebe, 2 Boyce's (Del.) 161, 77 Atl. 769 (1910), plaintiff brought an action of assumpsit to recover $122.25, with interest, for services rendered and materials furnished to defendant in connection with the storage of and repairs to a certain boat, the property of defendant. It was admitted that plaintiff stored the boat for defendant at an agreed price of $15. It was also admitted that the plaintiff furnished certain materials and made certain repairs to the boat at a price that had been agreed upon by both parties, these two agreements being separate and distinct, and having been made at different times. It was also

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It is insisted that as the measure of damage the jury should have been told that when work is improperly done the measure of damage is the difference in its value as done and what its value would have been if it had been properly done, and it is also insisted that, to render one liable for damages for the breach of a contract which arises from special circumstances and are so large as to be out of proportion to the consideration agreed upon, it must appear, not only that he knew of such special circumstances, but also that he at least tacitly consented to assume the risk arising therefrom. In

admitted that nothing had been paid by the defendant to the plaintiff on account of either of the contracts, but defendant contended that he was not liable for the materials furnished and labor done, because the same were not in accordance with the terms of the contract, and because of the damage he suffered thereby. It appeared also that there was a claim made by defendant that the boat was damaged in launching through the negligence of plaintiff. The court instructed the jury that if they found that plaintiff had performed his part of the contract for storage before he undertook to launch the boat, they should find in favor of plaintiff for the sum of $15 in any event, for there was nothing in the evidence to show that the storage up to that time was not proper, or that the boat had been in any way injured; but that, if they should find that the agreement concerning storage included the launching of the boat by the plaintiff, and also conclude that the work of launching was improperly done, and that the boat was thereby injured, they should take such fact into consideration in determining how much, if anything was due plaintiff for storage. With respect to the repairs to the boat, the court instructed that if plaintiff furnished the materials as he agreed to, and did the work in the manner he agreed to do it, and the boat was delivered to and accepted by the defendant, the plaintiff would be entitled to recover the full amount of his claim, and that if there were defects in the materials furnished and work done, if the defendant accepted the boat and failed to give notice to the plaintiff of such defects, after he had had a reasonable opportunity to discover them, the plaintiff would in such event be entitled to recover. On the other hand, if the jury believe the repairs were not in accordance with the contract, but were of some advantage or benefit to defendant, they should find for plaintiff in such a sum as they were reasonably worth to defendant. The court further said that defendant had filed in the case a notice of recoupment, under which he had a right to prove and be allowed any loss or damage incurred by him by reason of the failure of the plaintiff to perform the work in a proper manner and in accordance with the contract, and that such damage must be founded upon and grow out of the same identical contract, and the jury was instructed that, if they were satisfied from the evidence that the plaintiff did the work in accordance with the agreement, they should render their verdict in his favor for the full amount of his claim; but if, on the other hand, they should find that plaintiff did not do the work properly, and that defendant was damaged thereby, they should deduct the amount of such damage from the

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support of this contention appellant cites the opinion of this court in the case of Wells-Fargo & Express Co. v. Baker Lumber Co., 115 Ark. 142, 171 S. W. 132. In that case special damages were asked against a common carrier for delay in the delivery of a part of the machinery of a sawmill occasioned to timber, due to the inability of the plaintiff to saw the same, and this court held that such damages could not be recovered without an allegation and proof that the carrier had special notice of such damages at the time of the shipment. And it is argued here that the testimony should have shown that ap-

amount of the claims and render a verdict in favor of plaintiff for the balance, or, if they should find that the amount of damage was greater or equaled the claim of the plaintiff, they should find simply for defendant. There was a verdict for plaintiff for $139.96.

B. Caulking vessel on marine railway.

Plaintiffs placed their schooner on the marine railway of defendant, to be caulked and otherwise repaired, and alleged in the complaint that the work was so defectively done that, during a voyage, the vessel leaked and the water came into contact with some barrels of lime which were in the cargo, setting fire to the vessel which was burned. This action was brought to recover the value of the vessel and cargo. Plaintiffs had judgment and defendant appealed. It appeared that defendant had brought a prior action against plaintiffs to recover its charges for making the repairs, in which action no counterclaim was interposed by plaintiffs and defendant pleaded the judgment in that case as a bar to the present action. It was held that if the repairs were defectively made so that the vessel leaked, the damages were the cost of having the defect repaired and interest on the value of the plant and hire of employees and the like during the additional delay thus caused, that this direct damage might have been set up as a defense to the action by defendant, and that, while the damages now sued for would be a counterclaim, the foundation for them was taken away by the adjudication in the other action that the defendant had performed its contract. The court said that there was no evidence and no allegation that the defendant had notice that the vessel was to be used for carrying lime, nor, indeed, that that was its purpose, the evidence being that four barrels of lime were taken on board among the cargo, and that it was a remote and not a direct consequence that the water from the leak reached them, and set fire to the vessel, and the burning of the vessel from the leak was not in the contemplation of the parties. The captain testified that he could have saved the vessel except for the fire, and the court said that, even if the vessel had been sunk by the leaks, it was incumbent upon the plaintiffs to allege and to prove that they used due diligence, but did not and could not discover that the work was defective and that the vessel would leak until it was too late to avoid that consequence. The court pointed out that the complaint not only did not aver that, but on the contrary alleged that the plaintiffs relied on the defendant and had no knowledge of the breach of duty and violation of contract by defendant, and said that to start a vessel on a

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pellant was advised that it would be charged with responsibility for the explosion of the engine, so that a charge could have been made proportionate to that responsibility. But we think the doctrine of the case cited is not applicable here. One holding himself out as a machinist and accepting employment to repair a steam engine is presumed to know the nature and the character of the work he is about to do and the results likely to follow a negligent performance of his work, and is therefore liable for the damage proximately resulting from a negligent and unskilful performance of his work.

voyage upon that assumption, without inspection or trial was such gross negligence on the part of the plaintiffs as to make that the proximate cause of the disaster. Furthermore, the captain of the vessel as a witness for plaintiffs, testified that he knew the vessel was leaking before he sailed and when he took the four barrels of lime aboard. It was held that there was error in refusing the motion to nonsuit. Bell v. Mutual Mach. Co., 150 N. C. 111, 63 S. E. 680 (1909).

VI. Plating jewelry.

In Woltag v. Reichgott (N. Y. Misc.), 156 N. Y. Supp. 133 (1913), plaintiff sued to recover $24.50 for work performed, to which claim defendant counterclaimed, alleging that by poor workmanship plaintiff had damaged a watch and ring turned over to him for plating. The measure of defendant's damage applied was the amount paid by defendant for another watch and another ring, and the court said that, as it appeared without contradiction that the damaged watch and ring remained in defendant's possession, the correct measure of damage was the difference between the market value of the property in its alleged damaged condition and the value if the work had been performed skilfully, and that defendant's offer during the trial to turn the articles over to the plaintiff did not change the rule of damages as plaintiff was under no obligation to accept the offer. Judgment was reversed and a new trial ordered.

VII. Remodeling organ.

Plaintiff was the owner of an organ used in connection with a merry-go-round in the operation of which he was engaged at the time, and entered into a contract with the predecessors in business of defendant to convert the organ into a player organ to play perforated 65-note music, the work to be completed in about 6 weeks. The contract called for other repairs, for all of which plaintiff was to pay $135. Although plaintiff was making frequent demand that the contract be carried out, it appeared that nearly a year thereafter nothing had been done except to tear the organ to pieces and saw off some of the pipes, and eventually plaintiff was notified that his organ had been remodeled so as to play 44-note paper music instead of that called for by the contract, this not being done until more than 2 years after the contract was entered into. Plaintiff repudiated the work and declined to accept the organ thus remodeled, because it failed to produce the volume of music which he desired for his business, and further because it was an entire failure, even as a player of 44-note music, in that the sound was low and there was a great

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Gibson, Lee & Co. v. Carlin, 13 Lea (Tenn.) 440; Livermore Foundry & Mach. Co. v. Union Com. & Storage Co., 105 Tenn. 187, 58 S. W. 270, 53 L. R. A. 482; Sutherland on Damages, § 702.

The instructions as a whole correctly submitted the case to the jury, and we think the testimony was legally sufficient to warrant the jury in finding that the damage to the engine was such a proximate result of its negligent repair as to be within the contemplation of the machinist as a probable result of his negligence, and the judgment of the court below is therefore affirmed.

discord and a lack of harmony in the notes. Defendant began preparations to move to another city, and plaintiff was notified to come and get the organ, and was finally notified that defendants were unable to make the repairs, as required, at any time. In the meantime defendant's representatives suggested that plaintiff buy a new organ, which he had done, but not with the intention of abandoning his contract, and when it finally became evident that defendant had not only abandoned its contract, but had also rendered the organ worthless, plaintiff filed a petition fixing the value of the organ at $700 and sought judgment for that amount. Plaintiff had a verdict for $700 upon which judgment was rendered and defendant appealed. The court said that defendant was a bailee of the organ under a contract to remodel it, by which it agreed, according to the undisputed proof, to repair it so as to convert it into one playing perforated 65-note music, and that there was absolutely no testimony that defendant agreed only to undertake to make the repairs without assurances of success, as it alleged in its answer, and that it did not perform or commence to perform its contract within the time specified, nor within a reasonable time after it was made, and that plaintiff then, or at any time thereafter, had the right to abandon his contract and seek against defendant whatever relief the law would afford him, and that under such conditions the law seemed to be well settled that the bailor, if a chattel had been rendered worthless by the bailee, might treat it as a conversion and sue the bailee for its value. The court further said that the proof shows that at the expiration of more than 4 years nothing remained of plaintiff's organ but a lot of disconnected parts, of no value except, perhaps, as junk, and that plaintiff had the right to treat defendant's conduct as a conversion of his organ and to sue for its value and, as there was no material contradiction in the testimony relating to the nonperformance of the contract, the trial court did right in submitting to the jury only the value of the organ, although a different state of case might have been presented if the organ had not been rendered worthless to defendant's contract. The judgment was affirmed. Symphony Player Co. v. Hackstadt, 182 Ky. 546, 206 S. W. 803 (1908).

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COLLINS v. PECOS & NORTHERN TEXAS RY. CO.

[Commission of Appeals of Texas, Section B, May 28, 1919.]

— Tex. —, 212 S. W. 477.

1. **Master and servant—Injuries to servant—Rule for determining negligence on part of master.**
The correct rule for determining negligence on the part of a master is that where there is reason to anticipate, from the character of the services required and the manner of their performance, some injury may result to the servant, the duty is incumbent to exercise such care demanded by the relationship as will prevent the injury, and the failure so to do becomes actionable in the event injury follows the breach of duty.

2. **Negligence—Elements.**
Negligence rests primarily on two elements: First, reason to anticipate injury, and, second, failure to perform the duty arising on account of that anticipation.

3. **Negligence—When actionable.**
Negligence may exist abstractly, but to render it actionable, it must be concretely incorporated into some injury.

4. **Negligence—Anticipation of injury—Proximate cause.**
Anticipation of injury as applied in the determination of negligence and proximate cause should not be confused. The former is an element of negligence, while the latter is used to denote the relative position of cause to ef-

CASE NOTE.

Liability of master to servant for disease or illness due to nature or condition of employment.

I. Bad air in coal mine, 890-893.
II. Heat and dust in glass factory, 893-895.
III. Silver nitrate poisoning in mirror factory, 895-897.
IV. Systemic poisoning from paint gun, 897-898.
V. Lead poisoning of typesetter, 898-900.
VI. Disease of eyes from glaring light, 900-903.

Introductory. This note is supplementary to the note appended to Wiseman v. Carter White Lead Co., 13 N. C. C. A. 1083, to which note reference is made for cross-references to analogous subjects and for the scope followed in the present note.

I. Bad air in coal mine.

Plaintiff, an employee in defendant's coal mine, claimed that while he was so employed the air in the place where he worked became foul and ladened with damps and other impurities from the breathing of which he was stricken down, his health seriously impaired, and he was rendered unable to perform labor for a period of about 8 months, when he partially recovered, but was still weak and unable to do the full work of a man in normal condition. Defendant contended that plaintiff's testimony at best tended to show that he suffered from mere sickness or disease and not a personal injury within the meaning of the law, and that the law which permitted recovery for a personal injury related solely to wounds, bruises or hurts as distinguished from suffering, weakness, debility and loss of time arising from what was ordinarily termed sickness or disease, and that

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fect in ascertaining whether cause is so related to effect as to bring negligence in union with the result rendering liable a negligent actor for certain consequences.

5. **Negligence—Proximate cause—Determination.**
Whether a result can be chargeable to a certain dominant cause is determined by ascertaining whether the result flows naturally, without lapse, from the cause, although there may be intervening ancillary or subsidiary causes which contribute to the injury.

6. **Negligence—Incorporation in proximate cause of anticipation of results.**
Proximate cause incorporates in it such anticipation of results as ought, from the circumstances, to have been foreseen as the natural consequences flowing from a negligent act.

7. **Negligence—Proximate cause—Determination.**
Where some injury has resulted, chargeable to negligence, later followed by serious consequences, to ascertain whether these consequences proximately flow from the negligence, it is always necessary to look back down the line for causation, and if the consequences naturally flow from the negligence, without the intervention of any independent cause, such consequences ought to have been foreseen, and are chargeable to the original negligent act; or, on the other hand, if the negligent act produces an injury, and looking down the line to the future it can be ascertained that other and more serious injuries will naturally flow from the negligence, without any intervening independent cause, these consequences are probable and ought to be foreseen and are chargeable to the negligence.

8. **Master and servant—Injuries to railroad section foreman—Creosote poisoning—Proximate cause of permanent injuries—Question for jury.**
In an action against a railroad company by a section foreman for personal

plaintiff was suffering from mere occupational disease and not from any injury caused by failure of defendant to properly ventilate the mine. There was a verdict and judgment for defendant from which plaintiff appealed. The statute of the state required the operator of a mine to so ventilate it as to expel all noxious and poisonous gases in all the working parts of the mine, and the court said that if the air in the mine had become charged with poisonous gases to any extent to materially injure the plaintiff while employed therein, it followed of necessity that defendant had failed in its duty to so ventilate the room or place of work as to render it harmless and expel the deleterious agent causing such injury, and in such case it would follow with equal certainty that plaintiff would be entitled to recover his damages. The trial court so instructed the jury, but the instructions were qualified by propositions making the matter of an occupational disease very prominent, and in effect, charging that plaintiff could not recover if the injury was of that nature, and that, although it be found that plaintiff was injured, as claimed by him, and that such injuries resulted in the disabilities alleged, he could recover damages only upon further proof that such disabilities were not the result of an occupational disease. This feature of the instruction the court held to be erroneous, as an occupational disease, if it meant anything was distinguished from a disease caused or superinduced by an actionable wrong or injury, and was nothing more nor less than a disease which was the usual incident and result of the particular employment in which the workman was engaged as distinguished from one which was caused or brought about by the employer's failure in his duty to furnish him a safe place to work, and if the employer failed to provide a reasonably safe place to work or failed to ob-

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injuries caused by his being poisoned by wet creosōtē on ties which he was unloading, held that whether or not the permanent injuries sustained by plaintiff were the natural and proximate result of defendant's original negligence in failing to warn plaintiff of the danger of poisoning was a question of fact for the jury.

9. **Master and servant—Injuries to railroad section foreman—Creosote poisoning—Proximate cause of permanent injuries—Sufficiency of evidence.**

In an action against a railroad company by a section foreman for personal injuries caused by his being poisoned by wet creosote on ties which he was unloading, wherein the testimony was conflicting as to whether plaintiff's permanent injuries flowed naturally from defendant's negligence in failing to warn plaintiff of the danger of poisoning and were the proximate consequences thereof, held that there was evidence requiring the submission of such question to the jury and authorizing them to find such issue for the plaintiff.

Action against a railroad company for personal injuries sustained by its section foreman. Judgment of the Civil Court of Appeals (173 S. W. 250), which reversed the trial court's judgment in favor of the plaintiff and remanded the case, reversed, and the judgment of the trial court affirmed.

For plaintiff in error—J. Marvin Jones, L. C. Barrett and James N. Browning.

serve the specific requirement of the statute with respect thereto, and as the result of such neglect the employee was injured, the liability of such employer could not be avoided by calling such injury an occupational disease or by showing that a disease of that nature was often the accompaniment or result of such employment even when all due care had been exercised by the employer. The court said the material questions under the issues and admitted facts in the case were: The defendant's negligence with respect to the ventilation of the mine where plaintiff was employed; and, if such negligence was found, did plaintiff thereby sustain the injury of which he complained; and that if those two facts were established, defendant's liability to respond in damages was not open to question; and that a wrongful injury which operated to destroy or undermine or impair the health of another was no less actionable than was a wrong from which the injured person sustained wounds or bruises or broken bones. It was also held to be error for the court to instruct the jury that an occupational disease was not covered by or embraced in the provisions of the Workmen's Compensation Act, and the employer was therefore not liable in damages to one who contracted and suffered from such a disease, as it was alleged and admitted on the trial that defendant was not within the compensation act, and therefore plaintiff's right of action, if he had one, was not founded upon or in any manner controlled by that act, and, defendant having rejected the act, could not have the advantage or benefit of any of its provisions to limit or restrict its liability to respond in damages. It was also held to be error for the court to inform the jury that plaintiff claimed to have been injured by reason of breathing carbon monoxide gas, commonly termed "white gas," to which

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For defendant in error—Terry, Cavin & Mills, Madden, Trulove & Kimbrough and Carl Gilliland.

SADLER, J. This suit was filed in the district court of Parmer county by Robert Collins, to recover damages from the Pecos & Northern Texas Railway Company, for injuries alleged to have been caused by negligent poisoning while he was acting for the defendant as section foreman in unloading railroad ties recently treated with a mixture known as "creosote." The negligence is charged to have been the failure of defendant to warn him of the danger of poisoning resulting from contact with the solution.

The findings of the jury, and there is evidence to support same, sustain the allegations that about the 27th of May, 1912, plaintiff was working on the line of defendant's road, in charge of a section gang, unloading and placing ties which had recently been treated with a creosote solution for preservation; that these ties were wet with the solution, and that it got on the hands and face of plaintiff, causing injury; that he had theretofore handled creosote ties and timbers on which the solution had dried, but had no experience in handling wet timbers, and did not know that creosote, when wet, would pro-

charge plaintiff excepted as unduly narrowing the scope of inquiry where the petition charged simply impurity of the air in the mine such as is commonly termed in mining "bad air." As the court's statement of plaintiff's claim was less comprehensive than the allegations of the petition, and the appellate court were unable to say from an examination of the abstract that the evidence on plaintiff's part was such as to indicate white gas alone as the cause of the alleged injury, the judgment was reversed and the cause remanded to the district court for a new trial. Gay v. Hocking Coal Co., — Iowa —, 169 N. W. 360 (1918).

II. Heat and dust in glass factory.

Plaintiff was employed principally as a glass blower in defendant's glass factory, and alleged that his eyes became permanently injured by dust from various poisonous substances which arose in the mixing room adjoining the room in which plaintiff was employed and which, because of defendant's negligence in not keeping the mixing room tightly closed, was allowed to permeate the blowing room, against which danger plaintiff was not instructed, and also because of the negligence of defendant in causing him to work while he was exposed to great heat at a time when he was in a generally run down condition of health. There was a judgment for plaintiff and defendant appealed. Defendant objected to instructions covering the question of proximate cause and contributory negligence, but the court found, as to the instruction as to proximate cause, that while it did not say in express terms that the jury must find that as a result of the condition of his general health plaintiff had suffered cataracts of the eye, yet the instruction was so plain that the jury could not have been misled thereby, and upon the question of contributory negligence the instruction of

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duce injury to his hands and face by coming in contact therewith; that he did not know the properties of the solution, or that it was poisonous; that defendant did know, or by reasonable diligence could have known, that the solution used by it, when coming in contact with the skin before it had dried, would cause injury thereto, and would poison the flesh; that the defendant did not warn plaintiff of the dangers of poisoning or injury which were incident to handling wet creosote solution with his hands, and permitting it to come in contact with his face and hands; that plaintiff was permanently injured as a proximate result of the poisoned condition produced by the solution; and that this injury was the proximate result of the negligence of the defendant.

The honorable Court of Civil Appeals finds that the facts are sufficient to support the conclusion of the jury, except, as it says:

"Assuming that creosote is a poison, and so recognized by the chemists or the medical world, but, as noted by them, all known effects of such poison when applied to the skin is a burning sensation compared to a sunburn, and never known to the profession or treated by standard authorities as producing constitutional disorders, or systemic poisoning, whether an employer would be charged with negligence in failing to warn of such danger, when it did not know and could not know that a constitutional disorder would result from such a use—in other words, was such an injury incidental to the wrong done, and

the court which required the jury to find that plaintiff had no knowledge that the breathing of the dust, gases and fumes that came from the mixture were injurious to him, was sufficient as, if he had no such knowledge, it was impossible to conceive how he could have been guilty of contributory negligence. It was contended that the instruction as to contributory negligence was erroneous in that it assumed that defendant was negligent under the circumstances of the acts and omissions complained of. But the court said that, under the statute which required an employer to use every device, care and precaution which it was practicable and possible to use for the protection and safety of life, limb and health in work involving risk or danger to employees, the court said that if defendant had knowledge, or by the exercise of reasonable care could have known, of the poisonous nature and deleterious effect of the gases and dust on workmen, it was guilty of negligence in not so ascertaining that fact, and in permitting further unnecessary exposure of its employee, and that the instruction was not open to the objection charged against it. It was, however, held that an instruction to the effect that, because of plaintiff being required to work in the blowing room in the dust, fumes and gases, he became weak and sickened and his general health was bad, and he was in a generally run down condition, and that it was negligence upon the part of the defendant to allow and compel him to work in such place where his eyes were being subjected to radiated heat while in such run down physical condition, was erroneous, in that the paragraph of the complaint upon which it was based did not charge any knowledge upon the part of defendant as to plaintiff's run down condition of health, but simply a charge that defendant was guilty of negligence in causing plaintiff to

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was it such as may have reasonably been supposed to have entered into the contemplation of the appellant? * * * The fact that appellee's condition is a serious one, it will not necessarily follow that the hands burned by creosote produced it, though the opinion of the two doctors may have warranted the jury in finding as a fact it did. The evidence is lacking to show that such injury could or would reasonably have been anticipated, and that appellant did know or should have known thereof, and therefore, in order to prevent it, have warned appellee of such danger."

For a more extended statement of the pleadings, evidence, and discussion of the Court of Civil Appeals, see 173 S. W. 250.

Opinion.

Plaintiff in error complains of the holding by the Court of Civil Appeals that defendant in error was not liable for the constitutional and permanent injuries sustained by him, because it did not, and could not, anticipate that the failure to warn him would naturally result in the permanent injuries to the extent shown by the evidence. He also complains of the holding that the evidence was not sufficient to show that defendant in error had notice, or by the exercise of ordinary care would have known, of the extent of the injury produced by the poisoning of the creosote ties.

work where he was exposed to the intense radiated heat at a time when plaintiff was in such run down condition, as the effect of the instruction was to make the giving of the order to work in such place, under the circumstances as alleged in the paragraph of the complaint, negligence per se, while the question was one of fact for the determination of the jury and not the court. It was also held that an instruction relating to the predisposition of plaintiff to have cataracts of the eyes was erroneous in that it related back and was based upon the prior instruction as to plaintiff's run down condition, and permitted the jury to find for plaintiff as against the defendant whether defendant at that time had any knowledge of plaintiff's generally run down condition and predisposition to cataracts or not. Because of these errors in the instructions the judgment was reversed and a new trial granted. McBeth-Evans Glass Co. v. Brunson, — Ind. App. —, 122 N. E. 439 (1919).

III. Silver nitrate poisoning in mirror factory.

Plaintiff had been employed in the factory of defendant, being in charge of the silvering and polishing room and compounding the mixture used in the process of manufacturing mirror plates, where certain solutions were mixed and applied to the glass, silver nitrate being one of the ingredients used. Plaintiff became ill and left the employment of defendant, and after a long illness went to work elsewhere in other business, and brought suit claiming that his ailment resulted from silver nitrate poisoning, which he alleged resulted from the employment and from defendant's violation of statute. The action was based upon the occupational diseases act and the health and safety act. The court directed a verdict as to the second count, which was based upon

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As we interpret the opinion of the Court of Civil Appeals, it holds that there is no evidence supporting the contention that the negligence of the defendant, as found by the jury, was the proximate cause of the permanent injuries. We further understand the holding to be that, though the permanent injuries may be the natural consequence of the negligence, responsibility therefor cannot be chargeable against the defendant, without showing anticipation of such permanent injuries to exist at the time of the negligence.

We are thus brought face to face with the question of whether or not, when permanent injuries result from negligence, the wrongdoer is chargeable with all the consequences that naturally and proximately flow from such negligence; also with the question as to whether or not there is any evidence to support the finding of the jury that the permanent injuries to plaintiff were the natural and proximate result of defendant's negligence.

We believe that the correct rule for determining negligence is that where there is reason to anticipate, from the character of the services required and the manner of their performance, some injury may result to the servant, the duty is incumbent to exercise such

section 11 of the health and safety act, which was held to have no application in a room in a factory where there was 2,000 cubic feet of air space for each person employed in the room, the evidence plainly showing that there was much more than that air space in the room in which plaintiff did his work. The other two counts were submitted to the jury, and a verdict returned for defendant. Plaintiff moved for a new trial and appealed from a denial of his motion. The court held that section 2 of the occupational diseases act, the language of which was almost entirely confined to lead poisoning and which contained no general terms, was not intended to include silver nitrate poisoning. As to section 1 of the occupational diseases act, which covered any work or process which might produce any illness or disease peculiar to the work or process carried on, or which subjected the employees to the danger of illness or disease incident to such work or process to which employees were not ordinarily exposed in other lines of employment, the court held that there was a clear preponderance of the evidence that silver nitrate poisoning was not an occupational disease and not incident to the making of mirror glass, and could not be contracted by conducting the processes and making the mixtures in the work plaintiff did for defendant, and therefore the jury were warranted in finding defendant not guilty under the count based upon the occupational diseases act. The third count, which was based upon the health and safety act, which provided that all poisonous or noxious fumes or hazards arising from any process, and all dust of a character injurious to the health of the person employed which was created in the course of a manufacturing process within a factory or workshop, should be removed as far as practicable by either ventilating or exhaust devices. But the court said there was a clear preponderance of

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care demanded by the relationship as will prevent the injury, and the failure so to do becomes actionable in the event injury follows the breach of duty. We are not willing to subscribe to the rule that requires the master to anticipate all ensuing results which flow from the breach, before duty arises to exercise care to prevent the consequences. Anticipation is applied in the determination of negligence vel non. If no injury may be anticipated, no duty is breached by a failure to exercise care; but, if anticipated injury may result, then the duty arises. Negligence rests primarily upon two elements: First, reason to anticipate injury; and, second, failure to perform the duty arising on account of that anticipation. Negligence may exist abstractly; but, to render it actionable, it must be concretely incorporated into some injury.

In the Kieff Case, 94 Tex. 334, 60 S. W. 543, Chief Justice Gaines says:

"The negligence which results in actionable wrong is the failure to discharge a duty owed to the party injured. It is a duty incumbent upon all men to use ordinary care so to act as not to injure others. The duty arises when there is reason to anticipate danger."

evidence that the nitrate of silver did not and could not come into the air from the steam or from the ammonia or from any dust in the room, and that the verdict of the jury on that count was justified. The court said they were of the opinion that the contention of plaintiff that silver nitrate poisoning was incident to the manufacture of mirrors by the process employed by defendant could only be proved by general evidence on that subject, and not by specific examples supposed to have occurred in other factories, and that for such poisoning to be peculiar to or incident to the work or process carried on by defendant, it must have happened before, and must be such a disease as those familiar with the process would realize was liable to occur. Arnell v. Superior Mirror Co., 210 Ill. App. 486 (1918).

IV. Systemic poisoning from paint gun.

Plaintiff was in the employ of the defendant railway company at its roundhouse as a painter, being furnished, for use in his work, with a spraying appliance known as a paint gun, consisting of a tin can which held about a gallon of paint which, by means of certain appliances attached to the can, was sprayed by air pressure upon the cars and engines being painted, and in the operation of the machine it spattered paint around and upon the operator and enveloped him in a mist or fog created by the spray, which he was obliged to breathe while using the instrument, and he alleged that, while so engaged, he became sick, poisoned and incapacitated for any kind of work by reason of inhaling and breathing into his system the poisonous material thrown out from the machine, and that by reason of such sickness, poisoning and incapacitation for work he had been caused great physical pain and mental suffering and had been permanently injured and totally incapacitated for life. The action was brought under the Federal Employers' Liability Act, and it was contended

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See Ebersole v. Sapp, 208 S. W. 156.

In Heiting v. Railway Co., 252 Ill. 466, 96 N. E. 842, Ann. Cas. 1912 D 451, it is held that:

"It is not, however, essential to make a negligent act the proximate cause of an injury that the particular injurious consequences and the precise manner of their infliction could reasonably have been foreseen. If the consequences follow in unbroken sequence from the wrong to the injury without any intervening efficient cause, it is sufficient that if at the time of the negligence the wrongdoer might by the exercise of ordinary care have foreseen that some injury might result from the negligence."

Anticipation of injury as applied in the determination of negligence and proximate cause should not be confused. The former is an element of negligence, while the latter is used to denote the relative position of cause to effect in ascertaining whether cause is so related to effect as to bring negligence in union with the result rendering liable a negligent actor for certain consequences. Whether a result can be chargeable to a certain dominant cause is determined by ascertaining whether the result flows naturally, without lapse, from the cause, although there may be intervening ancillary or subsidiary causes which contribute to the injury. Proximate cause incorporates in it such anticipation of results as ought, from the cir-

by defendant that such act, which provided for a recovery of an action by an employee "suffering injury," must be given a restrictive meaning and must be confined to injuries which were attended with force and violence. The court said that if this contention was sound it would limit the scope and effect of the act and would draw from its operation any recognized causes of action which injured persons might have against railroads engaged in interstate commerce, but the court said that the declaration clearly stated a cause of action under the principles of the common law, and if it should be held that the suit could not be sustained under the Employers' Liability Act the effect would be merely to remit the plaintiff to his common-law action, which would subject him to the defenses of contributory negligence and the assumption of the negligence of fellow-servants, and that such defenses had never been potential in the prevention of suits for personal injury, and judgment for plaintiff was affirmed. Baltimore & O. R. Co. v. Branson, 128 Md. 678, 98 Atl. 225 (1916). This case was reversed, however, on the ground that the work in which plaintiff was engaged was not a part of interstate commerce. 242 U. S. 623, 61 L. Ed. 534, 37 Sup. Ct. 244 (1917).

V. Lead poisoning of typesetter.

One employed by defendant as a typesetter brought an action to recover damages for alleged lead poisoning claimed to have been contracted by her while so employed. A verdict was returned in her favor on December 31 for $10,000, and on January 3, before judgment was rendered on the verdict, she died. Later her death was suggested of record and her administrator substituted as plaintiff. The court required a remittitur of $2,000, and judgment was rendered for $8,000 nunc pro tunc as of De-

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cumstances, to have been foreseen as the natural consequences flowing from a negligent act.

In Railway Co. v. Leslie, 57 Tex. 83, 6 Am. Neg. Cas. 492, our Supreme Court says:

"The liability of the defendant is measured by the fact that the injury received follows proximately from the culpable act complained of, and if erysipelas sprang from the injury, the dangers from that disease, as well as the sufferings produced by it, constitute a portion of the injury itself, and it is none the less so because, under similar accidents producing fractures, that disease would not ordinarily ensue."

Judge Brown, in Railway Co. v. Powers, 101 Tex. 161, 105 S. W. 491, says:

"The railroad company, being liable for the infliction of the injury on the party, would be liable for all the consequences flowing from that injury, including such as a jury might say from the evidence presented to them would with reasonable probability occur at some future time."

In Railway Co. v. Smith, 148 S. W. 820, it is said that:

"It is not necessary that the precise injury should have been anticipated, but that some injury might follow from the act of negligence. 'The injuries, proximate and natural consequences of an act of negligence, are always deemed to be foreseen.'"

Where some injury has resulted, chargeable to negligence, later

cember 31. Upon appeal to the appellate court the judgment was affirmed. The declaration consisted of six counts, four based upon the occupational disease act and two upon the common-law counts, but reliance was placed wholly upon the counts based upon the occupational disease act. The declaration alleged in substance that the work carried on in the shop of plaintiff produced diseases peculiar thereto and subjected the employees to the dangers of lead poisoning, and that such diseases could be easily prevented by the adoption of reasonable and approved devices and means, and that defendant wilfully violated the statute in not adopting reasonable means and devices for the protection of the employees. Three questions of fact arose in the case, first, as to whether lead poisoning was incident or peculiar to the work of a setter or distributor of type within the meaning of the statute; second, whether plaintiff in error used such care in providing reasonable and appropriate devices and means for the prevention of lead poisoning, as was required by the statute, and third, whether plaintiff's intestate was suffering from lead poisoning, it being contended by defendant that there was no evidence in the record which fairly tended to prove either of such questions of fact. The court held that while the evidence offered on the part of plaintiff's intestate on some of the questions was meager, and the evidence offered by the defendant was of such a character as to appeal strongly to a tribunal commissioned to determine questions of fact, there was sufficient evidence in the record on behalf of plaintiff's intestate from which, if it stood alone, the jury could, without acting unreasonably in the eye of the law, find that each had been proven, and therefore peremptory instructions for defendant were properly refused. It was contended that the original cause of action abated upon the death of

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followed by serious consequences, to ascertain whether these consequences proximately flow from the negligence, it is always necessary to look back down the line for causation; and if the consequences naturally flow from the negligence, without the intervention of any independent cause, such consequences ought to have been foreseen, and are chargeable to the original negligent act. Or, on the other hand, if the negligent act produces an injury, and looking down the line to the future it can be ascertained that other and more serious injuries will naturally flow from the negligence, without any intervening independent cause, these consequences are probable, and ought to be foreseen, and are chargeable to the negligence. We cite further on this question the Bellar Case, 51 Tex. Civ. App. 154, 112 S. W. 323; the Peterson Case, 28 Tex. Civ. App. 194, 67 S. W. 133; Billman v. Railway Co., 76 Ind. 166, 40 Am. Rep. 230; Cowan v. Telegraph Co., 122 Iowa 379, 98 N. W. 281, 64 L. R. A. 545, 101 Am. St. Rep. 268; Sorenson v. Railway Co. (C. C.), 36 Fed. 166; Buck, Administrator v. Railway Co., 96 Ind. 346, 49 Am. Rep. 168.

The defendant in error relies upon the Bigham Case, 90 Tex. 223, 38 S. W. 162, and the Welch Case, 100 Tex. 118, 94 S. W. 333, as

the defendant in error's intestate after the verdict and before entry of final judgment. The court said that the situation created by the death of the intestate before the entry of final judgment was in no way affected by the entry of the judgment nunc pro tunc as of December 31, as the situation was not such as called for or warranted the entry of such a judgment, and pointed out that, under the statutes of the state and the rules as established thereunder, if a plaintiff in a suit brought to recover damages for personal injuries died before final judgment, from some cause other than the injuries for which damages are sought, the cause of action survived to the personal representative of deceased plaintiff, but if plaintiff's death resulted from the injury for which damages were sought the suit abated and could not be further prosecuted, and held that, in making a motion for a new trial and in arrest of judgment, the action of defendant was inconsistent with the claim that deceased died as a result of the alleged injury, and that, having taken the position in the trial court that she died of some disease other than that for which she claimed damages, defendant could not contend on appeal that the trial court erred in rendering judgment on the verdict after the substitution of the administrator as plaintiff. The judgment was affirmed. Wilcox v. International Harvester Co. of America, 278 Ill. 465, 116 N. E. 151 (1917), aff'g 198 Ill. App. 33 (1916).

VI. Disease of eyes from glaring light.

Plaintiff for 2 years was occupied in the operation of certain power-driven finishing rolls, with which certain dies were used for pressing sheets of steel and forming them into desired sizes, and seeing that the sheets of steel as they came from the rolls were of perfect texture and precise dimensions and, at the same time measuring the steel in a minute and

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sustaining its proposition that plaintiff can have no recovery for the permanent injuries sustained, because they could not be foreseen.

It is believed that, when properly understood, the Bigham Case is in consonance with the position which we take. In that case it is held, as we interpret it, that the railway company was not liable for the injuries to Bigham, because, in the negligent act, anticipation of injury to a person did not exist. The court in that case held that Bigham's injury was chargeable to an independent cause, which independent cause was not in anticipation of defendant. As we understand the application of the rule there announced, it is that where an independent cause follows a negligent act, in order to connect the subsequent result with the original cause, such independent cause producing the result should have been anticipated by the original wrongdoer. We do not understand that case as militating against the doctrine that where anticipation of injury arises, or is chargeable to an actor, he will be responsible for all of the consequences which naturally and proximately flow from that wrong. The court in that case, in our opinion, uses "anticipation" or "foresee," not as applying to the injury sustained by Bigham as such, but as applicable to

particular way through the use of delicate measuring instruments, such measuring being done under electric light of high power maintained about 18 inches above the plane of the steel sheet. The surfaces of the steel sheets were almost as bright as a mirror and the surfaces of the rolls were bright. The sheets were long, and as they came through the rolls were continuously waving and shaking so that there was, at all times, an intense glare of light, and at times flashes of light flashed into plaintiff's eyes, and he was obliged to strain his eyes to the utmost to discover the condition of the sheets with respect to texture, dimensions, irregularities and scratches. To produce steel sheets of the quality indicated, they were put through various processes, such as dipping into chemicals and applying oils, greases and water before reaching the rolls, and plaintiff's eyes, hands and system became saturated with these substances, so that his health and the sight of both eyes were ultimately destroyed. He notified defendant that his eyesight was becoming blurred and foggy, and that he could not read the instrument as clearly as before, and an examination was made by defendant's physician, but plaintiff was sent back to his work, where he remained for some time, when he notified defendant that he could not see to do the work and was then told to go home. He was not provided with goggles or other devices to prevent the splashing of liquids into his eyes or diminish the strain upon them, and defendant gave him no notice or warning of the dangers of injury to his eyesight or health nor instructions in that regard, and he was ignorant of such danger. It was also alleged that at the time of entering upon such work plaintiff was possessed of perfect eyesight and health, and that the disease contracted from the work was aggravated through the overheated condition of the place in which he was required to work, and also by strains

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the intervening independent cause producing that injury; that is, since the cause producing the injury is an independent one, the result of that cause is independent of the original negligence, and does not arise proximately from it. The same may be said with reference to the holding in the Welch Case. The view here given with reference to the Bigham Case is believed to be sustained by reference to the Kellogg Case, 94 U. S. 469, 24 L. Ed. 259, cited in support of the holding in the Bigham Case, wherein it is said:

"The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

Whether or not the permanent injuries suffered by plaintiff were the natural and proximate result of defendant's original negligence was a question of fact to be determined by the jury. Powers Case, supra; City of Galveston v. Posnainsky, 62 Tex. 118, 50 Am. Rep. 517; Seckinger v. Mfg. Co., 129 Mo. 590, 16 Am. Neg. Cas. 387, 31

caused by defects in the machinery and lack of necessary assistance, and that he frequently complained to defendant concerning the defective condition of the machinery and repeated promises were made to remedy the defect. In the trial court there was a judgment for defendant on the ground that the injury was within the Workmen's Compensation Act. The court of appeals, however, held that the action did not come within the Workmen's Compensation Act, which only provided for injury or death of employees and made no provision for disease, and said that plaintiff's trouble was not due to causes outside the employment of his work, nor was it one of accident or of traumatism in the sense of violence, but was due to causes incident to his service, whose effect upon his eyesight and health were alleged to have been unknown to him, though within knowledge reasonably imputable to defendant, and that the disease complained of developed and progressed by gradual process until it culminated at last in the loss of plaintiff's eyesight and health. The court said that the case set out in the petition fell well within principles of the common law as the general rule was that, where an employer placed or continued an employee for a substantial length of time in the regular performance of work, and under conditions which in the absence of preventive means and precautions were liable to engender in the employee a disorder of serious and injurious character, regardless of the name by which the disease was known, it was the duty of the employer to warn and instruct the employee as to the dangers and to furnish him with reasonably effective means to avoid them, and where, as the direct result of failure to perform this duty, an employee in the exercise of reasonable care suffers in-

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S. W. 957; Wieting v. Town of Millston, 77 Wis. 523, 46 N. W. 879; Railway v. Kemp, 61 Md. 619, 48 Am. Rep. 134.

In the instant case, defendant's negligence caused anticipated injury. The testimony is conflicting as to whether the permanent injuries flowed from that negligence naturally and were the proximate consequences of same. There is evidence in the record requiring the submission of this question to the jury, and upon which it was authorized to find that issue for the plaintiff.

In view of the disposition to be recommended in this case, we have considered the other assignments of error presented by appellant, and find therein no error calling for a reversal of the judgment of the lower court. The paragraph of the court's main charge to which exception is leveled is cured by the special charges given at the request of the defendant.

We are therefore of the opinion that the judgment of the Court of Civil Appeals should be reversed, and the judgment of the trial court affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

jury through a disorder so contracted, he is entitled to recover. The court further said that the right of recovery upon the facts stated was found in both constitutional and statutory provisions of the state of Ohio, there being a constitutional provision that no right of action should be taken away from an employee when the injury, disease or death arose from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employees, and there being a statutory provision requiring that every employer should, without cost to the employee, provide reasonably effective devices, means and methods to prevent the contraction by his employees of illness or disease incident to the work or process in which such employees were engaged, and that the effect of this statutory provision was to charge the employer with the duty to protect employees from the contraction of disease which was incident to the work they were required to perform, the intent of such statute finally being to require the employer, where necessary, to ascertain what devices, means and methods would be reasonably effective to prevent contraction of an occupational disease, and that, although the statute provided a penalty for failure to comply therewith, the liability thereunder was not limited to the penalty, for the rule was that where a statute, although penal in character, plainly imposed a duty for the benefit of a class of individuals, a right of action accrued to a person of that class who was injured through breach of the duty. It was therefore held that the denial of a right of recovery was error both under the common law and the statute, and judgment was reversed. Zajkowski v. American Steel & Wire Co., — C. C. A. —, 258 Fed. 9 (1918). R. L. S.

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EDWARD E. McMORRAN & CO. v. INDUSTRIAL COMMISSION et al.

[Supreme Court of Illinois, December 17, 1919.]

290 Ill. 569, 125 N. E. 284.

Workmen's Compensation—Illinois act—Finger injury—Loss of first phalange. The loss by an employee of about one-sixteenth of the phalange bone of his right index finger does not constitute the loss of the first phalange of such

CASE NOTE.

Injury to or loss of fingers or hands and compensation therefor.

I. Injuries as equivalent to loss of hand, 905-912.
- A. All fingers and thumb lost, 905-906.
- B. All fingers and first phalanx of thumb lost, 906-907.
- C. All fingers and most of palm lost, 907-908.
- D. Three fingers lost, one ankylosed, 908.
- E. Three fingers lost, one crooked, palm injured, 908-909.
- F. Three fingers lost, one mutilated, 910.
- G. Three fingers and two joints of fourth lost, thumb injured, 910.
- H. Two fingers and two joints of other two lost, 911.
- I. Three fingers, other injuries, 911-912.
- J. Three-fourths loss of use of hand, 912.

II. Injury as equivalent to loss of finger or thumb, 912-915.
- A. Loss of part of second phalanx of finger, 912.
- B. Loss of first phalanx, cellulitis of joints, 912-913.
- C. Injury to extensor muscles, curved fingers, 913.
- D. Stiff finger, 913-914.
- E. Useless thumb left for appearance, 914-915.

III. Loss of part of phalanx as loss of phalanx, 915-921.
- A. Tip of finger bone, 915-916.
- B. One-eighth inch of finger bone, 916-917.
- C. One-fourth inch of finger, 917.
- D. One-fourth and one-eighth inches of bones of fingers, 917-918.
- E. One-fourth of phalanx of finger, 918-919.
- F. Substantially all of distal phalanx of finger, 919.
- G. One-half of distal phalanx of thumb, 919-920.
- H. End of bone of second phalanx of thumb, 920-921.

IV. Injury to more than one digit, 921-928.
- A. Loss of four fingers, 921.
- B. Loss of third and fourth fingers; first joint of second, 921.
- C. Loss of third and fourth fingers; laceration of second, 921-922.
- D. Loss of second finger; first and third stiff, 922-923.
- E. Loss of first, second and third fingers and phalanx of fourth, 923.
- F. Contraction of second and third fingers, 923-924.
- G. Third finger stiff; loss of phalanx of fourth, 924.
- H. Loss of two phalanges of first finger; part of third phalanges of second and third; deformity of fourth, 924-926.
- I. Laceration of third finger; loss of first phalanx of second, 926.

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finger within the meaning of clause 6 of paragraph (e) of section 8 of the Illinois Workmen's Compensation Act [Call. 1920 Stat. ¶ 5475(8)], where, although the bone is more callous than usual, the injury does not interfere with the use of the distal joint, which still remains serviceable, and the tip of the finger will continue to be susceptible to cold and heat, and there remains enough of the bone to give the use of the finger.

Writ of error to review a judgment of the circuit court affirming an award of the Industrial Commission. Reversed and remanded with directions.

J. First and second fingers mashed; injury to tendons, 926-927.
K. Loss of fourth finger, fracture of metacarpal bone of third finger; infection, 927.
L. Loss of first finger with metacarpal bone, loss of flexor tendon of second finger, and laceration of all tendons of palm, 927-928.
V. Combination with other injuries, 928-931.
A. Injury to arm and hand, 928-929.
B. Partial loss of hands with injury to eye, 929.
C. Loss of phalanges with disability, 929-931.
1. Amputation following period of disability, 929-930.
2. Amputation immediately following injury, 930-931.
VI. Prior injury, 931.
A. Prior loss of part of finger in award for loss of hand, 931.
B. Loss of one hand; prior loss of other, 931.
VII. Effect of ability to use appliance, 931.

I. Injuries as equivalent to loss of hand.

A. All fingers and thumb lost.

The industrial board determined that claimant sustained a personal injury, resulting in the loss by separation of his thumb and all of the four fingers of the right hand at the metacarpal articulation, and asked the court to determine the number of weeks for which he was entitled to compensation. The court said that the facts showed that the injuries which claimant received resulted in what is termed, under the act, a permanent partial disability, and they were therefore required by the question to construe section 31 of the act, which section, after making a specific provision for the loss by separation of phalanges or entire fingers, and for the loss by separation of one hand at or above the wrist joint, concluded with a provision that in all other cases of permanent partial disability, including any disfigurement which might impair the future usefulness or opportunities of the injured employee, compensation in lieu of all other compensation should be paid when and in the amount determined by the industrial board, not to exceed 55 per cent of the average weekly wages for a period of 200 weeks. The court held that, under that section, they must conclude that the legislature did not intend that for the loss of two or more fingers on one hand in the same accident the amount of compensation could be arrived at by multiplying the schedule allowance for one finger by the number of fingers lost, because such an interpretation would lead to the absurd result that, for the loss of an entire hand at or above the wrist, the schedule

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For plaintiff in error—Gallagher, Kohlsaat & Rinaker.

MR. JUSTICE STONE delivered the opinion of the court:
This cause is brought to this court on writ of error to the circuit

would allow compensation for 150 weeks, while multiplying the specific allowance for each finger and adding the allowance for a thumb, there would be a total of 180 weeks, and that therefore such an injury as the one in question must fall under the general provision, and further, although that provision would seem, when standing alone, to give the board discretion in all such cases not to exceed 200 weeks, nevertheless, when read as a whole and taken in connection with the general plan and purpose of the act, it was clear that the legislature never intended, generally speaking, by such general provision that the board could, in its discretion, allow for a less injury more than was provided in the specific schedule for a greater injury. The court said, however, if such unusual and extraordinary facts should arise, of which they were unable to conceive of any instance at that time, in which the judgment of the board that injury by severance of a part and less than the whole member would entitle the injured employee to compensation for a greater period than that specifically provided for in the schedule for the loss of the whole, the board would be authorized to resort to the general provision and grant such allowance for such a period as, in its judgment, would be proper, not to exceed 200 weeks. In re Maranovitch, — Ind. App. —, 117 N. E. 530 (1917).

B. All fingers and first phalanx of thumb lost.

While claimant was engaged as a transfer man in operating an electric motor truck as an employee of the American Express Company, the motor truck came into collision with a yard engine, and claimant sustained accidental injuries which necessitated amputation of all four fingers of his right hand up to and including the greater portion of their proximal phalanges, leaving stumps with no separations between the ends, but with no involvement of the metacarpal bones. There was also a laceration and fracture of the terminal phalanx of his right thumb resulting in some thickening due to the growth of callous and in the muscles and tendons becoming somewhat shortened and smaller, impairing the full use of the thumb, and resulting in inability to bring the thumb into conjunction with the palm of the hand. Four months after the injury claimant returned to work, being assigned to clerical duties, and thereafter became night watchman at the station, and later on, at his request, resumed his former position of transfer man, and, at the time of the final hearing before the commission, he was being paid $10 a month more than his wages at the time he was injured. An award was first made for 5 weeks' compensation, and later an award for 116 weeks' compensation was made for the loss of four fingers, and subsequently the latter award was rescinded and an award for 244 weeks' compensation was made for the equivalent of the loss of the right hand. It was contended by defendant that the commission was not justified in awarding compensation for the permanent loss of the use of the hand. Upon appeal the court found that the evidence showed that claimant could

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court of Cook county to review a judgment of that court affirming the award of the Industrial Commission.

At the time of the accident in question the plaintiff in error and defendant in error, Alfred A. Habel, were working under and sub-

push a truck, holding it with his left hand and pushing it with the palms of both hands, but that his right hand could not be used in pulling the truck; that he could lift packages by pressing both palms against opposite sides of the package; that he could carry a package by lifting it with his left hand and resting it upon or supporting it by his palm and right forearm, or by inserting the palm of his right hand beneath the string by which the parcels were tied; that he could hold paper down with the palm of his right hand while writing on it with his left hand; that he could lift a small goblet of water to his lips; that, by a clip fastened to his hand, he could hold a fork, but could not raise food held by the fork to his mouth; that with a pencil between the thumb and palm of his right hand he could write four or five words, but that the thumb was weak, having about one-tenth strength, so that, upon writing with right hand, his thumb would lose its strength after a minute or two, and he could not hold the pencil. It was held that, while claimant had some use, for certain limited purposes, of the remaining portion of his hand, it could not fulfil, in a degree fair and worth considering, its normal and natural functions, and that the award of the commission was fully justified and should be affirmed. Dutcher v. American Exp. Co., 183 N. Y. App. Div. 162, 170 N. Y. Supp. 442 (1918).

C. All fingers and most of palm lost.

Plaintiff suffered an injury, while operating a punch press, which resulted in the loss of substantially all his right hand except the thumb, incapacitating him for work in the employment at which he was engaged at the time of the injury. He claimed compensation for total loss of his hand, to which defendant did not accede, contending that compensation was limited to that provided by the act for the loss of his four fingers. Upon hearing before a committee of arbitration he was awarded compensation for the loss of four fingers, and, not being satisfied with the award, appealed to the board, which modified the award by providing that the compensation awarded by the committee for the loss of four fingers should continue for 100 weeks, as specified, and if at the end of the 100 weeks he was totally disabled from working in the employment in which he was working at the time of the accident, he should be paid compensation at the same rate during such total disability, with a further provision for reduction of the amount in case his disability became partial. On the appeal before the board plaintiff claimed that he was entitled to compensation for 150 weeks for the loss of one hand instead of for 100 weeks, as found by the committee of arbitration, and on appeal to the supreme court contended that he should receive compensation for 150 weeks for the loss of the entire hand, or that the order of the industrial accident board be affirmed. The board found, and photographic evidence sustained the finding, that all four fingers were taken off as a result of the accident, and that, in addition thereto, practically the whole of the palm or fleshy part of the hand was also removed, so that when he bent his thumb over there was noth-

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ject to the provisions of the Workmen's Compensation Act. The accident arose out of and in the course of the employment. The award was for six dollars for a period of 6¼ weeks for total temporary incapacity for work, and a further award of six dollars per week

ing it could reach. The compensation act contained a provision that in no case should the amount received for more than one finger exceed the amount provided in the schedule for the loss of a hand, or one-half the average weekly wages for 150 weeks, and the court said that, if the strict construction urged by defendant was accepted, in no case could the amount awarded for more than one finger exceed, in the aggregate, 100 weeks, and the provision mentioned, which plainly recognized a permissible discretionary limit for the loss of more than one finger, to 150 weeks, would be meaningless, and held that, as the board found total disability, and the undisputed evidence showed that by reason of his injury plaintiff was not only totally but permanently incapacitated for work at the employment at which he was engaged at the time of the accident, the practical application would be the same whether he was awarded compensation for the loss of a hand, as he claims, or for 150 weeks for the totally disabling loss of all his fingers, taking with them the whole of the palm of the hand, and the award of the industrial accident board was affirmed. Lovalo v. Michigan Stamping Co., 202 Mich. 85, 167 N. W. 904 (1918).

D. Three fingers lost, one ankylosed.

Claimant lost three fingers of the right hand, and the index finger remaining was permanently ankylosed, the thumb being in a normal condition and the palm not seriously affected, aside from the loss of the fingers. The industrial commission awarded compensation for the loss of the hand. Under the compensation act a schedule of compensation provided for a fixed sum given for the loss of a finger or thumb, or the designated parts thereof, and for the loss of a hand, and there was no other provision for the loss of a part of a hand. The court held that it was evident that claimant had some use of the hand, and that the commission could not, in a case where a part of the hand was lost, award a corresponding part of compensation fixed for the loss of a hand, and said that if the hand was not lost, but was injured, otherwise than by the loss of the thumb or certain fingers or part of them, the compensation must either rest upon the loss of the separate members, or must fall under the provision as to other injuries which will be compensated for by the difference between the earning power before and after the injury. The award was reversed, and the matter remitted to the commission for further consideration. Adams v. Boorum & Pease Co., 179 N. Y. App. Div. 412, 166 N. Y. Supp. 97 (1917).

E. Three fingers lost, one crooked, palm injured.

In the course of his work of handling pig iron, claimant's left hand was crushed so that the second, third and fourth fingers were amputated, and the index finger was badly crushed, leaving a scar on the inside of the finger which contracted it so that it was bent inward, was stiff, and had very little motion, and was always painful. The palm of the hand

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for a period of 17½ weeks, as provided by paragraph (e) of section 8 of the Workmen's Compensation Act of 1917, for the reason that the injury sustained caused the loss of the first phalange of the index finger of the right hand. The only issue in this court is to that

became infected and was lanced several times, and at the time of the hearing before the commission, 8 months after the injury, it was soft, more hollow than the right hand, and there had been some sloughing of the tissues. The thumb was not injured and could be used in connection with the bent and stiffened index finger and the stump of the second finger to pick up small articles, assist in dressing, button a coat and do similar small acts. Previous to the accident claimant had received another injury and the second finger of his left hand had been amputated between the first and second joints, and a further amputation of one-half inch to three-quarters of an inch resulted from the present injury, leaving about one-fourth of the middle phalanx in position. Three months after the injury, claimant returned to work for the same employer, but his work was of a different character and for less pay, the character of the work not being clearly shown, but claimant's testimony showing that he did it with one hand by resting the handle of a scoop across the wrist of the other arm, using an appliance fastened around the wrist. The commission made an award based upon the permanent and complete loss of the use of the left hand, and the employer contended that it should have been based upon the loss of the index, third and fourth fingers, and should not have exceeded 50 per cent of the average weekly wages for 70 weeks, instead of 150 weeks which was awarded. It was further contended that, even if there was a complete loss of the use of a hand, the previous loss of a part of the second finger would have entitled the claimant to an award of 30 weeks' compensation if the Workmen's Compensation Act had then been in force, and therefore the compensation for the present injury should not in any event have extended beyond 120 weeks. The court held that the permanence of the loss of use was apparent and, while the defendant in error was able to perform some acts with his thumb and the remains of his finger, they were not of such a character as to be of any practical value in manual labor—at least there was evidence from which the arbitrator and the commission might reasonably have arrived at that conclusion, and the fact that by the use of a mechanical appliance or some substitute for the hand the claimant was able to perform manual labor to some extent, was not inconsistent with the complete loss of the use of the hand for practical work, as the incapacity to use need not be tantamount to an actual severance of the hand, but it was enough that the normal use had been taken entirely away. Upon the question of the prior loss of part of a finger, the court said the fact that the hand was not perfect did not render its loss any less complete because, as the result of the injury, he had lost the use of the hand which he previously had, and, under the statute, he was entitled to compensation for that loss, and the fact that he might have recovered for the first injury did not reduce the amount of compensation to which he was entitled for the loss of the use of his hand. The judgment was affirmed. Mark Mfg. Co. v. Industrial Commission, 286 Ill. 620, 122 N. E. 84 (1919).

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part of the award which relates to the loss of the first phalange of the index finger.

On August 3, 1917, the defendant in error, while working for the plaintiff in error and engaged in operating a punch press, injured the

F. Three fingers lost, one mutilated.

The workmen's compensation commission determined that claimant had sustained a loss of the index finger, for which he was allowed compensation for 46 weeks, that he had lost the second finger, for which he was allowed 30 weeks, that he lost the third finger, for which he was allowed 25 weeks, and that the fourth finger was mutilated, for which he was allowed 4 weeks, aggregating a total of 135 weeks, and no fault was found with that finding. The commission took the case up a second time, and concluded that claimant had lost the use of his hand, and made an additional allowance, bringing the time up to 244 weeks, and the employer and the insurance carrier appealed from the award, urging that the commission was without power to make more than the award specifically provided by the statute for the loss of thumbs and fingers. The court said that, obviously, the legislature contemplated that there would be cases in which the loss of a large portion of the fingers and thumb would produce a permanent loss of the use of the hand, and held that, where the first three fingers were destroyed, and the fourth made practically useless by reason of its bruised and strained condition, there could be no doubt that there had been a permanent loss of the use of the hand, which would not be compensated by the provision which was made for the separate fingers, and said: "We do not recognize the theory that the question of the use of the hand is to be determined by the particular work in which the claimant has been engaged; the act has not attempted to insure the workman in his particular avocation for life. It simply undertakes to compensate for the injury sustained, and the question presented to the commission is not whether the hand is permanently useless for a particular work, but whether it is useless for any kind of work to which the claimant may be adapted." The award was affirmed. Rockwell v. Lewis, 168 N. Y. App. Div. 674, 154 N. Y. Supp. 893 (1915).

G. Three fingers and two joints of fourth lost, thumb injured.

Claimant's hand was drawn into a hot mangle in her employer's laundry, with the result that she lost, by amputation, the index, middle and ring fingers of her left hand about one-quarter of an inch back of the head of the metacarpal bones, while the little finger was amputated at the second joint. The thumb was injured in the fleshy part so that it appeared to be somewhat sensitive owing to the necessary treatment. The state industrial commission awarded compensation for the total loss of the hand. This award was held to be erroneous and the matter was sent back to the industrial commission with directions to base the award upon the statutory allowance for the loss of the fingers, the injury to the thumb being only incidental to the general injury to the hand, no part of it recognized by the statute having been lost. Barringer v. Clark, 184 N. Y. App. Div. 685, 172 N. Y. Supp. 398 (1918).

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tip of the first finger of his right hand. The medical testimony shows from an examination of the finger and from X-ray photographs that about one-sixteenth of an inch of the phalange bone of said finger is missing; that the bone is more callous than usual; that the

H. Two fingers and two joints of other two lost.

Claimant sustained accidental injuries resulting in the amputation of his left arm between the wrist and elbow, and of the whole of the second and third fingers, and of two phalanges of the index and little fingers of his right hand. The workmen's compensation commission awarded him compensation for 244 weeks for the loss of his left hand, and 116 weeks for the loss of the four fingers of his right hand, and later the state industrial commission reconsidered the decision of the workmen's compensation commission, and determined that the injuries to the right hand had resulted in the permanent loss of the use of the hand, and made an award for total permanent disability. An appeal was taken from the award upon the grounds that the claimant's injuries did not constitute total permanent disability, and that the award was excessive. Upon the hearing before the commission it appeared that the claimant had some use of the hand, that he could pick up a lead pencil, but nothing much smaller, could write his name, and could dress himself with the exception of putting on his collar and tie. The court held, while the commission was fully warranted in making the decision which it did under the statute as then construed, that clearly, under the later decisions, claimant could not be said to have lost his right hand, and hence the making of an award for total permanent disability was not justified, but the award should have been for permanent partial disability. The award was reversed. Carkey v. Island Paper Co., 177 N. Y. App. Div. 73, 163 N. Y. Supp. 710 (1917).

I. Three fingers, other injuries.

An employee sustained an injury for which he received partial compensation and an additional compensation under the provisions of the Workmen's Compensation Act, and the only question upon the first appeal was as to whether, upon the facts, he was entitled to receive 25 weeks' additional compensation for a hand "permanently incapable of use." The exact nature of the injury to the hand was not given, but, in affirming the finding of the committee of arbitration that his hand was rendered permanently incapable of use, the industrial accident board found that the finding of the committee was warranted by the visible external physical condition of what remained of a hand, by the internal loss of bone structure as shown by X-ray photograph, by the testimony of the employee as to how he could use the hand, and by the testimony of the physician, who concluded with the statement that the hand had no use as a hand. The court held that, there being reasonable evidence to support the finding, it was conclusive, and that an agreement between the employee and the insurer for a specific additional compensation for 25 weeks for the loss of three fingers was not a final determination that the injury which the employee suffered was for the loss of the fingers and not for injury to the hand, rendering it permanently incapable of use, because, while the agreement as to additional compensation made reference to the

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injury did not interfere with the use of the distal joint, which still remains serviceable; that the tip of the finger would continue to be susceptible to cold and heat; that there remained enough of the bone to give Habel the use of the finger.

loss of three fingers of the right hand, it did not state that it was intended to cover all claims for other additional compensation, and therefore did not bar any action of the board based upon conditions which were not covered in the agreement. The decree of the superior court affirming the decree of the industrial accident board was affirmed. In re Lemieux, 223 Mass. 346, 111 N. E. 782 (1916).

J. Three-fourths loss of use of hand.

In Phonville v. New York & Cuba S. S. Co., — N. Y. —, 123 N. E. 258 (1919), the industrial commission found that claimant lost the use of 75 per cent of his right hand, and awarded him $20 per week for 183 weeks. The appellate division modified the award to $15 per week for 244 weeks. Under the compensation act the weekly compensation for the loss of a hand was not to exceed $20 a week. Permanent loss of use is equivalent to the loss of the member. In other cases $15 is the weekly limit. The court held that clearly the award should have been made under the provision authorizing the proportional award for the loss of the use of a hand, and therefore the weekly limit was $20 instead of $15. The order of the appellate division was reversed and the award of the industrial commission affirmed.

II. Injury as equivalent to loss of finger or thumb.

A. Loss of part of second phalanx of finger.

In Fortino v. Merchants' Dispatch Transp. Co., 171 N. Y. App. Div. 956, 156 N. Y. Supp. 262 (1915), claimant was awarded for the total loss of the index finger of his left hand, the amputation having become necessary by an injury resulting in the taking of a portion of the second phalanx of the finger. This was held to be correct and the award was affirmed without further particulars of the injury being stated.

B. Loss of first phalanx, cellulitis of joints.

While complainant was operating a sewing machine she was accidentally injured by a needle puncturing the third finger of her left hand, resulting in blood poisoning which necessitated the amputation of the finger at the first phalanx. The amputation appears to have been followed by cellulitis of the joints, so that the third finger had become practically useless. The commission had the claim before it on various occasions, making allowances and holding the same open for further consideration, with the result that the claimant had been paid the full compensation provided for the total loss of a finger, and further award was made by the commission, apparently upon the theory which was advanced by claimant that the finger, not having been actually severed above the first phalanx, the claimant had not lost the third finger, but was to be considered as coming within the provisions of the act that in all other cases in that class of disability the compensation should be 66 2-3 per cent of the difference between the employee's average weekly wages and his wage earning capacity thereafter in the same employment or otherwise.

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It is contended by the plaintiff in error that there is no evidence upon which the arbitrator and the Industrial Commission can base an award for the loss of the first phalange of the finger. The question whether the loss of any portion of the first phalange of the

The court said that the result of that contention would be that where a person had lost the entire use of a finger, only a portion of which was amputated, he would be entitled to a larger compensation than one who had suffered amputation of the entire finger. In reversing the award the court said: "In the case at bar a reasonably liberal construction gives the claimant the benefit of a loss of a third finger, where she still retains a considerable portion of it, which may be of more or less use to her; but to extend this construction to enable her to get more for this useless finger than she would be entitled to if the judgment of the surgeon had called for taking away a trifle more of the finger is absurd, and opens the way to fraud and litigation, where it was the purpose of the statute to eliminate both." Feinman v. Albert Mfg. Co., 170 N. Y. App. Div. 147, 155 N. Y. Supp. 909 (1915).

C. Injury to extensor muscles, curved fingers.

Claimant met with an accident consisting of a laceration of the back of the left hand which affected the extensor muscles controlling the third and fourth fingers, the third finger being drawn towards the palm of the hand at an angle of about 45 degrees, and the fourth finger at an angle of about 90 degrees, so that the two fingers were rendered practically useless. It was agreed that the earning capacity of the claimant, a painter, had not been diminished by the accident, and the only issue was whether claimant had "lost" those two fingers within the contemplation of section 16 of the statute and should receive the compensation specified therein "for the loss of the third finger, one-half the average weekly wages during the 18 weeks. For the loss of the fourth finger, * * * one-half the average weekly wages during fifteen weeks," or whether he had suffered a partial disability and should be compensated as provided in section 15, in which the basis of compensation was a difference between his earning capacity before and after the accident. Claimant contended for the former construction, and urged that the loss of the use of the third and fourth fingers must be construed as a loss of those fingers, which would entitle him to the specific amounts without regard to whether his earning capacity had or had not been lessened. The chairman of the industrial commission overruled his contention and fixed the amount of damages under section 15. The court sustained the finding of the commission that the loss of a member should be construed to mean a loss by severance only, and the appeal was dismissed. In re Merchant, — Me. —, 106 Atl. 117 (1919).

D. Stiff finger.

Claimant was injured, the finding of the commission being that the index finger of his right hand became ankylosed, and that he had permanently lost the use of that finger. The court said that while the record was not very satisfactory, the finding that the claimant had permanently lost the use of his finger probably found support in the record, but that, as the accident happened prior to the amend-

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finger is to be considered as the loss of the first phalange and award made therefor under paragraph (e) of section 8 of the Workmen's Compensation Act, or whether such disability is to be considered a temporary disability, has not heretofore been passed upon by this

ment of 1916, making the permanent loss of the use of a finger equivalent to the loss of such finger, the award should have been, instead of 66 2-3 per cent of the average weekly wages of the employee for 46 weeks, as for the loss of an index finger, 66 2-3 per cent of the difference between his average weekly wages and his wage-earning capacity thereafter, in the same employment or otherwise, payable during the continuance of such partial disability, not exceeding, however, the compensation for the loss of an index finger. The award was reversed and the proceeding remitted to the commission. Sugg v. Erie R. Co., 180 N. Y. App. Div. 133, 167 N. Y. Supp. 390 (1917).

Claimant was injured, and the finding of the commission was that the index finger of his right hand became infected, resulting in an ankylosis, which caused a permanent loss of the use of that finger, and on that finding an award of compensation was made by the commission of 66 2-3 per cent of the average weekly wages of the employee for a period of 46 weeks, or the equivalent of the loss of the index finger of the right hand. The report of the attending physician stated that claimant had a stiff finger and that the disability was likely to exist for 12 weeks from the date of the injury. Claimant stated that he estimated his disability would continue for the remainder of his life, and that his daily earnings had been reduced 25 cents per day by the injury, and, in his claim to the employer for compensation, stated that his index finger was permanently disabled, being stiff. The court held that there was no sufficient evidence upon which to base the finding that there had been a permanent total loss of use of the finger, and said further that, even if it were a permanent loss, an improper rate of compensation had been adopted, inasmuch as the accident occurred before the passage of the amendment of 1916, making the permanent loss of a finger equivalent to the loss of such finger, and that therefore the case fell within that part of the statute providing that a compensation should be 66 2-3 per cent of the difference between claimant's average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability and subject to the qualification that such compensation cannot exceed that for the loss of a finger. Supple v. Erie R. Co., 180 N. Y. App. Div. 135, 167 N. Y. Supp. 391 (1917).

E. Useless thumb left for appearance.

Claimant sustained an injury to the index finger and thumb of his left hand while working in a furniture factory on a shaper. The surgeon employed by defendant to care for the injury advised amputation of the thumb, but applicant insisted upon saving a portion of the thumb for the sake of appearances, and, under a local anesthetic, the bone of the second phalanx of the thumb was removed but not disarticulated, and the first phalanx of the thumb was then sewed back to the upper part of the thumb, forming a short or stub thumb in appearance, the upper portion of the thumb and joint at the hand being ankylosed or so grown together

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court. Clause 6 of paragraph (e) of section 8 of the Workmen's Compensation Act provides as follows: "The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of one-half of such thumb, or finger, and compensation

as to form no joint in reality, so that applicant had lost the use and control of the thumb of his left hand by reason of the accident, although there remained feeling in the thumb. Claimant was absent from his employment 13 weeks, when he was able to return and do the same work he was engaged in at the time of the injury and earn the same wages. He was awarded compensation for a period of 60 weeks by the industrial board on the basis of an entire loss of his thumb, and defendant contended that the period of his disability or incapacity was limited to 13 weeks. The court held that the injury was equivalent to the loss of the entire thumb, and reversed the award of the industrial accident board, holding that it should have been for the period of disability only. Adomites v. Royal Furniture Co., 196 Mich. 498, 162 N. W. 965 (1917).

III. Loss of part of phalanx as loss of phalanx.

A. Tip of finger bone.

Claimant, a girl 17 years of age, while operating a staying machine in a factory, was injured by her finger slipping and being caught under the head of the stayer, the end of the second finger of her right hand being squeezed off. Fourteen days later she returned to work at a smaller compensation than she formerly received, which was to continue until she recovered sufficiently to do her regular work. She did not go to a hospital, but was treated at home, and the conclusion of fact of the commission was that her fingers slipped and were caught between the anvil and the head of the staying machine, requiring the amputation of the tip of the bone of the second finger of the right hand. The court said the commission, by the expression "requiring the amputation of the tip of the bone" must have referred to the amputation by the machine, rather than any amputation executed by a surgeon's knife, for there was no evidence in the record of any surgical amputation but, in fact, the opposite was in the record, as the attending physician, in reply to a question as to what the treatment was, answered none, and in describing the nature and extent of the injury the physician said it was loss of the tip of the second finger of the right hand. The court said that this description did not minimize the injury as was shown by the X-ray photograph, for it was only by careful examination of the picture that any injury at all could be discovered, and, even after the injury was located it was perfectly apparent that only the merest shaving of bone was gone. The commission determined that the case came within subdivision 3 of section 15 of the compensation law, which provided that the loss of the phalanx of the finger was considered to be equal to the loss of one-half of the finger, and awarded compensation for 15 weeks. The court said that, while the policy of liberal interpretation was applied to the compensation act, it should not go to the extent of becoming an absurd interpretation, and that it could not have been the purpose of the legislature to enact that a loss of a fraction of the first phalanx, so slight as

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shall be one-half the amounts above specified." The "amounts above specified" are set forth in clause 2 of paragraph (e) of said section 8, as follows: "For the loss of a first finger, commonly called the index finger, or the permanent and complete loss of its use, fifty per centum of the average weekly wage during thirty-five weeks."

to be scarcely perceptible to the naked eye, should be equivalent to the loss of half the finger, and further that, under the last clause of subdivision 3 of section 15, and subdivision 4 of that section, provision is made that in either the cases of permanent partial disability or temporary partial disability, otherwise specifically provided for in section 15, the compensation should be 66 2-3 per cent of the difference between the average weekly wages of the injured employee and his wage-earning capacity after the accident, this compensation to continue during the disability, subject to certain conditions and limitations, and held that the claim should be disposed of under either one or the other of those provisions, according as the commission should determine the facts. The award was set aside and the claim remitted to the commission. Mockler v. Hawkes, 173 N. Y. App. Div. 333, 158 N. Y. Supp. 759 (1916).

B. One-eighth inch of finger bone.

Plaintiff, while employed upon a metal press, was injured by an accidental repeating of the press, catching the second finger of her right hand. The state industrial commission found that she received a traumatic amputation of one-eighth of an inch of the bone, same being a substantial portion of the bone, and an award was made for the loss of one-half of the middle finger of the right hand, and the sole ground of appeal by the employer and the insurance carrier was that the amputation of so minor a portion of the first phalanx did not, of itself, constitute loss of the phalanx, and hence loss of one-half of the finger, within the intent of the compensation law. The injury resulted in depriving plaintiff of the fleshy part of the finger beyond the end of the bone, and the extent of the bone taken off was something less than one-eighth of an inch. There was no proof of permanent loss or impairment of the use of the joint or of the injured phalanx, and the attending physician's report stated, in answer to the question as to what period from the date of accident disability was likely to exist, that it would exist 4 or 5 weeks. The treatment given to the wound was cleansing it, making it aseptic, and applying aseptic dressings. The court held that it was not the intent of the Workmen's Compensation Act that an injury resulting no more seriously than simply in the severance of so small a piece of the tip of the finger, should entitle a claimant to an award for the loss of the whole phalanx, but that, unquestionably, claimant was entitled to an award of compensation for the injury which she has sustained, even though not to the extent of the award theretofore made. The award was accordingly set aside, and the case remitted to the commission for further action. Geiger v. Gotham Can Co., 177 N. Y. App. Div. 29, 163 N. Y. Supp. 678 (1917).

While claimant was employed upon a machine cutting paper boards, the middle finger of her left hand was caught by the knife, resulting in the loss by separation of a part of the finger near the base of the nail, in-

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Defendant in error has filed no brief or argument in this case, and we are therefore not apprised of his position in the matter. We find, however, upon examination of the abstract, that the judge of the circuit court of Cook county who passed upon the petition for a writ of certiorari indicated that he based his decision on the case of In

cluding one-eighth of an inch of the first phalanx of the finger, and the industrial board awarded compensation to her under a provision providing "for the loss by separation of not more than one phalanx of a thumb or not more than two phalanges of a finger * * * 15 weeks." Appellant contended that that section was only applicable when substantially two phalanges of a finger were lost by separation, and that, inasmuch as only a small portion of the first phalanx of claimant's finger was lost, the provision did not apply. The court said it could not agree with that interpretation, as a fair and reasonable construction of the language used made it apparent that the loss by separation of the whole of the distal and middle phalanges of a finger, or any material fraction thereof, entitled an employee to compensation for 15 weeks and that, while the loss by separation of only one-eighth of an inch in length of the distal phalanx of a finger might appear to be a small fraction, it should be remembered that the loss by separation of any portion in length of such phalanx necessarily removed the muscular cushion on the end thereof, and thereby seriously interfered with the use of the finger. The court said further that the fact that the function of claimant's finger was not seriously impaired, if it was a fact, and that she was able to return to work within a short time after the injury, could have no influence on the interpretation of the statute in question. The award was affirmed. H. K. Toy & Novelty Co. v. Richards, — Ind. App. —, 117 N. E. 260 (1917).

C. One-fourth inch of finger.

Claimant suffered the loss by amputation of approximately one-fourth of an inch of the tip of one of his forefingers, and no claim was made of any further injury to the finger. An X-ray photograph contained in the record indicated that the entire bulbous terminal of the tip of the finger was not taken off, and the attending physician described the treatment as the removal of pieces of bone, closing of wound, and application of antiseptic dressing. Claimant stated, in answer to a question as to whether he would be able to take regular employment when he returned to work, that he would, but that he would not be able to accomplish as much as he was before the accident. The industrial commission held that the injury constituted the loss of the first phalanx of the finger, and made an award of 23 weeks' compensation, which was the full statutory award for the loss of one-half the finger, and the employer and insurance carrier appealed, claiming that the loss of so small a portion of the finger did not constitute the loss of substantially all the phalanx, and hence that the award was not warranted. The court sustained their contention and the award was reversed. Thompson v. Sherwood Shoe Co., 178 N. Y. App. Div. 319, 164 N. Y. Supp. 869 (1917).

D. One-fourth and one-eighth inches of bones of fingers.

While cutting asbestos boards upon a cutting machine operated by foot power, claimant's attention was dis-

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re Petri, 215 N. Y. 335. In the Petri Case it was held, in construing a provision similar to that of this state above quoted, that the applicant should recover for the loss of the entire first phalange, where, as in that case, the applicant had lost more than one-third of the

tracted from his work, and his right hand was caught between the knives of the machine, amputating one-quarter of an inch of the distal phalanx of the index finger and one-eighth of an inch of the distal phalanx of the second finger of his right hand, the commission finding that the loss was of a substantial portion of the phalanges. The commission treated his injury as constituting a permanent partial disabilty and allowed claimant compensation fixed by the act for the loss of the first phalanx or one-half of the first finger, 23 weeks, and for the loss of the first phalanx, or one-half of the second finger, 15 weeks. The only surgeon examined at the hearing testified that he found the joints of the terminal phalanges normal, and just as good as the others, and that he did not think the injuries would incapacitate the claimant to any extent in performing the labor which he was performing when injured, or interfere at all with his carrying on work as a machinist. An X-ray photograph received in evidence was confirmatory of the testimony of the physician, and the finding of the commission that one-quarter inch of the bone of the index finger was gone and one-eighth inch of the bone of the second finger, and it also showed a practically normal projection of the fleshy, bulbous, terminal part of each finger beyond the end of the bone. The court held that the award of the commission for the loss of the first phalanx of each finger and the consequent loss of one-half of the finger was not justified, and that the award, instead of being based upon permanent partial disability, should have been of 66 2-3 per cent of the difference between the claimant's average weekly wage and his wage-earning capacity in the same employment or otherwise during the continuance of such partial disability. There were also other errors, and the award was set aside and the case remitted to the commission to make an award in accordance with the views expressed. Ide v. Faul & Timmins, 179 N. Y. App. Div. 567, 166 N. Y. Supp. 858 (1917).

E. One-fourth of phalanx of finger.

An agreement between claimant and his employer was made to the effect that the nature of the injury was that the top of the index finger of the right hand was crushed and the nail taken away and part of the flesh, and the report of the attending physician described the injury as absence of part of the end of the index finger. No testimony was introduced at the hearing, but a discussion then had between the attorneys and the members of the commission disclosed that there was a loss of not less than one-quarter and of not more than one-half of the distal phalanx of the index finger, including a portion of the bone, and the X-ray photographs forming part of the record showed that the loss more nearly approached one-quarter than one-half of the distal phalanx. Claimant was granted an award of the equivalent loss of one-half of the index finger of the right hand. The court held that the loss of the first phalanx, not of a part thereof, was loss which was made equivalent to the loss of one-half of the finger, and that, as the loss in question did not approximate a loss of

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distal phalange of a finger. The court in the Petri Case says: "We think we should hold that the provisions of the statute become operative and applicable when it appears that substantially all of the portion of the finger so designated was lost." This, we believe, is a rea-

substantially all of the first phalanx, the award was erroneous, and should be reversed. Tetro v. Superior Printing & Box Co., 185 N. Y. App. Div. 73, 172 N. Y. Supp. 722 (1918).

F. Substantially all of distal phalanx of finger.

While claimant was in the employ of a steel pulley company he met with an accident which resulted in injury to and subsequent amputation of part of the first phalanx of his third finger, and he thereafter filed a claim for compensation covering such injuries. The evidence which was presented to the compensation commission variously described his injury as the cutting off of the third finger about the middle of the nail, or that the third finger was cut off near the first joint or near the root of the nail, and the commission found that the claimant's injury resulted in the amputation of the third finger on the right hand near the first joint, and that, in the amputation, about one-third of the bone of the distal phalanx was cut off. On those findings an award was made as for the loss of the entire phalanx of the finger, under a provision of the statute that the loss of the first phalanx of the thumb or finger should be considered to be equal to the loss of one-half of the thumb or fingers and compensation should be one-half of the amount specified for the loss of a thumb or finger. It was argued by the defendants that the compensation could be awarded as for the loss of the phalanx only when the entire phalanx had been lost, and that, in a case where only part had been lost, compensation must be sought under the general clause that in all other cases the compensation should be at a certain rate fixed in the section. The court, in affirming the order of the commission said that the loss might be of such a minor portion of the phalanx that an award could not be sustained as for the loss of the entire phalanx, but such did not seem to be the present case, and that, while the findings of the commission were somewhat contradictory and rather unsatisfactory in that they stated in one place that the amputation of the phalanx occurred near the first joint and in another place that about one-third of the bone of the distal phalanx was cut off, in the light of the evidence they might be regarded as stating that substantially all of the phalanx was cut off, and on that theory the award could be sustained, because of the general purposes of the act under which it should not be interpreted too narrowly for the purpose of defeating a recovery. In re Petrie, 215 N. Y. 335, 109 N. E. 549 (1915).

G. One-half of distal phalanx of thumb.

Claimant's left thumb was caught in a punch press, necessitating the amputation of about one-half of the distal phalanx of the thumb, there remaining a stump of the nail on the upper side of the thumb and a good cushion on the under side. An agreement was made for compensation at a certain rate during disability and payments were made in accordance with the agreement for some time. Claimant filed notice and application for adjustment of his claim, and an

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sonable construction of such provision. The facts in this case, however, are not on all-fours with the Petri Case. The evidence shows, without contradiction, that the applicant lost but one-sixteenth of an inch off the first phalange of the index finger; that the injury

arbitration was had which resulted in the entry of an order denying him further compensation. An appeal was taken to the board and a finding there made that the injury was of such a character that applicant had lost the entire use of the first phalanx of the injured thumb because of the accident, and the award of the arbitration committee was reversed and compensation ordered for 30 weeks. The statute provided that the loss of the first phalanx of a thumb should be considered equal to the loss of one-half of the thumb and compensation should be one-half of the amount specified for the loss of a thumb, which was 60 weeks. The court held that, as the statute nowhere provided for the loss of a part of a phalanx in the list of specified injuries, the compensation should be proportionate to the extent of the impairment of the earning capacity in the employment in which he was working at the time of the accident, under section 11, part 2 of the act, and held that the award of the board should have been limited to the period of disability, which, under the testimony of claimant, was 18 weeks. The order was reversed and the case remanded for further proceedings. Packer v. Olds Motor Works, 195 Mich. 497, 162 N. W. 80 (1917).

H. End of bone of second phalanx of thumb.

Claimant was engaged in feeding metal into a power press when his thumb accidentally caught in the press and the end of it was crushed, and the state industrial commission made an award of compensation for the loss of the entire thumb. The employers claimed that the award should have been limited to the loss of one-half of the thumb. The statutory provision covering the case was that the loss of the first phalanx of the thumb should be considered equal to the loss of one-half of such thumb, and the loss of more than one phalanx should be considered as the loss of the entire thumb. The evidence showed that the first or distal phalanx was amputated, and the injury to the second or proximal phalanx consisted of the removal of a small triangular piece of bone about three-eighths of an inch in length on its longest side, running to a point on the inside of the thumb, and an X-ray photograph showed the fleshy covering of the whole proximal phalanx of the injured thumb to be practically the same as that of the uninjured thumb, while the report of a surgeon of the medical division of the commission mentioned the injury to the proximal phalanx as being no more than the involvement of a very small portion of the bone. As the evidence was undisputed, the finding of the commission was held to be a legal conclusion subject to review by the court, and held that it was the intention of the legislature that, to constitute the loss of the phalanx, the injury thereto must be so substantial as to entitle claimant to an award if it were the only phalanx injured, and, as the evidence showed that the chipping off of the second phalanx had not lessened the use of it, the commission was in error in making the award for the entire loss of the thumb. The award was reversed and the claim remitted to the commission. Baron v. National Metal

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did not interfere at all with the use of the distal joint; that the tip of the finger, while susceptible to cold and heat, did not in any way interfere with the use of the entire finger.

While we are of the opinion that a liberal interpretation should

Spinning & Stamping Co., 182 N. Y. App. Div. 284, 169 N. Y. Supp. 337 (1918).

IV. Injury to more than one digit.

A. Loss of four fingers.

Plaintiff, who owned a considerable number of shares of stock in the defendant corporation, and was treasurer of the company and manager of the plant, sustained an injury resulting in the loss of four of his fingers on the right hand while he was instructing an employee in the use of a machine. It was held to be competent for the industrial commission to estimate the proportionate loss of the use of claimant's hand, and the award was not to be disturbed on that account. Berman v. Reliance Metal Spinning & Stamping Co., — N. Y. App. Div. —, 175 N. Y. Supp. 838 (1919).

B. Loss of third and fourth fingers; first joint of second.

Claimant lost the little finger and the third finger of his right hand at the palm of the hand and the second finger at the first joint, and the committee awarded him compensation for a period of 50 weeks, the period being determined by adding together the 15 weeks allowed by the act for the loss of the little finger, 20 weeks for the loss of the third finger and 15 weeks for the loss of the second finger at the first joint. A review of the award was asked by defendant and the award of the arbitration committee was affirmed by the industrial accident board. Defendant claimed that, as the act paid compensation for disability only, the claimant was entitled to compensation only for a period of 20 weeks, such period being the longest time allowed by the act for the disability complained of. The schedule for the compensation of the loss of fingers or phalanges thereof was followed by a proviso "that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand." The court held that the award of the board was proper and it was affirmed. King v. Davidson, 195 Mich. 157, 161 N. W. 841 (1917).

C. Loss of third and fourth fingers; laceration of second.

Claimant, while operating a punch press, sustained an injury which severely lacerated the third and fourth fingers of his left hand so that it was necessary to amputate them, and the second finger was also lacerated but was not amputated. After receiving the final payment provided for in an agreement with the employer, which agreement did not contain any reference to the second finger, claimant filed with the industrial accident board a petition alleging that, in addition to the loss of the third and fourth fingers he had partially lost the use of the second finger of his left hand, and that he had not been compensated therefor, and prayed that the case might be opened and he be allowed further compensation. The court granted the petition and, after hearing, it was provided that claimant was entitled to compensation amounting to one-half of the difference between his average weekly wages before the injury and the average week-

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be given to this class of cases, yet such interpretation should not go to the extent of becoming absurd. It cannot be reasonably said that the loss of one-sixteenth of an inch of the first joint of a finger is the loss of the first phalange or that the legislature so intended.

ly wages he was able to earn thereafter, the board finding that the second finger was stiff; that there was practically no grip in it; that the tissues and tendons of the finger were badly lacerated so that it was practically useless; that it was not likely to recover to any considerable extent, the muscles being atrophied and the nerves injured; and that its condition was such as to seriously impair the ability of claimant to use his left hand. The court found that there was an abundance of evidence in the record to sustain the findings of the board, and also testimony showing that, if it had not been for the injury to the second finger, claimant could have done the work he had done previous to the injury, and the decision of the board was affirmed. Green v. Buick Motor Co., 201 Mich. 86, 166 N. W. 1028 (1918).

D. Loss of second finger; first and third stiff.

An employee 16 years of age who was employed as a water boy got his right hand caught in the gears of a stone-crushing machine and received injuries thereto consisting mainly in the loss of the middle finger, which was amputated, and stiffness and other impairment of the index and ring fingers, the thumb being normal and the little finger in good condition except from disuse. He resumed work a little more than a month after the accident, and continued until a few days before the work closed, doing a regular water boy's work, including the starting of fire in the office stove and sometimes carrying pieces of iron. The industrial board found that, by reason of the injury, the employee's hand had been rendered permanently incapable of use and that he was entitled to compensation for total incapacity from the date his employment ceased. There was no evidence that the employee made any effort to get work elsewhere between the time of leaving his employment and the date of the hearing before the arbitration committee, and nothing appeared in the record to show that he was unable to work during that period aside from the necessary disability due to such an injury. The court said that, assuming that on the evidence the board might have awarded compensation for a partial loss of the employee's capacity to earn wages, in its opinion it did not warrant their finding that he was totally incapacitated for work and unable to earn any wages; and that such total incapacity would continue for an indefinite period, although an inability to obtain work resulting directly from an injury would be incapacity for work within the meaning of the compensation act. The court, in reversing the decree, said that it might well be that on the evidence the employee was entitled to compensation for partial incapacity, and to some additional specific compensation under part 2 of section 11 of the act, but that, as the employee had a full trial, with the aid of counsel, there should not be a rehearing involving the introduction of new evidence, but he should be given an opportunity to move for a further hearing before the board on the testimony already heard, and to apply for such compensation as he was legally entitled to, and for that purpose the case was recommitted to the

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There is, therefore, a distinction to be drawn between this case, where but a small tip of the bone was taken without the destruction of the use of the first joint of the finger, and the Petri Case, where a substantial portion of the first phalange was amputated. That dis-

industrial accident board. In re Lacione, 227 Mass. 269, 116 N. E. 485 (1917).

E. Loss of first, second and third fingers and phalanx of fourth.

Claimant lost the first, second and third fingers and the first phalanx of the fourth finger of his right hand, and the commission made an award upon the basis of the permanent loss of the use of a hand. The evidence of the defendant tended to prove that neither the hand nor the use of it was lost, the evidence coming from two physicians and three laymen, and there was no contradiction of it except the statement of one physician that the hand was useless in claimant's vocation, and that of another physician that, from a vocational point of view, he considered the deformity equivalent to the loss of the use of the hand. The latter statements, the court said, were not contradictions of the other evidence, as the fact, if it existed, that the injuries barred the claimant from employment in the particular occupational vocation he was engaged in when he received them, did not in itself tend to prove that the hand or the use of it was lost, and said that it was not within the letter or spirit of the law or the legislative intention that an injury to a limb or member of an employee, incapacitating him for the particular employment, should establish that he was incapacitated for employment permitting or involving the use of the limb or member as injured, and that it was a matter of common observation that a hand, arm, foot or leg which was incompetent through injury for certain employment was competent and useful for other employment, and that the expressions "loss" and "loss of use" as used in the law should be given their unrestricted and ordinary meaning, and, inasmuch as complainant's hand or the use of it was not lost, the award should have been for 108 1-2 weeks under the first rate of compensation provided for in subdivision 3 of section 15, which was for the particular injuries sustained. As such an award had originally been made by the commission, that award was reinstated and affirmed and the order appealed from reversed. Grammici v. Zinn, 219 N. Y. 322, 114 N. E. 397 (1916).

F. Contraction of second and third fingers.

Claimant received an injury which resulted in a contraction and inability to extend the second and third fingers of the right hand, with consequent interference with the function of the hand and remaining fingers. Seven awards were made from time to time, all of which were paid except the last one, and the compensation paid covered a period of 91 weeks. Defendant contended that the compensation was limited to 55 weeks for the loss of a second and third finger under subdivision 3 of section 15 of the compensation act. The court said that they could not agree with that contention as the injury affected the use of the hand and the remaining fingers, and that they agreed with the commission that, under the statute as it was at the time of the accident, compensation might be awarded under that part of subdivision 3 of section 15 regu-

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tinction is also borne in mind in the case of Ide v. Faul & Timmins, 179 N. Y. App. Div. 567, where a workman sustained the loss of one-fourth of an inch of the bone of the index finger and one-eighth of an inch of the bone of a second finger, and an award had been made

lating "other cases." The court held, however, that the award was wrong, inasmuch as it was made on the basis of the average weekly wages of claimant before the accident, as the statute in such case based the compensation, not on the difference between his former and subsequent wages, but on the difference between his former wages and his wage-earning capacity thereafter, in the same employment or otherwise, and while he did not work within the period covered by the award, he went to work within 2 weeks after it was made and might have been able to do so at the time of the award. As no testimony was taken on that point, the award was unsupported. The award was reversed, and the proceeding remitted for the court to determine the wage-earning capacity of the claimant, and not to base the award alone on actual wages received since the accident. In re Behrens, 188 N. Y. App. Div. 66, 176 N. Y. Supp. 28 (1919).

G. Third finger stiff; loss of phalanx of fourth.

In Kenwood Bridge Co. v. Stanley, — Ind. App. —, 117 N. E. 657 (1917), the uncontradicted testimony of claimant was that, as the result of the injury in question, the third finger of his right hand was stiff, that the leader was cut, and that it was partially stiff in the knuckle joint, so that he could not bring it forward to touch the palm or to more than about a right angle with the palm, and that the joint where the finger was attached to the hand was perfectly stiff, that he also received a crushing injury to his little finger, and it was stiff in the first joint, the tip end of the little finger being crushed so that the surgeon cut off the bone and sewed it up near the distal joint, so that he had lost the use of the little finger, and could not pick up anything with it. The court held that, under this testimony, the commission was warranted in the finding of fact which it made that the injury had resulted in the loss by separation of the distal phalanx of the little finger of the right hand and in the permanent total impairment of the third finger of the hand, that is, that the third finger was rendered totally and permanently useless, and that this finding sustained the award made by the commission of compensation for 45 weeks, as the compensation act made no specific provision as to the period during which compensation should be allowed for an injury to either finger considered alone, nor for the injury to both fingers considered in combination, and therefore it became the duty of the board to fix the compensation, in its discretion, under the general provision of section 31 of the act.

H. Loss of two phalanges of first finger; part of third phalanges of second and third; deformity of fourth.

In Norwood v. Lake Bisteneau Oil Co., 145 La. 823, 83 So. 25 (1919), plaintiff suffered an injury to his hand for which he brought suit for damages in the sum of $5,800, with an alternative demand that if the compensation act should be found constitutional, and applicable to his claim, for $1,125. He recovered a judgment

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by the Industrial Commission based on a permanent partial disability. This award was set aside by the decision of the Supreme Court of New York on the ground that the award for the loss of the first phalange was not justified and that the award should have been for tem-

for $750, from which defendant appealed, and on appeal he abandoned the claim for damages, and sought to sustain the judgment under the provisions of the Workmen's Compensation Act, under which the $750 was allowed. The injury to plaintiff's hand consisted of the loss of two phalanges of his index finger, more than two phalanges of the second and third fingers, and a permanent deformity of the little finger and a shrinking of the left arm to two-thirds of its normal size and strength, and the judgment was made up of an allowance of 30 weeks for the loss of half of the index finger, at $5 a week, $400 for the loss of the second and third fingers, that is, for each finger $10 a week for 20 weeks, and, in addition, $200 for the loss of the fourth finger. The court held that for a case to come within one of the provisions for an injury particularly specified in subsection (c) of section 8 of the statute of 1914, which was in force at the time of the injury, as for the loss of a finger, thumb, hand, etc., the member must have been severed or amputated, and that if a finger, thumb, or hand, as the case might be, had been permanently disabled, either partially or totally, but not severed from the body or amputated, the compensation is to be measured by the general provisions of the first paragraph of subsection (c) of section 8, which was for one-half of the loss of wage earning capacity, not exceeding $10 a week, for a period not exceeding 300 weeks, but, as the record did not show what was the difference between plaintiff's wage earning capacity before and after the accident, the court was not able to make a computation under that subsection for allowing compensation for the injury to plaintiff's arm and little finger, for which injuries compensation was not specifically provided. Defendant contended that plaintiff was not entitled to compensation for the loss of more than one finger, nor for a period exceeding 2 months. The contention being founded upon a provision in subsection (c) of section 8, that: "In no case shall payments be made under more than one clause of this subsection, nor in any case after the employee is able to earn as much as he did before the accident." As to the contention concerning earning capacity, the court said, while it is true plaintiff was back at his work attending to the pumping machinery 2 months after the accident, he was not able to start the engine, and therefore it could not be said that he was able to earn as much as he earned before the accident, because other workmen, through sympathy, would start the engine for him, and defendant, perhaps through sympathy, paid him the same wages that he had earned before the accident. The court further held that the expression "in no case shall payments be made under more than one clause of this subsection," could not be construed to mean that, though an employee had suffered the loss of three, he would be entitled to compensation for the loss of only one finger, in view of the following provisions for compensation for the loss of fingers and thumbs, that in no case should the amount received for more than one finger exceed the amount provided in the schedule for the loss of a hand. The judgment was amended by reducing the amount

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porary disability, only. The court there distinguishes that case from the Petri Case. In the case of Geiger v. Gotham Can Co., 163 N. Y. Supp. 678, it was held that the loss of one-eighth of an inch of the bone of the first phalange of the second finger did not constitute loss of the phalange within the meaning of the Workmen's Compensation

from $750 to $550, and, as amended, it was affirmed.

I. Laceration of third finger; loss of first phalanx of second.

Claimant sustained an injury which resulted in the amputation of the middle finger of the left hand at the distal joint, and a laceration about an inch long over the dorsal surface of the ring finger of the left hand. The commission classified her injury as a permanent partial disability of the affected area and awarded her the sum of $48.25 for time lost and the further sum of $150 for the permanent partial disability, and she appealed from the ruling of the commission to the superior court, basing her appeal upon the capricious and arbitrary action of the commission. A motion to dismiss the appeal was denied and, after hearing the evidence, the court entered judgment reversing the action of the commission setting aside the award and remanding the claim with directions to pay the claimant the sum of $400, together with her costs, and from that decision the commission appealed. The compensation act contained no specific provisions for the loss of or injury to fingers or parts of fingers, but provided for the loss of the major hand at the wrist, $1,600, and provided further, that compensation for any other permanent partial disability should be in the proportion which the extent of such other disability should bear to that permanent partial disability above specified which most closely resembled and approximated in degree of disability such other disability, but in any case not to exceed the sum of $2,000, which was the limit fixed for the loss of a leg. The court said they sympathized with the trial judge, for they also regarded the award as pitifully inadequate, but, as the correction of such insufficiency was neither with the courts nor with the commission, but must be remedied by the legislative function of the state alone, and that obviously the superior court could not say that an award made from a schedule so defined and limited by law as the one in question was a capricious and arbitrary one. The judgment of the lower court was reversed and the decision of the commission affirmed. Foster v. Industrial Ins. Commission, — Wash. —, 181 Pac. 912 (1919).

J. First and second fingers mashed; injury to tendons.

Plaintiff was injured by having the first and second fingers of his left hand mashed, cutting the flesh and injuring the tendons, and was sent to the employer's physician, who treated the hand for several days, and at the end of 13 or 14 days he returned to work and for about 5 months did light work which he could perform with one hand, when he went back to his original work. During the entire period of his employment after being injured he received the same wages that he was receiving when he was hurt. Defendant argued that the plaintiff was not incapacitated from performing labor beyond the two weeks' period by reason of the injury received by him. The court said that this contention was against the evidence of plaintiff who testified posi-

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Act. So in the case of Thompson v. Sherwood Shoe Co., 164 N. Y. Supp. 869, where a workman lost approximately one-fourth of an inch from the tip of one of his fingers. In the case of Mockler v. Hawkes, 158 N. Y. Supp. 759, it was held that the loss of the tip of a finger, which loss could be discovered only on examination of an

tively that he could not use the first and second fingers of his hand effectively, and that the injury hindered him in the performance of his work, and as the jury, by its verdict, found against defendant and found that the plaintiff was incapacitated, and the findings were supported by evidence, they were conclusive upon appeal. The judgment was affirmed. Gailey v. Peet Bros. Mfg. Co., 98 Kan. 53, 157 Pac. 431 (1916).

K. Loss of fourth finger; fracture of metacarpal bone of third finger; infection.

Complainant, an employee in a printing establishment, got her left hand caught in a machine she was operating and it was so seriously mangled as to necessitate amputation at the middle of the metacarpal bone of the little finger. The metacarpal bone of the third finger was fractured and, not having been reduced, united irregularly and in a curved shape, thereby shortening it a quarter of an inch, impairing its power and usefulness; and, in addition, infection intervened as a contributing cause, and the trial court found that the usefulness of the hand had thereby been reduced and destroyed one-half, constituting a permanent partial disability within the meaning of the compensation act, and judgment was rendered accordingly. On appeal the court found that the record disclosed ample evidence to support the finding of the trial court, and held that, while the compensation act made express provision for the loss of fingers from the thumb down, it did not necessarily follow therefrom that an injury of the character disclosed should be treated as a matter of law as the loss of the little and ring fingers only, but that, if the nature of the injury in such a case, when taken as a whole, showed by relation a reduction in the power and usefulness of the hand as well as the injury to and loss of the fingers, the court might, and properly should, find the facts accordingly, for the intended purpose of the compensation act is to secure to the injured employee compensation for the disability actually sustained. The judgment was affirmed. State ex rel. Broderick Co. v. District Court, Ramsey County, — Minn. —, 174 N. W. 826 (1919).

L. Loss of first finger with metacarpal bone, loss of flexor tendon of second finger, and laceration of all tendons of palm.

Plaintiff, while employed in defendant's plant as an electrician, sustained an injury to his hand by a traveling crane running over it as he was grasping the track to support himself while putting in conduits, the injury necessitating the amputation of the index finger of his left hand, together with the metacarpal bone thereof, a severe crushing and loss of the flexor tendon of the second finger, and a severe laceration of all the tendons of the palm. After being totally disabled for over one month, claimant returned to work for defendant and was employed in an entirely different line of employment, that of foreman in the tool crib. At the time of the accident his wage was

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X-ray photograph, was not equivalent to the loss of the first phalange within the meaning of the Workmen's Compensation Act. The same has been held to be the rule under a statute similar to that in this state, in the case of Packer v. Olds Motor Works, 195 Mich. 497, where it was held that the loss of a part of the first phalange of the

45 cents an hour, while at the time of of the hearing before the industrial board a man in the same employment was paid $.85 to $1 an hour, and his wage in the tool crib was $.55 an hour. It was claimed, and the evidence supported the claim that claimant could no longer follow any part of his former employment of electrician. At first an agreement was made to pay claimant 35 weeks' compensation at $10 per week for the loss of the index finger, the agreement never being approved by the industrial accident board and, although payments were being made under the agreement, claimant filed notice of claim for injury, and a committee of arbitration awarded his compensation for 35 weeks at $10 per week for loss of the index finger and, in addition thereto, $10 per week for disability subsequent to the 35-week period. Payments were continued and accepted by claimant during 34 weeks, but he refused to accept the payment for the thirty-fifth week or to sign a settlement receipt, claiming that, because of the condition of his hand, he was unable to perform the same duties as prior to the accident. The insurance carrier filed a petition with the board praying release from further liability under the award of the committee because it appeared that applicant had returned to work for respondent in charge of the tool crib at 55 cents per hour, plus a 10 per cent bonus, and that he was able to perform his former duties, although he never actually attempted so to do. Testimony was taken, and after consideration the industrial board added an order denying the insurance carrier's petition and ordering the payment of $10 a week for total disability subsequent to the date of the expiration of the 35-week period, and it was that order which the court upon certiorari was asked to review. The order of the board provided that claimant should be paid $10 per week during the period of his total disability in the employment in which he was engaged when injured, and that, should such disability become partial, then claimant should be compensated at a rate equal to one-half the difference between the amount he was earning per week when injured and any lesser amount he may thereafter be able to earn in the same employment during the continuance of such partial disability. Claimant's contention was that the statute did not, under the specific disability section, provide for the loss of the use of a hand, except in so far as that loss of use tended to or did actually affect the ability of the injured servant to earn in the same employment in which he sustained his injury. The court sustained his contention, saying that the statute spoke in terms of disability, and when the period of disability ended, compensation ceased, and the order of the board was affirmed. Schimmel v. Detroit Pressed Steel Co., 206 Mich. 450, 173 N. W. 206 (1919).

V. Combination with other injuries.

A. Injury to arm and hand.

Plaintiff received injuries, mainly to the forearm and hand, and there was evidence that they were impaired to the extent of 75 per cent and that the

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thumb could not be so construed as to provide for an allowance of compensation for the loss of the entire first phalange of the thumb.

We are of opinion that the circuit court erred in quashing the writ of certiorari issued in this cause, and that the Industrial Commission erred in making an award for 17½ weeks, at six dollars per

upper arm was impaired to the extent of 8 per cent. Compensation was awarded on the theory that the impairment of the arm as a whole was to the extent of 75 per cent, and the amount awarded was 75 per cent of the amount fixed by the statute for an arm, and on appeal it was argued that such an award was out of harmony with the provision that amputation between the elbow and the wrist should be considered as equivalent to the loss of a hand for which the compensation allowed was less than that allowed for the loss of an arm. The court said, however, that they could not say that the trial judge might not properly find that the injured arm was capable of no greater service than a weakened part, and, if so, he might properly find that the whole arm was injured to the extent of 75 per cent, and that such a finding was not necessarily in conflict with the statutory provision making amputation between the elbow and the wrist equivalent to the loss of a hand only. The court said further it was conceivable that a man's forearm might impair the efficiency of the whole arm more than an amputation. The judgment was affirmed by the supreme court. Blackford v. Green, 87 N. J. L. 359, 94 Atl. 401 (1915), and this decision was affirmed by the court of errors and appeals, 89 N. J. L. 357, 100 Atl. 1069 (1916).

B. Partial loss of hands with injury to eye.

For 50 per cent loss of usefulness of each hand, combined with a 10 per cent loss of the use of one eye, see

Orlando v. F. Ferguson & Son, 19 N. C. C. A. 722n.

C. Loss of phalanges with disability.

1. Amputation following period of disability.

Claimant suffered a laceration of the first finger of the right hand, and a voluntary agreement was approved for the payment of 50 per cent of wages throughout the period of total incapacity, and he was paid under that agreement for 25 1-3 weeks. Something over 3 months after the injury it became necessary to amputate two phalanges of the finger, and plaintiff claimed that he was totally incapacitated from the date of the injury until the date of the amputation, and that during that time he was entitled to compensation under section 11 as compensation for total incapacity, and that from the date of the amputation he was entitled to 25 1-3 weeks' additional compensation under section 12 as compensation for partial incapacity. Defendant claimed that the only compensation that could be awarded was that for 25 1-3 weeks on the ground that the compensation for the loss of the phalanges of the finger was exclusive of all other compensation. The court said it could not agree that since the loss from the date of the injury to the date of the amputation was of the use of the two phalanges, and from the date of the amputation was the loss of the two phalanges, the injury was a single one, but that the word loss was used in the act in the sense of deprivation, and designated the handicap under

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week, for permanent partial disability, as provided in paragraph (e) of section 8 of the Workmen's Compensation Act. The award of six dollars a week for a period of 6¼ weeks for total temporary incapacity is a proper award.

which the employee would suffer in the future, and that compensation was based upon that loss, and while, in the case of the loss of a member, the injury resulted in partial incapacity, the compensation for each was based upon a different theory. The court further said that there was nothing in the act which prevented compensation for any number of the several injuries specifically provided for, and that payment for one did not pay for any but the one injury, and if there had been a partial incapacity followed by the loss of a member there was nothing in the act which forbade the award of compensation for each, whether the loss of the member followed an injury to the member resulting in a loss of its use, or followed an injury to some other member, being quite immaterial as the injuries were equally distinct. The argument of defendant was based, to a large extent, upon that part of section 11 which provided that the compensation for the named injuries should be "in lieu of all other payments." The court said, however, that that provision referred to payments for the named injuries, and as to those the compensation designated was exclusive, but that it did not limit the award to any one of the compensations provided for the named injuries, nor did it purport to be in lieu of payments made for injuries resulting in partial incapacity not among those named injuries, and said: "The handicap determines the loss. But when the loss of the member is preceded by a long incapacity while efforts are made to heal and cure the injury, the injured employee has suffered far more than from the mere loss of the member. Compensation for the loss of the member will not compensate him for the period of incapacity preceding the loss of the member. The just rule of compensation will give compensation for the period of total incapacity as well as for the loss of the member." Judgment was advised in accordance with the opinion, dismissing the appeal. Franko v. William Schollhorn Co., — Conn. —, 104 Atl. 485 (1918).

2. Amputation immediately following injury.

In Kramer v. Sargent & Co., — Conn. —, 104 Atl. 490 (1918), claimant suffered an injury to the terminal phalanx of the index finger of his left hand which resulted on the same day in the loss of the phalanx by amputation and in a total incapacity for all labor from the date of the injury to the date of the hearing, which total incapacity would continue for a period of undetermined extent, and claimant claimed one award for the loss of the phalanx and another for the total incapacity resulting from such loss. The parties made a voluntary agreement, duly approved by the commissioner, for the payment of the medical, surgical and hospital expenses and for the loss of the phalanx, and left open for future determination any question as to total incapacity on account of the injury. The commissioner confirmed the voluntary agreement and also made an award for the total incapacity on account of the injury. The court distinguished the case from the case of Franko v. William Schollhorn Co., V, C, I, ante, in that, in the present case, there was but one injury, and the incapacity

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The judgment of the circuit court will therefore be reversed and the cause remanded to that court, with directions to enter a finding and order not inconsistent with the views herein expressed.

Reversed and remanded, with directions.

followed immediately in the loss of the phalanx and resulted from it, while in that case there was a considerable period of incapacity following the injuries before the loss of the phalanx, and held that, in the present case, the award for the loss of the phalanx was in lieu of and exclusive of all other payments for the particular injury, which is the loss of the member.

VI. Prior injury.

A. Prior loss of part of finger in award for loss of hand.

For the effect of prior loss of part of one finger upon an award for an injury equivalent to the loss of the hand, see Mark Mfg. Co. v. Industrial Commission, I., E., ante.

B. Loss of one hand; prior loss of other.

Claimant was injured in 1914, by having his right hand severed at the wrist. His left hand had been amputated in 1892, and the question was certified as to whether claimant was entitled to compensation for permanent total disability, under subdivision 1 of section 15, or for compensation as for the loss of one hand under subdivision 3 of that section. The court held that claimant should be compensated for total disability, and that as, by the accident, he had lost all the ability he had of earning a living, the disability was therefore total, and said that as his wages were evidently based upon the fact that he was previously partially disabled, to allow for the loss of the second hand as a permanent disability, a percentage of the weekly wage that he was then earning would be in complete harmony with compensation to one who had lost both hands by the accident, who received his 66 2-3 per cent upon the greater wages than he was earning at the time of the accident. Schwab v. Emporium Forestry Co., 167 N. Y. App. Div. 614, 153 N. Y. Supp. 234 (1915).

VII. Effect of ability to use appliance.

For the effect upon an award of ability to use an appliance, see Mark Mfg. Co. v. Industrial Commission, I, E, ante.

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WOODS v. CHALMERS MOTOR CO.

[Supreme Court of Michigan, December 22, 1919.]

207 Mich. 556, 175 N. W. 449.

1. **Explosives—Gasoline—Oil, etc., on water—Destruction of houseboat—Question for jury—Contributory negligence.**

If the testimony of the owner of a houseboat, that he had noticed the condition of the surface of the water surrounding it, which was covered with oil and greasy scum, and was trying to find a new location to get away from the fumes of gasoline, permitted an inference that he was actuated by any thought or appreciation of danger from explosion or fire, it was for the jury, rather than the court, and the trial court did not err in submitting the question of his contributory negligence to the jury, in an action by his assignee for damages for the loss of the houseboat by fire, communicated to it through the air or over the surface of the water, from an explosion and fire upon the premises of defendant upon the adjoining shore.

2. **Explosives—Gasoline—Oil, etc., on water—Destruction of houseboat—Question for jury—Negligence.**

Testimony that defendant stored gasoline upon its premises in a sunken tank holding 12,000 gallons, from which it was elevated by a continuously operated vacuum pump into a gravity tank with a capacity of three or four barrels, from which it was piped into defendant's building to motors which

CASE NOTE.

Liability for damage caused by casting oil or like substance upon water.

I. Pollution of water, 932-945.
A. Damage to farm property, 932-943.
1. Live stock, 932-936.
2. Growing crops, 936-940.
3. Soil fertility, 940-942.
4. Destroying fish, 942-943.
B. Damage to ice crop and fishing, 943-944.
C. Damage to spring, 944-945.
D. Damage to residence by bad odors, 945.

II. Damage by fire, 945-952.
A. Discharge from oil-burning steamer, 945-947.
B. Crude oil from gas leases, 947-948.
C. Sludge acid from separation tank, 948.
D. Waste products from condensery, 948-951.
E. Gas plant by-products, 951-952.

Cross-references. Liability of riparian proprietor infecting running stream with disease germs, see 16 N. C. C. A. 658; pollution of percolating or well water by waste matter stored or cast on neighboring premises, see 2 N. C. C. A. 646-651; injury by escape of water stored or retained on own premises, see 3 N. C. C. A. 1-34.

I. Pollution of water.

A. Damage to farm property.

1. Live stock.

Defendant, as part of its business, operated an oil pipe line for the purpose of distributing crude oil to its customers. These pipes were laid underground, and by reason of their defective construction oil escaped from them into the well of the plaintiff, making the water utterly unfit for stock or man. Defendant contended that the leak was an unexpected one which could not have been foreseen, and that it was promptly repaired when discovered, and that therefore it was not negligent; that since subterranean streams of water did not

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were being tested, the overflow from the gravity tank being returned by a pipe to the storage tank; that an open ditch was maintained along the testing building leading to a creek; that a trench system for drainage was maintained in the testing building and communicated with the open ditch; that the overflow from the gravity gasoline tank was not properly cared for, but that quantities of gasoline were permitted to overflow into the open ditch and to stand in pools; and that a sewer system was maintained in the building, which carried off water from the motors, and might also carry some lubricating oil, and which emptied into the creek, amounted to much more from which negligence could be inferred than the bare fact of the explosion, in an action by the owner of the houseboat, which was moored in the creek near defendant's premises, for its destruction by fire communicated to it through the air or over the oily surface of the water, following an explosion and fire upon defendant's premises, and such evidence was sufficient to give room for a reasonable inference or permissible presumption of negligence on the part of defendant to the damage of plaintiff and to authorize submission of that question to the jury.

3. **Explosives—Gasoline—Storage and handling—Care required.**

In storing upon its premises and handling for its purposes large quantities of gasoline, the owner is bound to exercise such reasonable care to avoid accident as is commensurate with the apparent dangers attending such use.

4. **Explosives—Gasoline—Destruction of houseboat—Presumption and burden of proof—Negligence.**

In an action for damages by the owner of a houseboat for its destruction by fire, communicated to it from a fire and explosion on premises on the adjoining shore where large quantities of gasoline and oil were stored and used, no presumption of negligence arose from the bare proof of the explosion, but

run in well-defined channels, the pollution of the subterranean stream that supplied defendant's well was damnum absque injuria, unless it was shown to have resulted from the negligent and improper use of defendant's adjacent premises. Affirming judgment of $350 for the plaintiff, the court held that the rule that any use, by one, of the percolating waters beneath his land may not be complained of by the adjoining owner, could not exonerate the defendant, because the subterranean waters had been polluted by surface methods that could be avoided or removed when discovered; and that, regardless of negligence, one who impounded oil or other substance by artificial methods, from which it escaped by percolation or otherwise, into the property of another, causing damage, was liable therefor. Regarding the contention of the defendant that plaintiff's petition could not stand because it did not allege facts constituting negligence, the court held that where, from the nature of the case, the plaintiff would not be expected to know the exact cause or the precise negligent act, and the facts were peculiarly within the defendant's knowledge, a general allegation of negligence was sufficient. Texas Co. v. Giddings, — Tex. Civ. App. —, 148 S. W. 1142 (1912).

Plaintiff sued defendant to recover damages for the death of 16 head of his cattle and for injury of 29 head, caused by drinking water poisoned by oil, which escaped from defendant's pipe line at a point where it crossed a creek, the oil flowing down this creek into the pasture where plaintiff's cattle were confined, they drinking therefrom and dying. No evidence was introduced tending to show that the oil was poisonous, or otherwise of such a character as would, when drunk, result in injury and death. Upon appeal affirming judgment for the plaintiff, the court held that, regardless of the question of negligence, defendant was liable for constructing and maintaining said pipe line, for any damages resulting therefrom. But upon rehearing this decision was reversed upon the

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the burden was upon plaintiff to prove facts from which it might be fairly inferred that defendant's negligence was the proximate cause of the explosion and injury.

5. **Trial—Right to dispose of case as matter of law—Testimony not in conflict.** Although testimony is not in conflict, it does not follow that the case should be disposed of as matter of law, if different inferences might reasonably be drawn as to its import.

Action for destruction of houseboat by fire resulting from explosion in defendant's nearby factory. Judgment for plaintiff affirmed.

For appellant—Clark, Emmons, Bryant, Klein & Brown.

For appellee—Charles A. Lorenzo (Clifton G. Dyer, of counsel).

STEERE, J. On October 16, 1916, plaintiff was living with her husband in a houseboat moored in Connor's creek near its mouth adjacent to land belonging to the city of Detroit, through the easterly part of which said creek flows. On that date the houseboat was destroyed by a fire resulting from an explosion in defendant's nearby

ground that no evidence had been introduced showing the poisonous or injurious character of the oil to cattle, the court holding that, this fact not being a matter of common knowledge, it could not be judicially noticed by the court. Texas Co. v. Earles, — Tex. Civ. App. —, 164 S. W. 28 (1914).

Plaintiff was engaged in raising hogs for market on his land through which a stream flowed. Near this land defendant maintained its electric light plant, using oil as fuel, which was negligently permitted to escape from the premises and gather in the stream, flowing through plaintiff's land, the water of which the hogs drank, causing them to die. Defendant was notified of the oil's effect upon plaintiff's hogs but nothing was done to remedy its escape. The defendant contended that plaintiff knew the hogs were being killed by the oil, and that it being the duty of a party owning property, which he knows is being injured by another, to exercise ordinary care to protect himself against such loss, plaintiff's failure to do so precluded a recovery for such loss as he might have prevented in the exercise of ordinary care. Affirming judgment of $165 for the plaintiff, the court held that the defendant was liable in damages; that the plaintiff owed the defendant no duty to remove his hogs from their pasture, and was not guilty of contributory negligence in not so doing. Mexia Light and Power Co. v. Johnson (Tex. Civ. App.), 120 S. W. 534 (1909).

Defendant railway company, operating roundhouses and maintaining machine shops for the manufacture and repair of engines, drained oil and water used in the cleansing of engines and machinery into a creek which flowed through the land of the plaintiff, thereby injuring the land and making the water unfit for the stock to drink, and causing damage to all the stock that drank it. Defendant contended that as it was the owner of the land upon which machine shops were erected, and that the cleansing of engines was necessary for the operation of the railroads, and as it had

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factory. Plaintiff's husband assigned to her all his right, title and interest in the houseboat and its contents, together with all demands for damages by reason of its destruction, and she thereafter brought this action against defendant in the circuit court of Wayne county. From a verdict and judgment in her favor for $1,644, found by a jury to be the value of the property so destroyed, defendant has brought the case to this court for review upon various assignments of error all directed, as stated in its counsel's brief, to these two questions:

"1. Was the defendant entitled to a directed verdict on the ground that the plaintiff had failed to show that the defendant was guilty of such negligence as would permit recovery? And

"2. Was the plaintiff guilty of such contributory negligence as bars recovery in this case?"

Defendant's claimed right to a directed verdict was presented and preserved for review by motion, requests and motion for a new trial, with exceptions to the trial court's rulings thereon, it being urged and argued that the record contains no testimony showing the cause of the explosion nor any negligent act or omission on defendant's

used due care in the process of cleansing, and it was necessary to have the oil and water used in connection therewith flow off somewhere, plaintiff could not complain if he had been damaged by defendant allowing it to be discharged into the creek, a natural water course. Reversing judgment for the defendant, the court held that riparian owners had a natural right to have streams flow unimpaired in quality as well as in quantity, and any use of the stream by one proprietor by which he corrupted it in such a degree as essentially to impair its purity and usefulness for any purposes to which running water was usually applied was an invasion of private right, for which those injured thereby were entitled to a remedy. The lower court had also charged the jury in effect that, in order to recover, plaintiff must show affirmatively, first, that the cattle injured were in a healthy and thriving condition before they drank said water, and, second, that he used ordinary care and diligence in disposing of said cattle and was unable to sell them; third, that he had no other pasture or place to which he could remove the same, and in securing other pastures or places to remove same, or in selling the cattle exercised ordinary care and diligence, and fourth, that he used ordinary care and diligence, and sold said cattle as soon as he could find a market for the same. The court held that such instructions were erroneous, and that such showings were not necessary for recovery. Benjamin v. Gulf, C. & S. F. R. Co., 49 Tex. Civ. App. 473, 108 S. W. 408 (1908).

Plaintiff was the owner of a farm traversed by a stream. Defendant, operating an oil well on land bordering on the stream, permitted oil to escape from his tank and flow down this stream, a natural water course, upon the land of the plaintiff, polluting the water on such land and rendering the well unfit for use, and making the water mixed with such oil and salt water dangerous to human beings and to the stock of the plaintiff. Affirming judgment for the plaintiff, the court held that the own-

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part; and that plaintiff's husband negligently kept their houseboat moored where oil and greasy scum floated around it and they well knew whatever dangerous conditions existed.

Connor's creek curves in its southerly course through Detroit at a point near where it crosses Clairpointe avenue south of Jefferson, running thence in a southwesterly direction to the Detroit river. Along its shores in that locality are located a number of manufacturing establishments. Defendant's factory property extends southerly from Jefferson avenue to Connor's creek with a number of large buildings upon it. Near its easterly limits is a long four-story factory building containing the heat treating department, to which is connected a one-story building used by the block testing department, located next to and abutting on Connor's creek. Close to the latter building on the northeast lies land owned by the city of Detroit known as the garbage plant property. Plaintiff's houseboat was moored to the shore in front of the city property, about 50 feet from defendant's one-story building of the block testing department in which motors manufactured and assembled elsewhere were

er of an oil well is not liable for injuries to real property caused by the pollution of water of a stream bordering the land, where such pollution is necessary to the enjoyment of the well and the owner is not actuated by malice and has exercised due care to avoid the injury; that the question of whether or not there has been negligence or malice is for the jury, and they having decided in favor of the plaintiff, the court would not disturb the verdict. Ohio Oil Co. v. Westfall, 43 Ind. App. 661, 88 N. E. 354 (1909).

See, also, Thomas v. Ohio Coal Co. and Straight v. Hover, I, A, 2, post; Indiana Pipe Line v. Christensen, I, A, 3, post.

2. Growing crops.

A stream, across which defendant ran its pipe lines for conducting crude oil from its fields, ran through plaintiff's land in its downward course. The pipes were laid underground except where they crossed the stream, and at this point the pipes were jointed, causing them to be weak, and defendant failed to strengthen these pipes at such joints with clamps. Excessive rains occurred, and by an overflow of the lands the pipe line was broken in the middle of the stream and oil escaped and spread upon the water, which, flowing over the plaintiff's land, damaged a growing crop of corn thereon. Defendant contended that the flood which caused the injury being an act of God, it was not liable. Affirming judgment for the plaintiff, the court held, that as the evidence tended to show that the breaking of the pipe line could have been prevented had the defendant used proper care in the construction and maintenance of the same by strengthening the joints with clamps, the question of defendant's negligence was for the jury. "The case falls within the rule," said the court, "that, where there is negligence concurring with the 'act of God,' and but for such negligence the injury would not have occurred, the person guilty of such negligence is liable." McMurry v. Prairie Oil

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tested. The two buildings were adjacent, and "connected by an opening in the steel aperture or door," as defendant's manager described their proximity.

Connor's creek is a sluggish stream at its mouth practically on the level of Detroit river into which it empties. On the day in question there was no perceptible current near its mouth, and a considerable quantity of oil and oily scum was floating upon its surface in that locality, held back by the wind which was then blowing up stream. That portion of the creek was quite commonly used as a place for mooring houseboats, especially in the fall, and on the day in question three were anchored not far from plaintiff's.

Gasoline was used by defendant in its block testing department to run the motors, which were placed on blocks or iron cradles for examination and testing, oil being also used to lubricate and function them. A supply of gasoline was stored in the yard on the west side of the building in a sunken tank having a capacity of about 12,000 gallons. For use it was first drawn from the large sunken storage tank by a vacuum pump system into a smaller gravity tank with a

& Gas Co., 159 Mo. App. 623, 141 S. W. 463 (1911).

Plaintiff, the owner of a farm of 167 acres, consisting of arable and swamp land, contiguous to an oil field, brought this suit against nine corporations and three partnerships, and a syndicate, all operators in the said oil field. A large coulee or natural drain, after running through the said oil field, traversed the land of the plaintiff, who complained that defendant negligently permitted oil and salt water to escape from their wells, tanks, and pipe lines, and to flow through said coulee upon his lands, killing his trees, destroying his crops and pasturage, and polluting the fresh water running down the coulee. The syndicate alone claimed ownership of all the waste oil escaping from the wells, ditches, and tanks of the other operators. There was judgment against the syndicate alone for $1,000, from which both plaintiff and defendant appealed, defendant contending that the injury was damnum absque injuria, and plaintiff contending that the damages allowed were not sufficient. Affirming the judgment, the court held that article 660 of the Civil Code as set forth by the defendant confined the servitude due by the estate below to the reception of waters which ran naturally from the estate above, and excluded a service of drain created by the industry of man. That oil and salt water extracted by the labors of man from the bowels of the earth, and whose natural flow, if any, was a thousand or more feet below the surface, did not come within the purview of that article of the code; that having extracted oil and water from the earth, the operators assumed the burden of confining or taking care of it in such a manner as to prevent injury to the adjoining proprietors; that the syndicate, having claimed sole ownership, was solely liable; that when, as in this case, the evidence of the quantum of damages was contradictory, the verdict would not be disturbed, unless manifestly erroneous, and that the claim of plaintiff for punitory damages was without any foundation whatever. McFarlain v.

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capacity of two or three barrels, located close to the side of the building. The overflow from this tank ran, as claimed by defendant, back into the submerged tank. Plaintiff claimed this overflow did not all return to the larger tank but quantities escaped into a small depression in the ground, or ditch, extending from the building to Connor's creek. The gasoline was piped from the small tank to the motor stand and released to the motors by pet-cocks. There was testimony that almost daily escaping gasoline, oil and water drained into Connor's creek along the small open ditch, and in places it could be seen standing in pools. There was also a sewer running from under the southeast corner of the test building to the creek. At about 5 p. m. of the day in question, just when the motor testing work had shut down and the quitting employees of that department were punching the clock preparatory to going home, there was a heavy explosion under that end of the building which blew off the covers of manholes of a trench or sewer system, including one just outside the building. Simultaneously with this explosion flames burst out of the building and the oily surface of Connor's creek was set

Jennings-Heywood Oil Syndicate, 118 La. 537, 43 So. 155 (1907).

Plaintiff had planted a patch of 10¼ acres of spinach in the vicinity of defendant railway company's track, near a point where it maintained three oil tanks, two above and one underground. While this crop was in flourishing condition the vicinity was visited by a heavy rain storm which destroyed 5 acres of the crop by washing the waste oil which had collected on the ground about the first two tanks, as well as that in the underground tank, over and across the land upon which the crop was growing. Plaintiff claimed that failure of the defendant to so safeguard the tanks as to prevent the escape of oil therefrom or water from flowing therein was the proximate cause of the injury. The jury found that the rain storm was unprecedented and extraordinary, but that the rainfall and high water were not an act of God, and assessed the damages on the basis of the destruction of the entire crop. Reversing judgment for $1,560 for the plaintiff and remanding the case for new trial, the court held that the jury's finding was inconsistent, and that the rain storm, if it was unprecedented and could not have been foreseen, must be deemed an act of God within the rule excusing one for damages resulting from the act of God; that the jury's basis of estimating the damages was erroneous and should have included only the 5.23 acres actually destroyed. Houston & T. C. R. Co. v. Walsh, — Tex. Civ. App. —, 183 S. W. 18 (1916).

Plaintiff brought suit to recover damages which were sustained in consequence of defendant's polluting a stream which naturally flowed from the latter's to the former's premises. The pollution resulted from the defendant's operation on his lands for underlying petroleum, in which operation petroleum was separated from salt water with which it was commingled, the salt water being then discharged into the stream, rendering its water unfit for plaintiff's live stock and causing it to overflow and injure the grass of pasture land. The defendant contended that he was not

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aflame. At the same time plaintiff's houseboat was listed over by the explosion, caught fire, and burned so rapidly that plaintiff, who was thrown off her feet by the shock, had difficulty in escaping. Her husband was away from home at his daily employment when this took place and some men who ran down to the shore rescued her. She testified of this:

"Between the time of the explosion and the time I discovered the house was on fire I didn't have time only to run for my life on the front deck, and when I got on the front deck of the boat the escape was cut off. Mr. Thompson and this other man had risked their lives to take me off. * * * I had two cats burned, they couldn't get off."

The negligence imputed by plaintiff to defendant is that it carelessly failed to keep its oils, gasoline and other dangerous combustibles safely stored upon its own premises and negligently permitted the same to escape upon its own premises, and into Connor's creek; that it employed unskilled persons to handle and use the same, and

"did negligently and wilfully cause a large quantity of oils, gasoline and other highly dangerous combustible substances to become ignited and to explode which escaped from its premises to plaintiff's said boathouse setting

liable, for the reason that he cast no water or other substance upon the plaintiff's lands except by the stream which naturally flowed from his lands, and that he was engaged in operating his lands carefully, in the only known mode for operating lands for underlying petroleum, and that the resulting discharge of the salt water into the stream, which was the natural drainage of the basin, was inevitable. Affirming judgment for the plaintiff, the court held that this defense could not be maintained; that although there was a servitude upon the lower proprietor to receive the natural flow of water from higher grounds, it was his right to receive it in its natural state, and without deleterious change effected by artificial means. "However numerous," says the court, "may be the persons who engage in mining for coal and petroleum, however laudable may be their undertakings, these are but private enterprises instituted and conducted for private gain, which may be acquired only with due regard to the rights of lower proprietors." Straight v. Hover, 79 Ohio St. 263, 22 L. R. A. (N. S.) 276, 87 N. E. 174 (1909).

Plaintiff brought this action against defendant and certain other oil companies to recover damages for injury sustained by him because of the pollution by oil from the oil wells of the defendants of the waters in a creek running through the plaintiff's premises which were used for pasturage purposes. The oil lands had direct and indirect drainage into said creek. The water in its polluted condition became unfit for the cattle to drink and damaged the grass of the pasture. The suit was subsequently dismissed against all of the defendants except one, who contended that, inasmuch as other oil companies contributed to the damage, and inasmuch as it could not be definitely ascertained to what extent defendant's wells contributed to said injury, plaintiff could not recover; further, that plaintiff was obliged to show that defendant used its oil wells in an unreasonable manner. Affirming judgment of $125 for the plaintiff,

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fire thereto and destroying the same together with all its contents," and "did also communicate to the oils, gasoline and other inflammable matters then accumulated on the surface of said Connor's creek near and about said boathouse, which also exploded and set fire to said boathouse, destroying same together with its contents," etc.

Defendant's contention that plaintiff was as a matter of law guilty of such contributory negligence as precludes recovery is directed to the claim that she and her husband with knowledge of conditions kept their houseboat moored in a manifestly unsafe location where oils, greasy scum, etc., had accumulated upon the surface of the water around it, the danger being, it is asserted, "appreciated by plaintiff's husband, who testified that he was so concerned over the situation that he was looking for a place to move, and that he had known this for some time at least before the fire and explosion."

The record scarcely sustains this version of his testimony. Thomas Woods, plaintiff's husband, had known and been around that portion of Connor's creek "off and on" for 17 or 18 years. It was navigable, sheltered water for some distance above its mouth and much used by rowboats, launches and houseboats. He built their

the court held that the mere fact that the amount of damages might be difficult to ascertain did not preclude a recovery, and that "no one can directly or indirectly, even though in the pursuit of a legitimate business, foul or pollute a stream of water and thereby damage a lower proprietary owner without rendering himself liable for damages therefor." The court further held that an instruction that plaintiff, in order to recover, must prove his case to the satisfaction of the jury, by a preponderance of the evidence, was erroneous and was properly refused. Thomas v. Ohio Coal Co., 199 Ill. App. 50 (1916).

See also Indiana Pipe Line v. Christensen and Niagara Oil Co. v. Jackson, I, A, 3, post.

3. Soil fertility.

The plaintiffs were owners as tenants by entirety of a tract of land adjacent to defendant's oil and gas lease. The oil was placed in a tank and the salt water separated from the oil was permitted to flow upon plaintiff's lands, which were lower than those of the defendant, destroying the vegetation, rendering the land sterile and the habitation unhealthy and uncomfortable. The defendant contended that because the lands upon which he was operating the wells were higher than the land of the plaintiff, the discharged salt water flowed upon them naturally; that nature had placed the oil there, and there it had to be taken out, and if another was injured thereby it was his misfortune and he was entitled to no recompense. Affirming judgment for the plaintiff, the court held that it could not assent to this doctrine, saying: "One is entitled to a reasonable use of his property, even if such reasonable use incidentally injures his neighbor; but, to avoid liability for such injury, such use must be reasonable. * * * Sic utere tuo alienum non lædas—'So use thine own that another you may not injure'—is an ancient rule of property well established in authority and equity; but it has been greatly circumscribed in later years by the influence of selfish

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houseboat in 1914. It contained several rooms, was comfortably furnished and fitted up as a home for himself and wife. They had there the usual household goods, comforts and conveniences of a modest home, including customary furniture, culinary utensils, a sewing machine, rugs, draperies, silverware, etc., with various other articles of use and modest luxury, including a phonograph and two cats. Plaintiff testified to having been married 33 years and that they had lived on board their houseboat for over three years. It had been moored abreast the city property where it burned for some time, just how long is not shown. Her husband worked nights at the Michigan Central station, going on duty at 4 p. m., and was called home by telephone shortly after the fire. He had recently noticed and apparently been annoyed by fumes of gasoline, and planned to find a more agreeable location. His testimony on the subject is as follows:

"Q. Did you have occasion to observe the condition of the surface of the water when you left? (On the day of the fire.)

"A. Yes, sir, I was trying to find a location to get out from the fumes of gasoline.

greed under the mask of pro bono publico. However, we are of the opinion that enough of the rule remains to prevent one from so using his property for his profit as to practically confiscate or destroy his adjoining neighbor's property where, as here averred, such injury could be prevented at an inconsiderable cost. And if he does so use his property under such circumstances and inflicts such injury, he should be compelled to respond in damages, for it can hardly be said that such a use is a reasonable one." Defendant also contended that the averments of defendant's negligence and plaintiff's lack of contributory negligence in the complaint were not sufficient. The court held that the complaint setting forth that a nuisance had been created and maintained, considerations of negligence and contributory negligence were not in place. Niagara Oil Co. v. Jackson, 48 Ind. App. 238, 91 N. E. 825 (1910).

Plaintiff's 700-acre farm, used for general farming and stock raising, was situated on both sides of a creek below a point where the creek was crossed by defendant's pipe lines, which were used for the purpose of transporting crude oil across the state. These pipes were allowed by defendant to become rotten and decayed, and great quantities of crude petroleum oil escaped therefrom commingling with the waters of the creek. The creek overflowed upon the plaintiff's land, and when the water receded the oil remained, doing great damage to plaintiff's grass and vegetation and killing some of his cattle. Evidence was introduced by the plaintiff tending to show that the crops received from the portion of land covered with oil were considerably less than those received in years before, but no evidence was introduced that the oil was the cause of this decrease, or to controvert the theory that it might have been due to some other cause. As to parts of the land, no evidence whatever was produced to show that the land, if properly seeded, would not, under favorable conditions, produce crops. No evidence was produced to show

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"Q. Because——
"A. On account of the fumes of gasoline.
"Q. You were doing what?
"A. Looking for a location to move.
"Q. When did you first notice those fumes?
"A. Sunday morning when I came home, which would be Sunday about 3 o'clock in the morning."

Other houseboats were moored close by. He does not testify that in his purpose to move he was actuated by any thought or appreciation of danger from explosion or fire. If his testimony permits that inference, it was for the jury rather than the court.

This is not a case where a plaintiff is shown or claimed to have been at default in some defined duty in regard to a danger of which he had knowledge. It is said in 29 Cyc. p. 640:

"The fact that the person injured was aware of the danger is not sufficient to render him guilty of contributory negligence as matter of law, but the question should be submitted to the jury."

Amongst the authorities cited in support of this text is Brezee v. Powers, 80 Mich. 172, in which it is said:

"Where the essential fact in a case is whether contributory negligence

that the land had been destroyed for all purposes of cultivation and vegetation. Reversing judgment of $17,000 for the plaintiff, the court held that this amount was excessive, as it was based on a permanent injury to the productive quality of the soil; that plaintiff's recovery must be limited to such items of damage, both past and prospective, as had been actually established by the evidence; and that such damages must be compensated in a single award; that in the case of a continuing abatable nuisance such as in the present case, the measure of damages was the depreciation in the rental value of the real estate affected; that in an action of this character proof that the plaintiff was in entire possession of the farm, together with claim of ownership, made a prima facie case of title against the defendant company, which could be rebutted only by a showing that the true record title was not in the plaintiff; that where a single completed wrongful act resulted in an injury, the effect of which would continue indefinitely, the damages occasioned by such an injury must be entirely compensated in a single award; that the award covered all resulting damages, both past and prospective. Indiana Pipe Line Co. v. Christensen, — Ind. —, 123 N. E. 789 (1919).

4. Destroying fish.

Plaintiffs were owners of farms in severalty adjoining a stream. Located one and one-half miles away in a low, basin-like territory with no natural drainage, defendants were operating oil wells. Disregarding the lay of the land, they dug ditches to the stream, draining their fields of oil, salt water and refuse matter, thereby polluting the stream as it ran by the farms and homes of the plaintiffs, causing obnoxious odors, poisonous gases, and destroying the fish, whereby the rental value of the property was greatly depreciated. The defendants contended (1) that each of the owners should have maintained a separate action; (2) that they had used their property in a lawful manner, and that hence the injury to the property of plaintiffs was damnum

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did or did not exist, and this depends upon inferences to be drawn from facts and circumstances about which honest, intelligent and impartial men might differ, such a case should be submitted to the jury."

The trial court did not err in submitting the question of plaintiff's contributory negligence to the jury nor in the charge upon that subject.

Not denying that there was an explosion in defendant's building with an outburst of flames, in the air and on the water, which set fire to and destroyed plaintiff's houseboat, defendant's further contention is that a directed verdict should have been granted in its behalf for the reason that no presumption of negligence arises from the bare fact of an explosion, and the record is destitute of testimony showing any negligent act or omission on its part causing or contributing to the explosion.

The court charged the jury that no presumption of defendant's negligence arose from the bare proof of an accident or explosion on its premises, that the burden of proving freedom from contributory negligence on her and her husband's part, and negligence on de-

absque injuria. Reversing judgment for the defendants, the court held, (1) the plaintiffs having a common complaint against the defendants inflicted by the same acts, it was proper for them to join in one cause of action for damages; (2) that though one was entitled to the natural use of his property, and was not liable for an unavoidable loss occurring to his neighbor, yet he must so use his own property as not to injure another; that in such cases there must be a balancing of the rights of the parties, i. e., all the circumstances of the situation must be taken into consideration, the importance of the use to the owner, as well as the extent of the damage to be inflicted upon a neighbor, and the right of the parties were to be adjusted in a practical way; that, granting that the digging of the ditches to secure drainage, which the natural lay of the land did not give, and the consequent pollution of the stream were but the natural result of the careful and proper operation of the oil wells, the defendants were nevertheless liable for the injury caused thereby. Teel v. Rio Bravo Oil Co., 47 Tex. Civ. App. 153, 104 S. W. 420 (1907).

See also Fischer v. Missouri Pac. R. Co., I, B, post.

B. Damage to ice crop and fishing.

Plaintiff was the owner of a tract of land of 30 acres, on which there was an artificial lake of about 17 acres in extent, which was a source of profit to the plaintiff in letting fishing privileges by the day to various pleasure seekers from the city, and likewise in letting ice-cutting privileges to various persons. Defendant, owner of a tract of land near by, erected shops on such lands, and likewise constructed a sewer which led to the outer edge of his land into a ravine which extended down into the lake, and conducted sewage and oil from said shops through this drain into the ravine, and from thence into the lake. This had the effect of killing the fish and destroying the marketable quality of the ice. Defendant did not contest the plaintiff's right to recover damages, but objected

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fendant's part causing the injury complained of rested upon plaintiff. If right in the assumption that the testimony viewed in its most favorable light for plaintiff, which is the recognized test, raised an issue of fact for the jury, the charge is not otherwise complained of, as we understand the position of counsel, nor open to criticism.

Counsel for defendant cite as analogous in facts and particularly in point here, Cosulich v. Standard Oil Co., 122 N. Y. 118 (25 N. E. 259). In that case plaintiff's vessel was lying at a wharf in Newton creek, Kings county, N. Y., next adjacent to defendant's wharf and premises on which it conducted a petroleum refinery, where some oil caught fire from an explosion and while burning a quantity of it ran down a pipe leading to a lighter lying at its wharf loaded with petroleum. The lighter exploded and set fire to plaintiff's vessel at the adjoining dock some 20 feet away. Although quite analogous in its general outlines, that case does not impress us as particularly helpful to the present inquiry, for the principles of law applied to the undisputed facts in that case are conceded here. The opinion

to the restoration of the property to its original condition and the loss of the fishing privileges and ice-cutting privileges as the basis for such damages. Affirming judgment for $2,500 for the plaintiff, the court held that the basis objected to by the defendant was a proper one, and that the award was not unreasonable. Fischer v. Missouri Pac. R. Co., 135 Mo. App. 37, 115 S. W. 477 (1909).

C. Damage to spring.

Defendant railway allowed oil to be thrown on the plaintiff's premises on which a spring was located. The oil, seeping into the spring, made the water utterly unfit for any purpose. Plaintiff expended the sum of $45 for the purpose of getting water connections, and was compelled to expend certain sums for ice to keep butter and eggs which she kept on the premises. The court instructed the jury in the following language: "You will find such sum as you believe will fairly compensate her for the damage and injury to her spring, if any, there was caused,' fixing no measure of damages at all. Reversing judgment of $350 for the plaintiff, the court held that "Under that language the jury might have 'roamed at will,' and fixed upon any amount they saw fit. Furthermore, the instruction permits a recovery, not only for damages for injury to the spring, but for the time plaintiff was deprived of the use of the spring, and for the annoyance, inconvenience and discomfort suffered by plaintiff. As there was no testimony given to show that the spring was permanently destroyed, the correct measure of damages in such a case is the diminution in the value of the use of the spring from the time it was polluted up to the time of filing this suit. If, however, plaintiff could, by the exercise of ordinary care, and at reasonable cost, have cleaned out the spring and removed the cause of its pollution, she could only recover up to the time when she could have so cleaned it out. It was her duty to minimize the damages if she could do so by ordinary care and at reasonable expense. She could not sit idly by

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is a long one, dealing with many negligent cases involving explosions and similar accidents. It is somewhat peculiarly commented on by Judge Thompson in his work on negligence with the concluding reflection:

"but a great many judges forget the limitations of their own power and perform the functions of jurors in actions at law for damages, in this way." 1 Thompson on Negligence, note to section 763.

Be that as it may, the essence of the long decision in facts and law as disposed of appears in the following excerpts:

"The plaintiffs proved simply an explosion. The inference is perhaps permissible that the subject of the explosion was the receptacle described as a boiler, tank, still or agitator, although no witness pretends to assert that it was destroyed or torn down. If it may be inferred that it was the tank the evidence is silent as to the cause. * * * He who alleges injury sustained through the negligence of his neighbor, with whom he has no contract relation and who owes him no other duty than that he shall observe reasonable care to prevent injury, must prove the facts from which an inference of the particular act of negligence charged can be drawn."

Here facts were proved beyond simply an explosion, from which plaintiff claims and defendant denies the inference of negligence

and recover damages which she might have avoided by the exercise of ordinary care." Cincinnati, N. O. & T. P. Ry. Co. v. Gillispie, 130 Ky. 213, 113 S. W. 89 (1908).

D. Damage to residence by bad odors.

This suit was brought by the plaintiff against the defendant railroad company to recover damages for personal discomfort suffered by her, and for decrease in the value of her home, caused by the negligence of the defendant railway company in permitting oil to escape from tanks on its premises near by and flow down a ravine near the plaintiff's home. Defendant contended that it was impossible to transfer oil into the tank without leaking, so that it was not negligent in allowing oil to escape therefrom. It was shown, however, that the oil might have been kept on the premises by the use of oil tanks. Affirming judgment of $500 for the plaintiff, the court held that the defendant railway company, not having used proper care to prevent escaping of oil from its premises, was guilty of negligence for which it was liable, and that a finding that, by reason of the disagreeable odors arising from the oil, plaintiff's use of her home had been interfered with, and that she had been caused much discomfort and annoyance, and thereby damaged in the amount found, should be sustained; that the plaintiff, who lived on the premises, could better determine the character and extent of the annoyance and discomfort caused by her by the flow of the oil than her neighbors in passing along the street near the residence who had been called by the defendant as witnesses. Houston & T. C. R. Co. v. Crook, 56 Tex. Civ. App. 28, 120 S. W. 594 (1909).

II. Damage by fire.

A. Discharge from oil-burning steamer.

An oil-burning steamer, the Santa Rita, lying beside a wharf, discharged a considerable quantity of inflammable fuel oil from her hold into the waters of a bay, which was carried by the wind and tide under a wharf,

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can be drawn. The facts upon which plaintiff relies are scattered through the testimony in a more or less fragmentary way, of claimed varying significance, full understanding of which an examination of the entire record might best subserve, but we can only note certain significant items of testimony which at least distinguish this from the Cosulich Case.

Defendant used large quantities of gasoline in its testing department taken from a storage tank of 12,000 gallons capacity sunken in the yard near by. It was elevated from there by a vacuum pump into a gravity tank just outside the building with a capacity of three or four barrels, from which the gasoline passed by gravity through piping to the motors. The gravity tank was elevated so as to keep a 10 or 12 foot head on the motors. On that side was an open ditch about 16 inches wide leading along the building from the creek for about 60 feet to where, as a witness states, "it got out of the building to an outlet." From 55 to as high as 100 motors a day were tested in the building, supplied with gasoline from the small gravity tank by the wall outside. Carl C. Hinkley, defendant's work

where mixing with floating debris it formed a mat. The wharf was 90 feet wide, supported on piles, and there were vessels lying on the opposite side. The floor of the wharf was in places soaked with oil which had escaped from oil burning engines used thereon, and the men employed there were in the habit of smoking. From some unknown cause this inflammable mat formed on the water under the wharf was set on fire, burning a portion of the wharf and also injuring libelant's vessel, the Boieldieu, lying on the other side and around which the oil had floated. Reversing the decree for the respondent, the court said: "We are of the opinion that the injury to the Boieldieu was the natural and probable consequence of the negligent act of the Santa Rita, and ought to have been anticipated in the light of the surrounding circumstances. The circumstances which must be considered are the highly combustible nature of the oil, the condition of the tide and wind, the proximity of the wharf and shipping, the inflammable condition of the oil-soaked wharf, and the many chances of accidental ignition to which the oil was exposed. Without doubt, the natural and probable consequence of covering water with oil might not, under different circumstances, have had a natural tendency to produce any injury. If the oil had been dumped into the middle of the bay, far from any ship or wharf; if the wind and tide had been different; if the wharf had been fireproof; if the oil had been less inflammable; if the chances of fires had been much less —we might have reached a different conclusion. But, considering all the facts and circumstances, we must conclude that the injury done by the floating oil ought to have been foreseen, and that, therefore, the placing of it on the water was the proximate cause of the injury inflicted by its ignition." The test was not whether such an act would produce a conflagration in the majority of cases, but whether it had a decided and natural tendency to produce such a result. The court further declared: "One of the most valuable tests to

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manager and engineer, testified the vacuum pump supplying gasoline from the sunken storage tank pumped continually—"all the time," the overflow running back into the big tank, and "in taking out gasoline for motors there was a third pipe." Plaintiff contended and introduced testimony to show that the overflow was not properly cared for and safely returned to the big storage tank but quantities of gasoline were negligently permitted to overflow from the small elevated gravity tank to the ground, spreading into the open ditch and standing in pools, creating a condition which was in effect a dangerous nuisance. This was an issue of fact for the jury, of which Hinkley said when making denial of the fact:

"it would be highly dangerous to have a surplus, so many motors you know. For instance, if there was considerable gasoline permitted to accumulate around the premises, it would be highly dangerous, so many motors, you know. If gasoline was allowed to accumulate around the premises, it would be dangerous. I know where the ditch was on the outside of the premises that day. If that ditch was filled with gasoline or partly filled or if it had any gas in it at all, there would be a certain amount of vapor always present. There would be a certain amount present if used with lubricating oil. * * * If gasoline was present there would be also gasoline action in the ditch. It is obvious that the greater the quantity, the greater the gasoline action. I should imagine if there

apply to determine whether a negligent act is the proximate or remote cause of an injury is to determine whether a responsible human agency has intervened between the fact accomplished and its alleged cause. 'If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered too remote.' * * * In this case another force or power had not intervened. The throwing of the lighted cigar, or burning coal, into the bay cannot be said to be another force, or to break the causal chain." The Santa Rita, 100 C. C. A. 360, 176 Fed. 890 (1910), aff'd 218 U. S. 674, 54 L. Ed. 1205, 31 Sup. Ct. 223 (1910).

B. Crude oil from gas leases.

The defendants, several individuals and several independent corporations operating separate oil and gas leases, negligently allowed crude oil to escape from their respective leases into a nearby creek, where from some unknown cause it became ignited and was carried by the wind and natural flow of the stream upon the barn of the plaintiff situated upon such stream, which barn, together with its contents, was thereby totally destroyed. Plaintiff brought this action against all jointly, and defendants contended upon demurrer that (1) there had been a misjoinder of causes of action; (2) that the act of the defendants was not the proximate cause of the injury, but rather the grass and a wooden dam which, being first ignited, had carried the fire to the barn. Affirming judgment for the plaintiff, the court held that the defendants were jointly and severally liable for the wrongdoing, and that it was within the plaintiff's option to institute an action against one or all of those contributing to the injury; that he might exercise this option even if concert among the wrongdoers was lacking, as long as their several independent acts combined to produce, directly, a single injury; that this was an injury which should have been foreseen by the defendants and their acts were the proximate cause of it. "The question

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was sufficient gasoline saturating the air it would ignite if it came in contact with flame."

An apparently disinterested witness named Thompson, who worked for the city at the garbage grounds adjoining defendant's property and was near by at the time of the explosion, testified:

"I have seen this tank overflow for hours at a time. Gasoline came out of it. The gasoline would flow on the ground, lay there in a pool and run off into the creek. Some of it remained in that pool. This was not protected in any way. * * * I saw the can run over day after day. * * * There is a little ditch running all the way through where this stuff comes out of the tank in this ditch, * * *. I have seen gasoline and oils in this ditch; I saw this on the 16th of October, 1916. There was oil and gasoline in it. * * * There was quite a little bit in it, water and gasoline and oil together. The bottom of the ditch was covered with it. The ditch was probably 16 inches wide, just a narrow little gutter down to drain it. There was a flat hole, little trap running from the edge of the hole to the ditch and the flat hole was full. * * * I was down near where the sewer empties into the stream on the day in question. I saw oil and water coming out of it, right at the corner of the Chalmers building. * * * It was quite a little stream running there."

Of the explosion Thompson said in part:

"I was standing in the barn door and was looking in that direction. The explosion took place about the middle of the building. About the time of the

is not whether such an act would produce a conflagration in the majority of cases," said the court, "but whether it was a decided and natural tendency to produce such a result." Northup v. Eakes, — Okla. —, 178 Pac. 266 (1919).

C. Sludge acid from separation tank.

Sludge acid, which is an inflammable substance containing a percentage of oil, partly filled a water pipe leading into a separation tank in the yards of respondent's oil refinery. A valve in the pipe was left open causing the tank to fill and the sludge acid to run over its top onto the ground below. Perceiving this, a foreman ordered an employee to flush off the tank and the ground with a hose. This was done, the water mixed with the sludge being carried down a gutter into the river near by, where libelant's tug lay. About ten minutes thereafter flames broke out on the surface of the water, and before the tug could be taken to a place of safety it caught fire and its engineer lost his life. Affirming a decree for the libelants for the tug, the death, and the loss of the effects of the crew, the court held that a finding that the negligence in allowing the sludge acid to be carried into the river had caused the fire was no mere conjecture, but rested under the circumstances on very strong evidence, and that a holding of the trial court that this result should have been foreseen and that respondent was liable was not error. Brown v. Standard Oil Co. of New York, 247 Fed. 303, 159 C. C. A. 397 (1917).

D. Waste products from condensery.

Defendant was engaged in the manufacture of commercial asphaltum from crude petroleum and, in the process of condensing the oil, gases and inflammable oils were produced and were conveyed to a gas receiver, and from there to a receptacle known as a gas seal, from which place it was conveyed to and used in the furnaces under the asphalt stills. A ditch extended along the side of the asphalt stills to a point near the gas seal, and this was connected by a 6-

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explosion the air was on fire, gasoline oil or something going out of all the windows over there. The flames came from the Chalmers plant. I saw the burning flames in the air. The burning flames lit on the houseboat of the Woods. Prior to the explosion I did not see any flames around the houseboat. I was looking in that direction. After the explosion I saw flames light on the houseboat and saw the houseboat afire."

Another witness near by who ran out on hearing the explosion to see what had happened said in part:

"I jumped up quick and ran outside and when I got outside everything was afire. The houseboat was afire. It was all over the houseboat, right around where the boat lay, and kept working up further because Mr. Benowski had all he could do to get his boat out of the way. * * * There was fire inside the Chalmers plant. I saw fire coming out of the manhole at the foundation of the one-story building. I saw flames coming from the inside of the building. * * * The point where the fire came out of the manhole there was about in the center of the one-story building."

Outsiders testified to two apparent drainages from the test block building, a sewer from the southeast corner and an open ditch on the side of the building towards the garbage plant. It also appeared from Hinkley's testimony there was some kind of a tunnel system under the building. He said he would "judge the tunnels are about

inch pipe with a trap, the trap being level with the surface of the ground and the 6-inch pipe entering it at a point below the surface of the water in the trap. From the trap there was an 8-inch pipe located on the opposite side of the trap and higher than the 6-inch pipe, and this pipe conveyed the water to another ditch which ran along near asphalt kettles which were placed along the wall of a cooper shop, on the second floor of which deceased was employed. The cooper shop had become coated on the side next to the asphalt kettles with highly inflammable soot. Defendant's master mechanic was called upon to repair a leak in the gas seal, and, without knowing or inquiring as to its contents, and assuming that it was water, he caused a stand pipe in it to be turned down parallel with the ground, causing the entire contents to run over the ground around and near the trap and into the trench at the furnaces. The water in the trench came from the condensers. The oil and gas thus liberated soon ignited from the furnaces, and was apparently communicated to the oil in the trap, either by means of the 6-inch pipe from the trap or over the surface of the ground, or by means of the gases released, and from the trap the flames were apparently conveyed to the side of the shed which immediately burst into flames and deceased was burned to death before he could escape. Upon the question of defendant's negligence in permitting the contents of the gas seal to be spilled upon the ground and in the trench, the court said: "There was no material conflict in the testimony as to the cause of the fire in front of the stills and around the open trap. To effect the repair of the gas seal it was not necessary, but was, we think, negligence, to discharge its highly inflammable fluid, as was done, in a way to come in contact with the intense furnace fires, and in a way to spread, as it did quickly, to the immediate vicinity of the open trap, the surface of which carried more or less oil and inflammable material." Plaintiffs contended that, having shown the circumstances surrounding

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20 inches wide and 3 feet deep"; that they were "just a trench system from the block test" and not a part of the sewer system; that the only water which ran out of the sewer at the southeast corner was waste water from cooling the engines, and the only oil which could pass out with it "would be the lubricating oil that was backed up by the water in flushing out the circulating system of the engines." He stated "the tunnel had an outlet to the outside." Asked where the tunnels or trench system emptied he replied, "as near as I can recall, it emptied into the ditch that you referred to and ran down to the creek." He also said that there were manholes in the tunnel system under the floor, and at the time of the explosion "the motors that were over the manholes were elevated and tipped over, causing the damage." In explanation of his failure to remember to whom he reported the accident, and whether his report was in writing, he offered the reflection that "the management was changing quite rapidly at that time."

Without further prolonging reference to other items of testimony of similar import which might be noted, we conclude it can be

the fire, sufficient appeared to justify the invocation of the res ipsa liquitur doctrine, and that, in the absence of explanation by the defendant, the circumstances afforded reasonable evidence that the accident arose from want of care. The court, however, found it unnecessary to invoke the res ipsa doctrine in support of a verdict for plaintiffs because they were satisfied from the evidence that deceased was not furnished a safe place in which to work in that, whatever the cause of the fire at the shed, whether it originated at the gas seal or by some unknown cause at the shed itself, deceased lost his life through conditions which defendant allowed to exist and which by ordinary care could have been avoided, as it was beyond dispute that the rapidity with which the fire spread over the building was caused by the oil-impregnated soot which had been allowed to accumulate on the timbers and sides of the building which, with ordinary care, could have been kept free from that danger, and that, considering the purposes for which the upper story of the shed was used, which was as a storage and cooperage plant, and its crowded condition with barrels and materials of all kinds, and the meager means of escape afforded deceased and his companion, they were in a veritable trap when the flames and smoke burst upon them almost at the first cry of fire. The judgment of the trial court and the order denying defendant's motion for a new trial were affirmed. Hallawell v. Union Oil Co. of California, — Cal. App. —, 173 Pac. 177 (1918). Rehearing denied.

In a subsequent case to recover for the death of another employee in the same fire a judgment for the plaintiff was also affirmed, and the court found there was evidence that 60 or 70 gallons of the liquid were negligently poured on the ground out of the gas seal, and that it ran down the trench in front of the furnaces and was seen while burning not far from the opening of the 6-inch pipe which ran to the trap, and also was seen burning around the trap and within two or three feet of it; that the flames

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fairly maintained from the record that there is much more shown in this case from which it is possible to infer negligence than the bare fact of an explosion. Negligence is absence or want of ordinary care. In storing upon its premises and handling for its purposes large quantities of gasoline, defendant was in duty bound to exercise such reasonable care to avoid accident as was commensurate with the apparent dangers attending such use. While the burden was upon plaintiff to prove facts from which it might be fairly inferred defendant's negligence was the proximate cause of the explosion and her injury, the evidence need not be direct and positive. Negligence in a given cause may be susceptible of proof only by circumstances pointing more or less directly to the ultimate fact charged. To carry the case to the jury plaintiff was only bound to prove sufficient to give room for a reasonable inference, or permissible presumption, of negligence on the part of defendant to her damage.

It is urged for defendant there is practically no conflict in the evidence and therefore "the decision of the case becomes a question of law, and not of fact for the jury." We are impressed the testi-

rose up from the burning fluid two or three feet, and that a high wind was blowing from the southeast across the furnaces and across the trap, and that, in the opinion of the court, the evidence tending to show a causal connection between the fire at the asphalt shed and the fire in front of the stills was equally satisfactory, if not more convincing, than at the other trial, and that there was no evidence upon which any rational theory could be predicated that the fire started at the asphalt shed otherwise than by the burning oil carried through the 8-inch pipe, and that the evidence in both cases was sufficient to establish actionable negligence in discharging the liquid contents of the gas seal onto the ground in a way to cause it to run along the ditch in front of the stills and over the ground and near the trap, so as to quickly take fire, as it did, from the furnaces under the stills, and that this was the initial act of negligence which was shown to have caused the fire at the asphalt shed. As in the Hallawell case, the court said that it was their conclusion that the two men lost their lives by reason of conditions with which defendant caused them to be surrounded while at work, and which defendant could have avoided by the exercise of ordinary care, and that that conclusion might be reached in the present case regardless of the origin of the fire, since the deceased was in no degree responsible for the fire and in no degree contributed to the accident which caused his death, and since, under the existing statutory law, the defenses of assumption of risk and fellow-servants' negligence have been abrogated. Judgment for plaintiff was affirmed. Graves v. Union Oil Co. of California, — Cal. App. —, 173 Pac. 618 (1918). Rehearing denied.

E. Gas plant by-products.

The defendant corporation, which was engaged in the manufacture of illuminating gas and its by-products for use in a city and adjacent territory, allowed water-gas-tar and other injurious by-products to escape into

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mony cannot be counted harmonious upon whether, or the extent, gasoline was permitted to overflow and run at large from the gravity tank upon and over the ground to gather in pools, or in the ditch connected with tunnels under the testing building; but were the testimony not in conflict, if different inferences might reasonably be drawn as to its import, it does not follow the case should be disposed of as a matter of law.

"It is also the general rule that the mere fact that an injury has resulted from certain conduct does not establish the further fact that the conduct was negligent, and we may add a third rule, stated by counsel, which is that although the facts concerning the conduct complained about are not in dispute, if different minds may honestly draw different conclusions respecting them, the question whether there was negligence is still a question for the jury." Brown v. Bryant, 166 Mich. 180.

We regard as well in point and applicable here the principles applied in Schoepper v. Chemical Co., 113 Mich. 582, involving an explosion of nitro-glycerine, the cause of which defendant contended rested entirely in conjecture. As was said there in conclusion:

"Negligence, like any other fact, may be inferred from circumstances. (Citing cases.) And, though the proof of plaintiff depended upon inference to establish the main fact, the question of whether the inference suggested by the plaintiff's theory is the correct one, or whether it was sufficiently rebutted, was for the jury." (Citing cases.)

The judgment will stand affirmed.

a nearby river, from whence they were carried by currents into a bay, in which the oyster and other shell-fish beds, which the plaintiff had leased from the state, were located, causing the injury to oysters, other shell-fish and beds complained of. Holding that the evidence sustained a finding of $17,280 for the plaintiff, the court said: "The defendant is not required by law to manufacture water gas or any other gas. It is permitted to manufacture either for its own emolument and profit, but with the implied, if not express, limitation that it shall not become a public or private nuisance; that if it creates deleterious and poisonous substances it will safely dispose of the same without injury to others, and any manufacturer who allows his deleterious waste product to contaminate the waters of the state, be they public or private, is liable to any person who is injured thereby in his private capacity and apart from being merely one of the public, provided he can trace to its origin the noxious substance whereby he is damaged. This the plaintiffs have done. The damage was proved to have been occasioned by water-gas-tar coming from the premises of the defendant. They make and must confine and safely keep this and other dangerous and deadly products of their manufacture at their peril." Payne & Butler v. Providence Gas Co., 31 R. I. 295, Ann. Cas. 1912 B 65, 77 Atl. 145 (1910).

F. A. D.

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AMERICAN INSURANCE CO. OF NEWARK v. MARTINEK.

[Supreme Court of Michigan, September 27, 1918.]

203 Mich. 108, 168 N. W. 982.

1. **Appeal and error—Review—Finding of fact.**
It is the duty of the supreme court, on appeal, under Comp. Laws 1915, § 12587, to review a finding which it is asserted is against the clear weight of evidence.

2. **Insurance—Agent—Failure to cancel policy—Liability to insurer.**
When instructed so to do, it is the duty of an insurance agent to cancel a policy of insurance issued by him, and, if he fails to cancel, he is liable to his principal for the damage sustained by the principal, unless the agent can show some valid reason for his failure to follow instructions.

3. **Insurance—Agent—Failure to cancel policy—Defense to liability to insurer—Contributory negligence.**
A fire insurance company was not guilty of contributory negligence, barring recovery of the amount of a fire loss from an agent who did not comply with instructions to cancel a policy, by failing to cancel the policy direct, where the fire occurred nearly four months after notice to the agent to cancel the policy, but the agent had, under the instructions of the company, canceled a great many policies, and he clearly understood it to be his duty, when instructed to do so, and the company supposed that its positive instructions in the particular case had been carried out.

4. **Insurance—Agent—Failure to cancel policy—Knowledge on part of insurer—Sufficiency of evidence.**
In an action by a fire insurance company against an agent to recover damages for a fire loss which it was compelled to pay because of the failure of the agent to cancel a policy, according to instructions, evidence held insufficient to show that plaintiff knew that the policy was not canceled and to show that it supposed its instructions had been carried out.

CASE NOTE.

Failure of insurance agent to obey principal's instructions to cancel policy as negligence, and applicability of defenses of assumed risk and contributory negligence in action to recover damages because of such failure.

I. Unconditional order to cancel, 953-957.
A. Negligence as jury question, 953-954.
B. Measure of due care, 954-955.
C. Contributory negligence as defense, 955-957.
II. Order to reduce amount of risk, 957-958.
III. Effect of secretly reinsuring rejected risk, 958-959.
IV. Alternative order to cancel, 959-960.

I. Unconditional order to cancel.

A. Negligence as jury question.

The defendant issued a policy of insurance on some property of W. The property was in the prohibited list of the plaintiff insurance company, and when its special agent inspected the property he directed the defendant to cancel the policy, which it neglected to do. The property was destroyed by fire and W brought suit on the policy and recovered the full amount. This suit was then brought by the insurance company against the defend-

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5. Insurance—Agent—Failure to cancel policy—Estoppel of insurer to recover from agent—Retention of premium.

A fire insurance company is not estopped to recover from an agent the amount paid on a fire loss due to the failure of the agent to cancel a policy, as instructed to do, because of the retention of the premium, where it was the custom of the agent to make monthly current statements, and all he had to do was to pay the return premium out of funds of plaintiff in his hands, give himself credit for that amount, charge it to the company, deduct it from his next statement, and return the policy in lieu of cash.

Action by an insurance company against its agent to recover damages for the agent's failure to cancel a certain fire insurance policy according to its instructions. Judgment in favor of defendant reversed and new trial granted.

For appellant—Sawyer & Sawyer (Thomas Bates, of counsel).

For appellee—Doyle & Barstow.

KUHN, J. In this action it is sought to recover damages occasioned to the plaintiff because of the failure of the defendant, as plaintiff's agent, to obey its instructions and cancel a certain fire insurance policy written by the defendant in the plaintiff corporation. The case was tried before the judge without a jury, who at the close of the testimony filed written findings of fact and of his conclusions of law and entered judgment in favor of the defendant. The case is brought here by the plaintiff to review the conclusions of law of the learned trial judge and the findings of fact by him made.

ant, its agent, for issuing a prohibited risk, and for failure to cancel the policy. The lower court directed a verdict in favor of the plaintiff and defendant appealed. Reversing judgment for plaintiff, the court held that, there being no evidence that the agent knew the risk was prohibited, the action for failure to cancel the policy was based on negligence, and a directed verdict was improper, negligence being a question for the jury. The defendant contended that the return of the premium by the company was a condition precedent to the action. Held, that in the absence of a showing that the agent had no funds of the company on hand, the agent's contention could not be maintained. It was also held that the special agent's power to cancel the policy himself, and the conduct of other local agents when ordered to cancel policies, constituted no defense in this action. Westchester Fire Ins. Co. v. Bollin, 106 S. C. 45, 90 S. E. 327 (1916).

B. Measure of due care.

Defendants were insurance agents who, having issued policies, were instructed by the company to cancel them. Acknowledging this order, they said they would do so but failed to carry out the promise. Within two weeks the property was destroyed by fire and the company was held liable by a jury after an unsuccessful de-

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In order that the case may be fairly understood; it is necessary to set forth certain facts. The plaintiff has been lawfully engaged in carrying on the business of fire insurance in this state, prior to, on, and ever since October 21, 1910, and the defendant conducted a general fire insurance agency at Menominee in this state, where he represents some 35 insurance companies, including, during the period of this controversy, the plaintiff in this case. The appointment of the defendant as agent contained the following:

> "To receive proposals for insurance against loss and damage by fire, * * * to fix rates of premiums, and receive moneys for transmission to the company, and to countersign, issue and renew policies of insurance signed by the president and secretary of the company, subject to the rules and regulations of the company, and such instructions as may from time to time be given by its officers and managers."

The appointment was not for any specified time, but the right was reserved in the company to revoke the appointment at any time. Five years before the appointment of the defendant to the agency for the plaintiff, the defendant's predecessor in said agency issued a policy of insurance in said company, insuring one Jule Duquaine against loss or damage by fire, covering a certain elevator building, the machinery and appliances therein, and other contents thereof, located at Carney in said county, in the sum of $3,400. This policy had been renewed from year to year and was in force when said defendant received and accepted said agency for the plaintiff. The defendant thereafter annually renewed the said policy until April 17, 1916. On the 8th of April, 1916, the defendant filled out and delivered to said insured a policy of insurance insuring said property in

fense that the policies were canceled. Defendants testified that they had mailed the notices of cancellation. Immediately after the fire they wrote to the home office that the fire had occurred and that they supposed the company would join in an adjustment with other insurers. Having paid the judgment against it, the company sued the agents for neglect to cancel. Affirming judgment for the plaintiff, the court held that the agents, having undertaken a duty which, had they refused to perform, might reasonably have been done by the company itself, could not deny their obligation. "As to the degree of vigilance required," said the court, "even supposing this a purely extra task, the court was justified in its finding that they had not used even ordinary care." National Union Fire Ins. Co. of Pittsburg v. Dickinson, 92 Wash. 243, Ann. Cas. 1918 C 1042, 159 Pac. 125 (1916).

C. Contributory negligence as defense.

The defendant agent in the month of August issued a policy of insurance on the property of a country club. Immediately on receipt of the daily report forwarded by the defendant, the plaintiff insurance company notified the agent to take up and return the policy at once. This he failed to do, and in October the property was destroyed by fire. The premium on the policy was paid to the

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like amount from April 17, 1916, to April 17, 1917, and on the same day reported the transaction to the plaintiff, which report was received by the plaintiff on April 10, 1916. On April 11th, and again on April 27th and on May 9, 1916, the plaintiff wrote to the defendant, disapproving the policy unless revised to cover not exceeding $1,500 on the building and equipment, with stock item to equal or exceed that amount. The defendant did not reply to any of these letters, and on May 24, 1916, the plaintiff wrote the defendant:

"Assuming from the delay that the assured is not willing to increase the grain insurance and cut down the building item, we must ask for the return of the canceled policy."

On the 9th and 17th days of June, 1916, the plaintiff, by the use of a blank form mailed to defendant, had said, among other things, with reference to this policy:

"As the policy has doubtless been taken up, please return it to this office at once. We wish to state that we never give an agent credit for the return premium on canceled policies until they are received at this office. * * *

"Trusting we will be favored with the above mentioned policy at once, we remain."

On July 3, 1916, a duly authorized special agent of plaintiff wrote to the defendant requesting attention at once and the cancellation and return of the policy, and on July 7th, 10th, and 28th a form letter, containing in substance what we have quoted above from the other form letter, was mailed to, and duly thereafter received by, the defendant. The defendant in no way replied to any of plaintiff's letters or notices regarding the policy, although he had written a great many policies in the plaintiff company and had canceled the

agent in September and remitted by him to the plaintiff company in December, after the property had been burned. Plaintiff paid $2,531.35 to the country club in settlement, and then brought this action against the agent to recover the amount. Reversing judgment for the defendant, the court held that, when instructed to do so, it was the duty of an insurance agent to cancel a policy issued by him; and if he failed to cancel such policy he was liable to his principal for the damage sustained by the principal unless the agent could show some valid reason for his failure to follow the instructions given him. Upon retrial the defendant's answer was amended, setting up contributory negligence and assumption of risk in that that company failed to exercise reasonable care and diligence to cancel or procure the cancellation of the policy after they knew, or should have known, that the agent failed to cancel it, and thereby contributed to the loss. Upon appeal the court again reversed judgment for the defendant, and held that the doctrine of contributory negligence and assumption of risk did not apply, quoting as follows: "Where an insurance company has directed its agent to cancel a policy, it is not guilty of contributory negligence if it fails to act outside of said agent and cancel said policy itself. The company has a right to rely on its agent's obedience

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policies when he had been requested so to do. The insured property was damaged by fire on July 31, 1916, entailing a loss as established by the proofs and adjustment, which the plaintiff was obliged to and did pay, on the 16th day of September, 1916, in the sum of $2,801.88, besides the expense of adjustment, amounting to $49.72. It is for these two amounts that this action is brought, with interest thereon from the date of payment.

Counsel for plaintiff and appellant in their brief, with reference to the rule of law applicable, said as follows:

"When instructed so to do, it is the duty of an insurance agent to cancel a policy of insurance issued by him, and if he fails to cancel, he is liable to his principal for the damage sustained by the principal, unless the agent can show some valid reason for his failure to follow his instructions."

In reply, counsel for defendant say, referring to this statement of the law:

"So far as the above statement of law goes, it is unchallenged. There is no doubt that the above quotation is a correct statement of a rule of the law of agency. The difficulty with opposing counsel is that they stop short with this one rule of agency and disregard entirely other and equally binding, well-settled rules of this same law of agency. One need not look into a law book to know that unless a principal had some redress against his agent for disobedience of instructions, there would be few relations of principal and agent established."

But it is insisted that, notwithstanding the acknowledged negligence on the part of the defendant, no right of recovery should be had in this case, because it is urged that the doctrine of contributory negligence on the part of the plaintiff should be invoked, and that if this is done, under the findings of fact of the court, the defendant

to positive directions to cancel, and presume that they would be obeyed; the disobedience of the agent being at his peril." St. Paul Fire & Marine Ins. Co. v. Bigger, — Kan. —, 182 Pac. 184 (1919). For opinion on former appeal, see 102 Kan. 53, 169 Pac. 213 (1917).

II. Order to reduce amount of risk.

By a clear, unambiguous letter, the defendant agent was instructed to at once relieve the plaintiff company of its liability to the extent of $1,500 on a certain elevator which had been insured for $2,000. Defendant received the letter, and although 24 days elapsed between such receipt and the fire, he neglected to carry out the instruction. The elevator having been destroyed by fire, the plaintiff having been required to discharge its liability under the policy, now brought this action to recover damages for defendant's negligence in disobeying the instructions. Reversing judgment for the defendant agent, holding him liable, the court said: "It was the undoubted legal right of the plaintiff insurance company to have the agency executed according to its instructions. It is also apparent that such instructions were not susceptible of a misinterpretation, and the undisputed evidence is that defendant neglected within a reasonable time, or at all, to comply therewith, and by such negligence he incurred a lia-

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should not be held liable. In the findings of fact the following is found:

"The facts and circumstances of the case justify the inference which is drawn, that the plaintiff's general officers knew the defendant had not rearranged the insurance or canceled the policy, and in ample time to have prevented a loss by cancellation direct."

The seventh assignment of error is as follows:

"The court erred in finding, and in refusing to strike therefrom, as per plaintiff's fifth proposed amendment, as follows: 'But the question remains whether he (referring to defendant) could be held for the loss where it appears the plaintiff knew of his disobedience in ample time to have avoided loss by cancellation of policy itself,' because the same, and the assumption of facts referred to is against the clear weight of the evidence."

It, therefore, becomes necessary for us, by virtue of section 15, chap. 18, of the Judicature Act (3 Comp. Laws 1915, § 12587), to review this finding of fact. We cannot agree with the learned trial judge that, under the circumstances of this case, the plaintiff should be held guilty of contributory negligence or that the doctrine of avoidable consequences can be made to apply. The record showed that the defendant had, under the instructions of plaintiff, prior to this time canceled a great many policies, and he clearly understood it to be his duty, when instructed to do so by the plaintiff, and it seems to us that the plaintiff had the right to believe, and that the record justifies the conclusion that it did believe, that its instructions as to the cancellation of this policy were being obeyed, for in the notice sent by the plaintiff as late as the 28th of July, there appeared the following:

bility to his principal to respond in damages for such negligence." The proper measure of damages, the court held, was the amount with interest which plaintiff was obliged to pay to the insured under the policy over and above what it would have been obliged to pay had such instructions been complied with. Queen City Fire Ins. Co. v. First Nat. Bank of Hannaford, 18 N. D. 603, 22 L. R. A. (N. S.) 509, 120 N. W. 545 (1909).

III. Effect of secretly reinsuring rejected risk.

Defendants, insurance agents, upon orders by letter from plaintiff company had canceled a previously existing insurance at a prohibitive rate, 2½ per cent, but had rewritten the same property at the same rate as the canceled policy and purposely failed to report such insurance to the company. The property was destroyed by fire and the company paid $861.43. This action was brought to recover that amount, $50 expenses in adjusting the same, and $35, the amount of the premium which defendants should have exacted. Reversing judgment on a directed verdict for the defendants, the court held that the plaintiff had a prima facie case, entitling it to have the same submitted to the jury, and that the agents were liable to the company for the premium and all the damages suffered. It was argued that as the plaintiff

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"We again call your attention to the fact that we have not as yet received policy No. 11173, issued to Jule Duquaine and ordered canceled ———— ————, 1916, at your agency. As the policy has doubtless been taken up, please return it to this office at once."

The defendant did not answer a single one of the letters that he received, but refused to obey the instructions of the plaintiff as to canceling the policy. The agent was located hundreds of miles from the principal, and the only method by which the plaintiff could ascertain whether the policy had been canceled was through its agent, who refused to advise it whether he had canceled it or not, but instead of doing so, he stubbornly refused and neglected to perform his duty under his appointment as the agent of the plaintiff. We are of the opinion that there is nothing in the record to warrant the inference that the plaintiff knew that the policy was not canceled, but in our opinion the conclusion is clearly warranted that they supposed that their positive instructions as to cancellation of the policy had been complied with and that the plaintiff had been refusing to return the canceled policy. A somewhat similar case is found in 169 Pac. 213 (a Kansas case), St. Paul Fire & Marine Ins. Co. v. Bigger, 102 Kan. 53. Another instructive case is London Assurance Corporation v. Russell, 1 Pa. Super. Ct. Rep. 320, where the court said:

"In the defendant's testimony, the plaintiff company is relieved entirely of any charge of contributing to this loss, as the letters produced by the defendant clearly show that the company relied on their first notice through their representative, Mr. Calley. The primary obligations of an agent, whose authority is limited by instructions, is to adhere faithfully to those instructions in all cases to which they ought properly to apply. He is, in general, bound

brought suit for the 35-dollar premium on the policy, it elected to make the contract its own and by so doing, ratified the act of its agents; but the court held it did not by accepting the fruits of the transaction condone the agent's disobedience. Regarding a claim that contributory negligence on the part of the company should have been negatived in the petition, the court said: "The action is bottomed on defendants' failure, as agents, to obey the instructions of their principal, and upon fraud and wilful wrong on their part. In such a case contributory negligence need not be negatived. Call the action what you will—there is no requirement of law that contributory negligence be negatived in such a case. Even if the gravamen of plaintiff's action be negligence, the wrong charged was a wilful one, and in such cases contributory negligence need not be negatived in the petition." Continental Ins. Co. v. Clark & Cressler, 126 Iowa 274, 100 N. W. 524 (1904).

IV. Alternative order to cancel.

Additional premium became due by reason of an endorsement of a waiver on a policy. Plaintiff insurance company wrote to its agents, the defendants, directing that the policy be canceled unless the additional premium be paid. Repeated correspond-

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to obey the orders of his principal exactly, if they be imperative, and not discretionary; and, in order to make it the duty of a factor to obey the order, it is not necessary that it should be given in the form of a command. The expression of a wish by the consignor may fairly be presumed to be an order. * * * One who receives orders to cancel a policy delays their execution at his peril."

It is also said by counsel for defendant that as the company retained the premium, that fact operated as an estoppel against the plaintiff. We do not think there is any merit in this contention, for the defendant testified:

"At the end of the month I make a current statement and send it to the company. In 45 days or 50 days thereafter, they draw on me through the bank. If I had canceled this Duquaine policy, I would have had to pay Mr. Duquaine back his unearned premium, then I would charge that to the company, and in my balances I get credit for it."

It appeared that the defendant at all times had in his possession the entire premiums collected on plaintiff's policies for two and one-half months, and all he had to do was to pay the return premium out of plaintiff's funds, give himself credit for that amount, charge it to the company, and deduct it from his next statement, and return the policy in lieu of the cash. With him it was simply a matter of bookkeeping.

After a careful review of this record, we are satisfied that the trial judge erred in rendering a judgment for the defendant, and a judgment upon these facts should have been entered for the plaintiff for the full amount claimed. The judgment is, therefore, reversed and a new trial granted, with costs to the appellant.

ence was pursued between plaintiff and defendants with reference to the transaction, and it showed that defendants were insisting that the additional premium be not charged, because it would lose the partonage of that customer, and the plaintiff continued to insist upon the collection of the premium or the cancellation of the policy. The policy was not canceled nor was the additional premium paid. The property was damaged, 6 months after the issuance of the policy, the company settling the loss, and this action was brought against the agents for negligent failure to cancel. Affirming judgment sustaining a demurrer to the complaint in so far as it sought to recover damages in excess of $30, the court held that the liability of the agents was limited to the amount of additional premium, and they were not liable for the sum paid by the company in settlement of the loss, the company having never made an unconditional demand for cancellation of the policy. "The point in controversy," said the court, "between the plaintiff and defendants was concerning the collection of the premium and the violated instructions related to that point only." Phoenix Ins. Co. of Hartford, Conn. v. A. B. Banks & Co., 114 Ark. 18, L. R. A. 1915 A 860, Ann. Cas. 1916 D 649, 169 S. W. 233 (1914).

F. A. D.

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BARABE v. DUHRKOP OVEN CO.

[Supreme Judicial Court of Massachusetts, January 2, 1919.]

231 Mass. 466, 121 N. E. 415.

1. **Sales—Faulty installation of manufactured article sold—Damage by fire—Action by buyer—Instruction.**

In an action for damages for fire resulting from the operation of a patent baking oven manufactured and installed by defendant for plaintiff in accordance with the terms of a conditional sale contract, held that the jury were correctly instructed that while defendant was under no obligation to remove the truss beam directly over and in contact with the masonry of the arch at the top of the oven, to which, as the jury could find, the fire bursting through the bricks was communicated because the interstices had not been sufficiently filled with mortar, it was required to use reasonable care to protect the truss beam from combustion.

CASE NOTE.

Liability of vendor of machinery or other mechanical appliance for negligent construction, installation or assembling thereof, causing injury to another than vendee.

I. Injury to licensee of vendee, 961-962.

II. Injury to employee of vendee, 962-964.

A. Defective shoe stitching machine, 962.

B. Worn seam in boiler of second-hand traction engine, 962-963.

C. Defectively constructed and intentionally concealed brake rod on car, 963.

D. Handle of unfit material on flush toilet, 963-964.

E. Defective second-hand water heater, 964.

III. Injury to traveler on public highway, 964-966.

A. Defectively constructed drawbar of trailer, 964-965.

B. Negligently fastened iron stringers of bridge, 965-966.

IV. Injury to donee of vendee, 966.

V. Injury to tenant of vendee, 966-967.

Cross-references. Liability of manufacturer or independent contractor for injury to third person caused by instrumentalities dangerous only because of defective construction, see 12 N. C. C. A. 562-589; liability of manufacturer of automobile for injury or damage caused by defects in machine, see 13 N. C. C. A. 1029-1043.

Scope of Note. This note does not include mechanical appliances on automobiles and like vehicles, dangerous weapons, or appliances not mechanical. Cases involving manufacturers, who are not vendors, have also been excluded.

I. Injury to licensee of vendee.

Plaintiff took passage on an elevator going to the office of a dentist on the fifth floor. When she started to alight at her destination the elevator was stopped by the operator so that the floor thereof was on a level with that of the corridor, and while she was in the act of alighting from the elevator it suddenly dropped about 6 inches with a jerk, whereby she was thrown to the floor of the corridor,

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2. **Sales—Faulty installation of manufactured article sold—Damage by fire—Liability of seller to buyer.**

In an action for damages for fire resulting from the operation of a patent baking oven manufactured and installed by defendant for plaintiff in accordance with the terms of a conditional sale contract, held that, if defendant's faulty performance of the work caused the fire, it was liable in damages even if the exact form in which injury to the plaintiff might result was not foreseen.

3. **Sales—Faulty installation of manufactured article sold—Damage by fire—Liability of seller to owner of premises occupied by buyer.**

In an action for damages for fire resulting from the operation of a patent baking oven manufactured by defendant and installed by it for the occupant of plaintiff's premises, in accordance with the terms of a conditional sale contract with such occupant, held that the defendant owed to the plaintiff as the landowner the duty of not causing injury to her property by its tortious acts or misfeasance and that, if the jury found that when properly used and because of insufficient construction, the oven became a dangerous instrumentality which would be likely to set the plaintiff's buildings on fire, the defendant was liable in damages.

breaking her arm. This action was brought against the manufacturer, and it was charged that the elevator was defectively constructed. The testimony showed that as between the owner of the building and the elevator company, the elevator had been completed and accepted before the accident, although under contract the defendant had undertaken the operation of the elevator. The court charged the jury that the faulty construction of the elevator, or the fact that the elevator had become defective, could not be charged against the defendant elevator company. Upon appeal, affirming judgment for the defendant, the court held that such instruction was not error. Johnson v. Portland Railway, Light & Power Co., 79 Ore. 403, 155 Pac. 375 (1916).

II. Injury to employee of vendee.

A. Defective shoe stitching machine.

The plaintiff was injured while running a stitching machine used in the manufacture of shoes, which machine had been leased by the defendant to plaintiff's employer, a shoe manufacturing company. Defendant, by the terms of the lease, reserved control of the machines "for the purpose of keeping them in suitable condition and repair." The plaintiff contended that the defendant owed the plaintiff the duty not to provide or maintain for his use, as an employee, a machine which was not in proper condition or repair. Affirming judgment sustaining the demurrer to the plaintiff's complaint, the court held that there was no duty out of which any liability arose such as was contended for by the plaintiff. "There are exceptional cases, * * *" said the court, "as, for example, in regard to dangerous and vicious animals, firearms, explosive and other dangerous goods, poisonous drugs, and we may add, injurious articles of food. * * * The case at bar has no relation to any such exceptions." McClaren v. United Shoe Machinery Co., 92 C. C. A. 386, 166 Fed. 712 (1909).

B. Worn seam in boiler of second-hand traction engine.

Defendant manufacturers and vendors reconstructed and set up ready for sale a second-hand traction threshing engine. They published that the same had been tested for boiler resistance, and could be used with safety to life and property, and sold the same to the employer of plaintiff's intestate. The boiler was not sound for the reason that a seam had rusted and worn for a distance of 18 inches in the iron forming the boiler,

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Actions for damages for fire resulting from the operation of a patent baking oven manufactured and installed by defendant. Exceptions by defendant overruled.

For plaintiffs—J. P. Doran.

For defendant—Eaton & McKnight and Stanley W. C. Downey.

BRALEY, J. The exceptions to the instructions are not well taken, and the presiding judge rightly submitted to the jury the question of the defendant's liability. It manufactured and installed for the plaintiff Alcid Barabe one of its patent baking ovens in accordance with the terms of a conditional contract under which title

and while using it during the threshing season it instantaneously, and without giving any indication of weakness, exploded at the weak place in the seam, tearing a hole in it and discharging steam with terrific force, breaking off from the engine and boiler pieces of wood and iron, throwing them with violent force, some of which struck plaintiff's intestate, injuring him so that he died within a few minutes. Affirming judgment for the defendants, the court held that, where the injury was the result of an act, the cause of which was not in itself imminently dangerous to life and limb, nor based upon fraud or deceit, nor implied invitation, and where the plaintiff was not a privy of the contract with the defendant, an action for negligence would not lie. "In all cases like the one at bar," said the court, "where the manufacturer and vendor owed no duty to the third party, who was a stranger to the contract, there could be no recovery." Laudeman v. Russel & Co., 46 Ind. App. 32, 91 N. E. 822 (1910).

C. Defectively constructed and intentionally concealed brake rod on car.

The defendant company had manu factured and delivered to the railroad company a car with the brake rod constructed in an imminently dangerous manner, which it knew to be so dangerously constructed at the time, and concealed the defect with paint. It knew the use to which the car would be put, and plaintiff's infant son, an employee of the railroad company, while using the brake, received an injury of which the father complained in this action. Affirming judgment for the plaintiff, the court held that where an act of negligence was imminently dangerous the manufacturer was liable to the party injured, whether there was any relation of contract between them or not. "The rod," said the court, "was not only imminently dangerous, but the defect which rendered it so was concealed." Pullman Co. v. Ward, 143 Ky. 727, 137 S. W. 233 (1911).

D. Handle of unfit material on flush toilet.

The plaintiff, a mechanic, received an injury to his hand through the breaking of a knob at the end of the handle of a valve used to flush toilets in the shop where plaintiff was employed. It was alleged that the knob was made of defective and unfit material. Denying plaintiff's motion for judgment on the pleadings against the defendant manufacturer,

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did not pass to the vendee upon completion and installation, but was to be transferred by a bill of sale when the contract price had been fully paid. The plaintiff, who never has acquired title, used the oven in his bakery, and within four months from the date of the contract, and while it was being operated at the requisite temperature for baking bread, fire broke out between the top of the oven and the ceiling, which the jury would have been warranted in finding was caused solely by the defendant's negligent workmanship.

The defendant had bound itself to furnish an oven which was not defective when subjected to the conditions of operation shown by the contract. And the jury were correctly instructed that while the defendant was under no obligation to remove the truss beam directly

the court held that, if the nature of a thing was such that it was reasonably certain to place life and limb in peril when negligently made, it was then a thing of danger, and that, if it was known that the thing would be used by persons other than the immediate purchaser, and used without new tests, then, irrespective of contract, the manufacturer of such thing of danger was under a duty to make it carefully, and was liable to persons other than his immediate purchaser for his failure to perform that duty. "In this case," said the court, "it seems to me the article in question should be held as a matter of law not to be a thing of danger within the principle stated." Byers v. Flushovalve Co., 160 N. Y. Supp. 1050 (1916).

E. Defective second-hand water heater.

This action was brought to recover damages for personal injuries received through the explosion of a hot water heater in the basement of a building in which plaintiff was janitress, and which heater defendant was endeavoring to sell to the owner of the building. Defendant had notice of the defective condition of the heater, and claimed that it was endeavoring to sell the heater to the owner of the building as a second-hand article, and therefore contended that the transaction was a bailment for the mutual benefit of the defendant and the owner, and that there was no implied warranty that the heater was fit for use. Affirming judgment for plaintiff for $800, the court held that as the defendant was undertaking to sell the heater, and as demonstrations were being made, and the defendant had notice of defects in the heater, and also knew that plaintiff would operate the heater, it was the duty of the defendant to put the same in order. Calhoun v. Central Illinois Light Co., 205 Ill. App. 185 (1917).

III. Injury to traveler on public highway.

A. Defectively constructed drawbar of trailer.

This action was brought by the plaintiff, as administrator, to recover damages for the death of his intestate, caused by what was called a "trailer" which broke away from the automobile which was hauling it, and which then, being no longer under control, ran upon the sidewalk and caused the injury and death complained of. The negligence charged against the defendant company was

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over, and in contact with the masonry of the arch at the top of the oven, to which, as the jury could find, the fire bursting through the bricks was communicated because the interstices had not been sufficiently filled with mortar, it was required to use reasonable care to protect the truss beam from combustion. If the company's faulty performance of the work caused the fire, it is liable in damages even if the exact form in which injury to the plaintiff might result was not foreseen. Hill v. Winsor, 118 Mass. 251; Dulligan v. Barber Asphalt Paving Co., 201 Mass. 227, 231, 21 Am. Neg. Rep. 652, 87 N. E. 567; D'Almeida v. Boston & Maine Railroad, 209 Mass. 81, 88, 95 N. E. 398, Ann. Cas. 1913 C 751.

The plaintiff in the second case is the mother of Alcid, and when the oven was built and when the fire occurred, she was the owner

that it manufactured the drawbar defectively and used defective materials, so that the bar was not capable of withstanding the strain and work required of it in drawing the trailer and in resisting the thrusts imposed upon it. This action was also brought against the owner who had bought the drawbar of the defendant company. Sustaining a demurrer of the manufacturing company, the court held that the manufacturer of an instrument, even one inherently dangerous, was liable only for his failure to make the instrument so that it would stand proper and reasonable usage. Jazek v. Firuski, 166 N. Y. Supp. 444 (1917).

B. Negligently fastened iron stringers of bridge.

Defendant contractor constructed a bridge for a county, and while plaintiff's decedent was crossing it with a traction engine it gave way and fell, causing injuries which resulted in his death. It was alleged that the bridge was constructed on stone abutments on each side of the stream, with a floor beam in the center thereof supported by certain truss rods, and that iron stringers were laid from the stone abutments on each side with the other ends meeting and resting on the floor beam. It was charged that defendant was negligent in failing to fasten the ends of the stringers to the floor beam and to other parts of the bridge and to each other, and that by reason of such negligence the stringers crept and shifted and finally fell from the floor beam, causing the floor of the bridge resting thereon to fall. Affirming judgment for the defendant, the court held that, after acceptance of the bridge by the county, the traveler might rightly repose confidence in the county to the extent of believing that it had exercised reasonable care to provide a safe bridge for his use; but he had no right to repose such confidence in the contractor who built the bridge. "Many cases have been cited * * *," said the court, "involving the liability of manufacturers of machinery, conveyances and other articles sold in the regular course of trade, for injuries resulting to persons not parties to the contract, on account of defects in the construction of the article sold. The relations involved in such cases are analogous to those in the case at bar, but they are not identical; and the rules of law which apply, while similar in many respects, are not the same. In the class of cases to which the one at bar belongs, the work is generally done by the contractor in accordance with

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of the "real estate" occupied by her son for the purposes of his business. It is contended that the verdict assessing damages for the injury to the buildings should be set aside because the fact of her ownership was unknown to the defendant, and no contractual relations existed between them. The defendant, even if the contractee used that part of the premises where the oven had been placed, owed to the plaintiff as the landowner the duty of not causing injury to her property by its tortious acts or misfeasance. It was uncontroverted that it had annexed to the premises an oven to which it retained title under a contract the performance of which by the conditional vendee until he acquired the ownership recognized the maintenance and use of the oven as previously stated. If the jury found that when so used, and because of insufficient construction, it became a dangerous instrumentality, which would be likely to set

plans furnished by the party letting the contract or under his direction and supervision, and the work is subject to inspection before acceptance. In the other class of cases to which reference is made, the machinery or other article manufactured is made according to the plans of the manufacturer and under his direction and subject to his inspection before sale. The differences pointed out between the classes of cases under consideration furnishes a reason for holding that the liability of an independent contractor toward third persons, not parties to the contract, terminates with the completion of the work and the acceptance of the contract, while a similar rule, but somewhat modified, applied to manufacturers selling in the ordinary course of trade." Travis v. Rochester Bridge Co., — Ind. —, 122 N. E. 1 (1919).

IV. Injury to donee of vendee.

The plaintiff was seriously injured by falling from a stepladder. It was of a construction commonly known as a stepladder chair, and bore the words, "Trade-Mark, Steinfeld." The chair was one of a half dozen bought of the defendant jobbers by a retailer, from whom it was bought by plaintiff's daughter and sent by her as a present to the plaintiff. Plaintiff claimed that the ladder came in two by the drawing out of nails and of the screws which held the hinges to the back portion of the ladder, which caused it to collapse. There was no proof that the defendants did not use reasonable care in making an inspection, and it was also inspected by plaintiff's husband when it reached plaintiff's home, and no defect was discovered. Affirming judgment for the defendants, the court held that the mere breaking of the ladder did not render the defendants liable, and that if a reasonable inspection was made by defendants, as was found by the jury, and the alleged defect not discovered, then there was no negligence chargeable to the defendants as jobbers or sellers. Miller v. Steinfeld (N. Y. App. Div.), 160 N. Y. Supp. 800 (1916).

V. Injury to tenant of vendee.

The plaintiff, whose minor son had been killed by inhaling carbon monoxide gas emitted by a defective water heater in the bathroom at their home, brought suit as administratrix of his estate against the defendant, the grantor of the present owner. When

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the plaintiff's building on fire, the defendant is liable in damages. Derry v. Flitner, 118 Mass. 131, 134; Gorham v. Gross, 125 Mass. 232, 240, 28 Am. Rep. 224; Bickford v. Richards, 154 Mass. 163, 164, 27 N. E. 1014, 26 Am. St. Rep. 224; Dulligan v. Barber Asphalt Paving Co., 201 Mass. 228, 231, 21 Am. Neg. Rep. 652, 87 N. E. 567; Standard Oil Co. v. Wakefield, 102 Va. 824, 832, 17 Am. Neg. Rep. 259, 47 S. E. 830, 66 L. R. A. 792. The cases of Lebourdais v. Vitrified Wheel Co., 194 Mass. 343, 80 N. E. 482, and Leavitt v. Fiberloid Co., 196 Mass. 440, 21 Am. Neg. Rep. 150, 82 N. E. 682, 15 L. R. A. (N. S.) 855, which hold that where the article or instrumentality is not of itself inherently dangerous, "a vendor who makes no representation is not liable to a remote purchaser of the article sold for damages done by defects in it," are manifestly distinguishable. The exceptions in each case must be overruled.

So ordered.

defendant owned the premises he installed therein the water heater, which had an exhaust or ventilating pipe running from the top and a burner to be lighted to heat the water for bath purposes. The ventilating pipe ran up into a corner of the bathroom and ended inside of the bathroom below the ceiling and behind the flush box, so that on entering the bathroom it could not be seen. When the heater was lighted it consumed the oxygen and other parts of the air and gave off carbon and other material in the bathroom. Plaintiff was tenant of defendant's grantee, and her son went to the room to take a bath, the heater having been lighted. Shortly afterwards, plaintiff went to the bathroom and found him, sitting up in the bathtub, dead. The coroner's jury found that he died from poisoning by carbon monoxide gas generated by the water heater, which it was charged had been negligently installed. Affirming judgment for the defendant, the court held that the former owner of the premises could not be held liable for the negligent installation and defective condition of the heater where there was no proof that he knew of the dangerous condition at the time he sold the premises, nor that the dangerous condition existed at that time. "The liability, if any," said the court, "must rest upon the existence of a duty which might arise out of a relation between the parties and a negligent failure to perform the duty. There is a material difference between the relation between a manufacturer or vendor of a machine or article purchased for a specific use and one using the machine or article for the contemplated purpose, or between a landlord occupying a contractual relation with his tenant and the tenant, and the situation of one who has ceased to have any connection whatever with property which he has conveyed or his grantee." Mercer v. Meinel, 290 Ill. 395 (1919).

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GUTMANN v. ANDERSON.

[Supreme Court of Minnesota, March 21, 1919.]

— Minn.—, 171 N. W. 303.

1. **Master and servant—Injuries to minor servant—Unguarded machinery—Act of vice principal—Action for damages—Charge as to test of vice principalship.**

The plaintiff, a minor under 16, was injured while working at a grinder with an unguarded intake gear in the defendant's meat shop. He claimed that he was put to work at the grinder by one Victor, who to some extent, was in charge, and that the work was a dangerous employment forbidden by Gen. St. 1913, §§ 3848, 3870, to boys under 16. No other fault was attached to Victor. Unless the plaintiff was employed in violation of the statute, he could not maintain a common-law action, for, if his employment was "legally permitted," his rights and the liability of the defendant were fixed by the Workmen's Compensation Act (Gen. St. 1913, § 8230g[2]). The court stated to the jury the effect of the statute and the conditions under which the defendant would be liable for the act of Victor in putting the plaintiff at work, and referred to his authority, express or implied in fact, as the representative of the defendant. After a verdict for the plaintiff it granted a new trial upon the ground that it submitted to the jury the wrong test of the vice principalship of Victor, that is, the rank or grade of service, instead of the nondelegable character of the duty resting upon the defendant. It is held that the charge adopted the proper test of vice principalship, namely, the nondelegable character of the duty imposed upon the defendant; that it properly stated the circumstances under which the defendant would be liable for Victor's act; and that a new trial should not have been granted because of the alleged error in the charge.

2. **Appeal and error—Review—Order granting new trial—Errors considered.**

When a motion for a new trial is granted on the ground of error of law it may be sustained by showing other errors, properly raised, aside from the one on which it was granted. In this case there were none.

CASE NOTE.

Status under the compensation acts of minor employees illegally employed or employed at prohibited work.

I. Minor employed under misrepresentation as to age, 968-970.
II. Employment certificate or permit, 970-973.
A. Sufficiency of certificate, 970-972.
B. Absence of permit required by penal statute, 972-973.
III. Employee of farmer loaned to clay mine, 973-975.
IV. Girl employed at prohibited work, 975.

Cross-references. Application of compensation act to minor legally permitted to be employed but not in particular work to which he was assigned, see 11 N. C. C. A. 599-604; employment of minors generally, and status, where contract of employment is in violation of statute, under workmen's compensation acts, see 15 N. C. C. A. 720-734; status under the compensation acts of minor employees illegally employed, or employed at prohibited work, see 16 N. C. C. A. 1063-1067, 17 N. C. C. A. 607-618.

I. Minor employed under misrepresentation as to age.

While plaintiff was employed in defendant's laundry his hand was caught in a laundry machine and drawn between the two rollers and crushed, and he brought a suit for

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3. **Appeal and error—Review—Order granting new trial—Errors considered.**
When a motion for a new trial is granted upon the ground of error of law it cannot be sustained upon the ground of insufficiency of evidence or excessive damages. Orders for new trials upon such grounds are not appealable. When the motion is made upon the grounds of errors of law, insufficiency of evidence, and excessive damages, and granted solely on the first, without a consideration of the others, and the order is reversed, the second and third are for consideration by the trial court upon the going down of the remittitur.

[Headnotes by the Court.]

4 **Master and servant—Injuries to servant—Nondelegable duties of master—What constitute.**
The law puts upon the employer certain duties or obligations which are nondelegable in the sense that he cannot authorize them to be done by some one else and escape responsibility for the manner or lack of their doing. Such in general is the furnishing of a reasonably safe place in which to work; the furnishing of reasonably safe tools and instrumentalities; the proper supervision of the work in certain cases; sometimes warning and instruction; the guarding or fencing of machinery; and in general the doing of such things as are necessary to meet the positive requirements of a statute enacted for the safety of employees.

5. **Master and servant—Injuries to servant—Nondelegable duties of master—How dischargeable.**
The nondelegable duties or obligations of a master can be discharged only by performance.

6. **Master and servant—Who is vice principal.**
A vice principal is one, whatever his work, who with competent authority discharges a primary or nondelegable duty of the employer.

7. **Master and servant—What does not make foreman a vice principal.**
It is a general principle that the power conferred upon a foreman to direct the work of the employees in the mere manner of its doing does not make him a vice principal.

[Additional Headnotes by Publishers' Editorial Staff.]

damages based upon common-law liability of an employer to compensate an employee for injuries received in his employment by reason of the negligence of the master. At the time of the accident plaintiff was under 16 years of age, but that fact was not known to defendant. In fact, at the time of his employment, plaintiff represented to the company's superintendent that he was then over 16 years of age. Plaintiff had a verdict, and this appeal was upon defendant's rule to show cause after verdict, the first ground upon which the court was asked to make the rule absolute being that the compensation act provided the only means by which an injured employee could recover compensation. It was held, however, that the statutory provision with relation to recovery of compensation only applied where the contract of hiring was a valid one, and not where such a contract was prohibited by the statute law of the state. Under the factory act it was provided that no minor under the age of 16 should be employed, permitted or suffered to work at any of the operations named, including that upon which plaintiff was injured. Defendant contended, however, that that provision did not apply in this case inasmuch as defendant had been induced to hire plaintiff by reason of a false representation made by him as to his age, and therefore the false representation having been the inducing cause of the employment, the infant was estopped from taking advantage of the statute. It was held, however, that the doc-

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Action by a minor for personal injuries sustained while in the employ of the defendant. Verdict for plaintiff. Order granting defendant a new trial for errors of law reversed.

For appellant—D. G. Cash and John B. Richards.

For respondent—Larson & Marsch.

DIBELL, J. Action by the plaintiff, a minor, to recover for personal injuries sustained while in the employ of the defendant. There was a verdict for the plaintiff. The defendant moved for a new trial upon three grounds: (1) That there were errors of law occurring at the trial; (2) that the verdict was not sustained by the evidence and was contrary to law; (3) and that the damages were excessive.

A new trial was granted upon the ground of errors of law and the plaintiff appeals.

1. The defendant operated a small meat market in Duluth. The plaintiff, a boy of 14, another boy of about the same age, a man by the name of Axel Victor, and the defendant constituted the working force.

In the shop was a meat grinder operated by electric power. The plaintiff while operating it caught his hand in the intake gear, which was unguarded, and sustained an injury.

The right of recovery is grounded upon the employment of the plaintiff by the defendant in a dangerous place about machinery

trine of estoppel had no application in such a case and the court ordered that the rule to show cause be discharged. Lesko v. Liondale Bleach Dye & Print Works, — N. J. L. —, 107 Atl. 275 (1919).

II. Employment certificate or permit.

A. Sufficiency of certificate.

Taglinette v. Sydney Worsted Co., — R. I. —, 105 Atl. 641 (1919), was an action at common law to recover damages for the death of a minor resulting from injuries received while employed by the defendant in its factory, plaintiff being the father of deceased. To the declaration defendant filed a plea in abatement, alleging that at the time of the accident both defendant and deceased were subject to the Workmen's Compensation Act, and therefore a common-law action could not be maintained. Plaintiff by his replication sought to take the case out of the operation of the compensation act by alleging that a minor, to become subject to the act, must be of an age at which he could legally be permitted to work under the laws of the state, and that at the time of the injury deceased was over 14 years of age but not 16 years of age, and that the defendant at the time the deceased entered its employ did not have in its possession an age and employment certificate required by statute, because the certificate in the possession of defendant stated that the mother had control of de-

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not guarded to the extent practicable. By G. S. 1913, §§ 3848, 3870, the employment of minors under 16 in certain dangerous employments is forbidden. It is clear that the ground stated is that upon which the recovery must rest if any is had in a common-law action. If the plaintiff's employment was "legally permitted" his rights and the liability of the defendant were fixed by the Workmen's Compensation Act and the question of negligence of one party or the other was unimportant. G. S. 1913, § 8230g (2); Westerlund v. Kettle River Co., 137 Minn. 24, 15 N. C. C. A. 720, 162 N. W. 680; Pettee v. Noyes, 133 Minn. 109, 157 N. W. 995. In the Westerlund Case the question of what constitutes an employment in violation of section 3848 and section 3870 is discussed; and the effect of an employment in violation of these sections upon the provision of the Workmen's Compensation Act (Section 8230g [2]) bringing within its operation "minors who are legally permitted to work under the laws of the state" is decided.

At the time of the injury the defendant was out of the shop on business connected with it. Victor, a man 33 years of age and of some years' experience in the business, was in the shop. To some extent, at least, he was in charge. The claim of the plaintiff is that Victor directed him to operate the grinder and in giving such direction was a vice principal of the defendant.

The court stating this claim to the jury, and referring to the responsibility of the defendant for Victor's action, so far as presently material, said:

ceased, and was signed by her, whereas it should have been signed by plaintiff, and should have stated that the father had control of deceased. Defendant demurred to the replication. The compensation act provided that "a minor working at an age legally permitted under the laws of this state should be deemed sui juris for the purpose of this act," but was silent as to when a minor is legally permitted to work. Other statutory provisions prohibited the employment of a child under 14 years of age in any factory, manufacturing or business establishment, and provided that no child under 16 years of age should be employed or permitted to work in such an establishment unless the employer should have in its possession an age and employment certificate given by or under the direction of the school committee of the city or town in which the child resided, one of the statements which the certificate must contain being that the child had completed 14 years of age. It was contended by defendant that, inasmuch as deceased was 14 years of age and a child of that age might legally be employed to work in a factory, the deceased, simply because of his age, was legally an employee under the Workmen's Compensation Act. It was held, however, that since the statute prohibited employment below the age of 16, unless the employer had a certificate in his possession, a minor working in a factory at the age of 14, when there was no certificate in

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"This is the law on that feature of the case and I will give it to you. It requires you to pass upon the question of fact, and you will bear in mind, as I proceed with the charge and refer to the negligence of the defendant, that as you decide the question of fact one way or the other as to Victor's status in that butcher business, you will apply the charge accordingly in determining the question of negligence: If Axel Victor, in defendant's absence from his place of business, was authorized by the defendant to have control over what plaintiff should do, or if defendant knew or under all the circumstances ought to have known that in his absence Victor was in the habit of exercising control over what plaintiff should do, and Victor on June 19th directed the plaintiff to grind sausage, or hamburger, requiring the use of the machine which injured him, you are instructed that the directions of Victor to plaintiff would be in law the directions of the defendant, and, in such case, the defendant would be responsible for any negligent acts of Mr. Victor resulting in injury to the plaintiff, if such act was committed in the course of his employment, or in the line of his duty, with a view to the furtherance of the defendant's business. The fact that Victor may have exceeded his actual authority, or even disobeyed his express instructions, would not alter this rule."

A new trial was granted on the ground that the giving of this instruction was error. The view of the trial court was that it left the question whether Victor was a vice principal to the jury, but gave it the wrong test for its determination; or more specifically that instead of making the question determinable upon whether the duty cast upon Victor was a nondelegable duty of the defendant, which is the test of vice principalship in this state, it employed the grade of employment or superior servant rule applicable in some states.

The defendant could not employ the plaintiff in violation of the two sections cited without making himself liable for the consequences

the employer's possession, was not working at an age legally permitted under the laws of the state, and therefore deceased was not within the compensation act because of his age alone. It was found, however, that the certificate which was in defendant's possession was sufficient, and therefore deceased came within the terms of the compensation act, and the decision of the trial court sustaining defendant's demurrer to the replication was affirmed and the case remitted for further proceedings.

B. Absence of permit required by penal statute.

Under the Washington statute it was made a misdemeanor for an employer to employ a girl under the age of 16 years in any factory without the written permit thereto of a judge of the superior court of the county in which the child should live, and the compensation act provided that if any workman should be injured who was of less than the maximum age prescribed by law for the employment of a minor in the occupation in which he was engaged, the employer should, within 10 days after demand by the department, pay into the accident fund certain payments. While plaintiff was in defendant's employ about a power-driven machine her left hand was caught between the rolls of the machine and she lost the four fingers of the hand. At the time of her injury she was under 16 years of age

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resulting from the unlawful employment; nor could he evade liability by authorizing Victor to put him at forbidden work. Victor's act in such case would be his act; or we may say, stating it negatively, and it seems to be the same thing, that the duty to refrain from putting a boy under 16 at work forbidden by the statute is nondelegable.

The law puts upon the employer certain duties or obligations which are nondelegable in the sense that he cannot authorize them to be done by some one else and escape responsibility for the manner or lack of their doing. They can be discharged only by performance. Such in general is the furnishing of a reasonably safe place in which to work; the furnishing of reasonably safe tools and instrumentalities; the proper supervision of the work in certain cases; sometimes warning and instructing; the guarding or fencing of machinery; and in general the doing of such things as are necessary to meet the positive requirements of a statute enacted for the safety of employees. Dunnell, Minn. Dig. & Supp. § 5668 et seq.; 4 Labatt, Mast. & S. § 1495 et seq.

The statute which we have cited adopts a definite standard of duty. The employer must not put minors under 16 in certain dangerous employments. The prohibition is absolute. If Victor, under an express or implied delegation of authority from the defendant, put the boy at prohibited work at a dangerous employment in violation of the statute, the defendant was as much liable as if he had done so himself. Victor was then a vice principal, for a vice

and had no permit to work from the superior court. In an action by her for the injuries sustained, defendant insisted that her sole remedy was to be found under the terms of the Workmen's Compensation Act, and this position was sustained by the court on the ground that the statute requiring the permit imposed no penalty upon the child when it did work, so that it followed that the child neither gained nor lost any rights by such employment although the employer might be penalized, and, further, that the provisions of the compensation act above mentioned plainly recognized that a child less than the maximum age for employment was a workman within the meaning of the act. A judgment for plaintiff was reversed and the action dismissed. Rasi v. Howard Mfg. Co., — Wash. —, 187 Pac. 327 (1920).

III. Employee of farmer loaned to clay mine.

In Moll v. Industrial Commission, 288 Ill. 347, 123 N. E. 562 (1919), a proceeding for compensation under the Workmen's Compensation Act, it appeared that Moll was employed by a farmer to work on a farm, and did work on the farm until a certain date, when the farmer made a contract with a clay company to remove the surface earth from the clay which the clay company was mining and shipping to market, and Moll was put upon that work and paid by the

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principal is one, whatever his work, who with competent authority discharges a primary or nondelegable duty of the employer.

The defendant cites Pasco v. Minneapolis, etc., Co., 105 Minn. 132, 117 N. W. 479, 18 L. R. A. (N. S.) 153. There it was held that the power conferred upon a foreman to direct the work of the employees in the mere manner of its doing did not make him a vice principal. This is a general principle. In the application of it there is often difficulty. It has no special application here for the statute applicable to the situation casts a duty negative in character upon the defendant and it cannot be delegated or evaded.

We are unable to hold that the instruction of the court was erroneous. It did not adopt the grade of employment or superior servant rule. It made the defendant liable, if at all, not because Victor was somewhat in control of the plaintiff and had some authority to direct him, but only in the event that he had express or implied authority to put him at the work prohibited by the statute and did so; and in such event the jury was told that his act was the defendant's act. The relative rank or superiority in service of Victor and the plaintiff was not put to the jury as the test. Whether he, under competent authority from the defendant, put the plaintiff at forbidden work, was made the test. The nondelegable character of the duty was the test and not superiority in rank or service.

We do not understand that it is claimed that the plaintiff might not have been properly employed about the shop in some capacity

farmer his monthly wages and the farmer was paid by the company, the work being done under and in accordance with the direction of the clay company with plows and scrapers furnished by it. He continued upon this work, most of the time being engaged in stripping earth from the clay, but occasionally, when directed by officers of the clay company to do so, he did some other kind of work about the mine. While engaged in the work at the clay company's mine Moll lodged and boarded at the farmer's place and performed chores there in the morning and evening. While driving a team hitched to a plow upon which the president of the company was riding to make it sink deeper into the ground, a chain attached to the whiffletree broke, and the whiffletree flew back, striking Moll's right leg and breaking both bones above the ankle. A physician was called by the company and Moll was taken to a hospital where the fracture was set and he could receive proper attention, and in this action he claimed compensation for a period of total disability and for a permanent partial disability. The clay company denied that he was an employee, claiming that he was an employee of an independent contractor. – Liability to pay compensation was also denied on the ground that the employment was casual and because claimant was under 16 years of age and was engaged in work he could not legally be employed to perform. The Workmen's Compensation Statute provided that "minors who

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without a violation of either section 3848 or section 3870; and we are not now concerned in considering the character of the machinery in use, nor the character of the employment, nor the character of the evidence bearing upon the issue whether Victor did in fact put plaintiff at forbidden employment. We hold that the charge was correct and that a new trial should not have been given because of the error alleged in it.

2. The plaintiff may sustain an order granting a new trial upon the ground of errors occurring at the trial if he can show other errors of law, properly raised, sufficient to justify the granting of the motion. McAlpine v. Fidelity, etc., 134 Minn. 192, 158 N. W. 967, and cases cited. No error other than that assigned relative to the charge is particularly urged and we find none.

3. If a new trial is granted because of the insufficiency of the evidence or because of excessive damages, the order is not appealable. This is the effect of G. S. 1913, § 8001, subd. 4. McAlpine v. Fidelity, etc., 134 Minn. 192, 158 N. W. 967; Heide v. Lyons, 128 Minn. 488, 151 N. W. 139; Pust v. Holtz, 134 Minn. 266, 159 N. W. 564.

The new trial was granted solely because of errors of law at the trial. No other ground of the motion was considered by the trial court. Upon the grounds assigned, other than that of errors of law, the parties have had no decision. Upon the going down of the remittitur they will be for consideration by the trial court.

Order reversed.

are legally permitted to work under the laws of the state" should be considered the same and have the same rights as adults, and as by the child labor act it was made illegal to employ a child under 16 years of age in the employment in which claimant was engaged, his employment by the clay company was illegal, and it was held that the Workmen's Compensation Act did not apply to him, and a decision of the circuit court affirming the decision of the arbitrator and industrial commission denying compensation was affirmed.

IV. Girl employed at prohibited work.

Plaintiff, a minor between the ages of 14 and 16 years, employed in work prohibited by the child labor act, sustained an injury to her right hand resulting in the thumb being crushed so that she lost approximately half of the first phalange, was under the physician's care for 25 days, her arm was swollen for about a month and she did not work for 5 months, and the pain was severe and continued until the time of the trial. It was held that the action could be brought for damages although the employer was operating under the Workmen's Compensation Act, she not being an employee legally permitted to work under section 5 of that act, Callaghan's 1916 Stat., par. 5475 (5). It was also held that the verdict for $750 was not excessive. Zurasky v. Handycap Co., 210 Ill. App. 254 (1918).

R. L. S.

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MARX v. SCHULTZ.

[Supreme Court of Michigan, December 22, 1919.]

207 Mich. 655, 175 N. W. 182.

1. **Appeal and error—Assignment of error—When sufficiently specific.**
A general assignment of error that "the court erred in directing a verdict in favor of the defendants" is equivalent to saying there were facts in the case upon which the jury might find for plaintiff and is sufficiently specific when no testimony was offered by defendants.

2. **Druggists—Mislabeling prescription—Action for death—Sufficiency of evidence.**
In an action for the death of plaintiff's wife, alleged to have been caused by an overdose of arsenic due to an error in labeling a prescription at defend-

CASE NOTE.

Liability of druggist or manufacturer for negligence in the sale of drugs or in filling prescription.

I. Hog cholera treatment, 976-981.
II. Stock dip, 981-982.
III. Anthrax vaccine, 982-985.
IV. Wrong medicine on prescription, 985-986.
V. Poison instead of harmless drug, 986-988.
VI. Impure ether for anesthetic purposes, 988-991.

Introductory. The earlier cases involving the question here annotated will be found in the note to French v. DeMoss (Tex.), 13 N. C. C. A. 63.

I. Hog cholera treatment.

Plaintiff, a farmer and stock raiser, sued and recovered judgment against defendant, a manufacturing chemist, for causing the death of 49 of his hogs. Defendant manufactured a large variety of chemical products, among them a remedy for hog cholera designated as the serum-virus treatment, and did a wholesale business selling its products to the drug and veterinary trade. Plaintiff claimed that his hogs were killed by having the remedy administered to them by a local veterinary, to whom sale was made by a traveling salesman who took the veterinary's order therefor and forwarded it to defendant. Plaintiff alleged in his petition that the hog cholera remedy used in the manner prescribed by the veterinary was a deadly poison, and was so known to the defendant, and that defendant knew that the remedy or serum would, if administered according to the directions furnished by defendant, poison and kill hogs instead of curing and preventing the disease of cholera, which fact of the highly dangerous and poisonous character of the serum defendant negligently failed to divulge or make known to the veterinary or to plaintiff. The court said that the proof fell far short of sustaining that allegation, the only proof that the remedy was a deadly poison being that the veterinary administered it to the hogs and in 8 days thereafter they became sick and began dying, and at the end of 2 or 3 months 49 of the 59 treated were dead, and that, at the time of the treatment, the hogs were apparently well and showed no symptoms of cholera, and that the hogs of a

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ants' drug store, in which it was contended by defendants that her death was due to disease not connected with the poisoning, the answer of a physician to a hypothetical question, embodying the circumstances of the giving of the overdose of arsenic and the symptoms displayed by the wife soon thereafter, that "Those symptoms are caused by an overdose of arsenic and probably would result in her death," warranted the drawing of an inference favorable to plaintiff sufficient to present a disputed question of fact as to the cause of death, which should have been presented to the jury.

3. **Trial—Questions for jury—Weight of testimony.**
The weight of the testimony is a question for the jury to determine in the first instance.

4. **Witnesses—Examination—Adverse witness.**
In view of the fact that a plaintiff in an action for the death of his wife, alleged to have been caused by negligent labeling of a prescription at defendants' drug store, was practically obliged to call the attending physician as a witness, the trial court should have been liberal in allowing a showing of incidents occurring between plaintiff and such physician tending to show that such witness had become adverse and unfriendly to plaintiff's cause.

neighbor were treated by the veterinary at about the same time and a large per cent of them also died, it being shown, however, that hog cholera was raging in that neighborhood, that doubtless being the reason for the hogs being treated, and that other herds of hogs treated in the neighborhood fared well and showed a small death rate. The treatment in question consisted of the injection into the flesh of the hog of a liquid consisting of the hog cholera virus, which was taken from the blood of hogs affected with cholera, and, at the same time, the injection of hog cholera serum which was taken from hogs which had had the cholera and recovered therefrom, being immune from the disease. The bottles containing the medicine were labeled, clearly showing their nature, the hog cholera virus bottle containing a statement that, if used without serum, the contents would produce hog cholera. The veterinarian testified that, in giving this treatment on plaintiff's hogs, he followed the directions as to dosage and manner of injection given by the defendant, and that he did not know what caused the hogs to die, and that other hogs vaccinated by him did well, the loss being practically nothing. It was further shown that defendant was one of the largest and most reputable concerns of its kind; that the hog cholera remedy was not a secret or patented remedy, but was prepared by a number of firms, and its manufacture was open to all; that its preparation was regulated and supervised by the agricultural department of the United States, and by most of the states; that defendant was duly licensed and supervised, and that its methods of preparing the virus and serum, the prescription and directions for its use, the dosage, and all printed matter on and inclosed with the packages containing the virus and serum, had been approved by the agricultural department. The jury were instructed that if they found for the plaintiff, they were to assess his damages at the market value of the hogs lost by plaintiff, if they found from the evidence that plaintiff lost any hogs on account of the medicine being poisonous, and further, that such medicine or remedy was administered according to the directions of the defendant. The court said that this instruction plainly implied that the jury need find but two facts to make defendant liable—that the medicine was poisonous and that it was administered according to the printed directions—and, as it was ad-

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Action for wrongful death. Judgment on directed verdict in favor of defendants reversed and new trial ordered.

For appellant—Thomas A. Conlon.

For appellees—Thomas M. Cotter and William Wisner Taylor (E. Dean Alexander, of counsel).

This action was brought by Richard Marx for $25,000 damages alleged to have been suffered by him on account of the death of his wife, Lydia Marx, caused, according to his claim, through the negligence of the above named defendants, or some of them. It appears that on November 30, 1915, Lydia Marx was being treated by Dr. Francis McNamara for a skin rash, his treatments

mitted that the medicine was more or less poisonous, the instruction had the effect of making defendant an insurer of the remedy if administered according to the directions, which certainly was not the law. It was held that the evidence did not support a case based on negligence, and that the negligence alleged in the petition, that defendant negligently failed to divulge or make known to the veterinary or to plaintiff the dangerous and poisonous character of the remedy, was completely refuted by the evidence. As further sustaining the finding of the court that plaintiff wholly failed to make a case by showing negligence on part of defendant, the court pointed out that no scientist or chemist has been able to detect any difference in the composition of the virus and the serum, the poison and the antidote, the blood of a sick hog and the blood of one after it has recovered, and that the reason why one produced disease and death and the other arrested and cured was largely a matter of speculation; that it was quite well established that, in its incipient stages, hog cholera could not be detected, and when it had advanced to the stage where the symptoms were discernible, it was too late for most hogs to yield to the antidote or serum, this being true of the disease whether resulting from the usual contagion or caused by the injection of the virus. The court said they might conjecture, therefore, judging merely from results, that the hogs already had the disease in its incipient stages, and the serum administered after the additional injection of virus could not counteract the disease, or, judging merely from results, they might conjecture that the veterinary, however honest in his belief that he administered that remedy properly, made some mistake, or miscalculation, as it was shown that administering too much of the virus or too little of the serum would result as did the treatment with plaintiff's hogs, and that, while these were mere conjectures, it was also a mere conjecture that there was some negligence in the preparation of the virus used, and that the mere fact that injury resulted from the use of this virus in the way it was intended to be used was not sufficient to prove negligence in its manufacture, but that there must have been some evidence from which the negligence counted on was fairly and reasonably inferable. The court further said they might concede

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having extended back to about the middle of that month, although he had been conversant with her condition for five years and had been one of several physicians in attendance on her from time to time during that period. It is disputed in the record as to the exact nature of the ailments that she had previously suffered, her husband having testified that her previous condition was "fair" and that with the exception of an operation for a "pus case in the 'abdomen'" and a few minor ailments, her health had been that of an ordinary woman. This assertion is denied by Dr. McNamara, whose testimony is as follows:

"Q. How long, then, if that is your answer, had this patient been suffering from Bright's disease?

"A. I think she was suffering for about four years. She had an infection about four years ago and had a very severe operation. I think—it is my opinion that the Bright's disease dates from that time because Bright's

that a manufacturer or dealer in any article like that involved would be held liable to one poisoned by an article when sold as being harmless, though the person injured was not the purchaser but a third person, provided the injury was the direct and natural consequence of the manufacturer's or dealer's negligence in the preparation of the poisonous article, but that, in this case, there was no proof of negligence in the preparation of the articles causing the damages. The judgment for plaintiff was reversed. Brown v. H. K. Mulford Co., 198 Mo. App. 586, 199 S. W. 582 (1917).

In Hollingsworth v. Midwest Serum Co., 183 Iowa 280, 14 N. C. C. A. 880, 162 N. W. 620 (1917), a hog cholera serum case similar upon the facts to Brown v. H. K. Mulford Co., set out above, it appeared that a state statute provided that the director of the biological laboratory should have the power and it was made his duty to establish and declare the standard degree of potency of hog cholera serum for successfully treating and controlling hog cholera, and that, in the purported exercise of such authority, the director had established and announced that the dose which should be stated on the label must be sufficient to prevent a susceptible hog of the weight the dose was recommended for from showing symptoms of hog cholera when injected hypodermically with two cubic centimeters of virulent blood which would produce hog cholera in susceptible hogs of the same weight within 8 days after being inoculated with the same quantity of virulent blood, but the court said that this could avail nothing to plaintiff as there was no ground in the record upon which to claim that the lot of serum in question had not been tested and that it had not fulfilled the conditions of the test before marketing, and that if the regulation was to be read as a call upon the serum for successful results after it was marketed, it was not responsive to the statute, and was a purported exercise of authority not conferred upon the director. It was held that the trial court properly instructed that proof of the death of the hogs was not of itself proof that it was caused by any wrongdoing of the defendant, and said that both purchaser and seller knew that, in the use of the article, uncertainty of result to some degree was inevitable, and that it was the duty of the producer to follow the ap-

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disease is simply an infection of the kidneys brought about by some bacterial poisoning.''

Dr. McNamara was the only one of the doctors who had previously treated Mrs. Marx who was called by the plaintiff. His diagnosis corresponds to that of Dr. Brandt, the county physician, who stated in his testimony that the post-mortem examination of the organs of Mrs. Marx which he made soon after her death was the basis for his opinion that she had died of chronic Bright's disease of from one to ten years' standing. Other similar and relative evidence, indicative of the dispute over the condition of the health of the deceased prior to November 30, 1915, was introduced.

On that date, however, a consultation was held in plaintiff's presence between Dr. McNamara and Dr. Varney, a specialist on skin diseases, and the latter then told the plaintiff that his wife was suf-

proved methods of production and of testing, as generally recognized by those versed on the subject, and under the undisputed testimony he could do no more for general use. If further testing were deemed desirable for added security as to a particular herd, the purchaser had the opportunity to make it upon a few of the particular herd which he was about to inoculate, and that the prudence, if any, of such a course must have been as obvious to one veterinary surgeon as to another. The court held that the burden was upon the plaintiff to show that, in the production of the serum, the defendant violated some duty owing to the public or to the vendees of the product; that no standard degree of potency of serum had been established in the state, the published regulation of the director of the laboratory not being responsive to the statute, and therefore not obligatory; that no violation of the statute was shown; that the circumstantial evidence relied on was not sufficient to sustain a finding that the defendant violated the spirit of the statute, or that he failed to fully conform to the generally accepted methods of production and test; and that the finding of negligence was not sustained by the evidence. Judgment for plaintiff was reversed.

In Shimerda v. Nebraska Serum Co., 102 Neb. 812, 169 N. W. 785 (1918), an action against the serum company to recover damages growing out of administering hog cholera serum sold by defendant, when it was alleged to have been spoiled and poisonous, by the administering of which it was alleged the death of 202 of plaintiff's hogs was caused, none of the evidence was set up in the report, but the court held that there was sufficient conflict in the evidence to warrant submitting the case to the jury, and that the finding of the jury upon such evidence would not be disturbed unless it was clearly wrong. Defendant claimed that the verdict, if sustained, would work great injury to it in its manufacture of hog cholera serum, to which the court answered that if the serum manufacturers would take certain precautions, it would enable them to make, at least, a defense to actions of that kind; as, for instance, defendant could have met the contentions of plaintiff, had it simply shown that the serum was aseptically prepared, and could have further shown that there were no poisonous or deleterious

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fering from an eruption of the nerves. It was decided, as a result of this consultation, to prescribe Fowler's solution of arsenic, and Dr. McNamara thereupon wrote out a prescription directing the taking of three drops of this substance in water after meals, three times daily.

This prescription was handed to the plaintiff, who sent it to a drug store at 563 Dix avenue, in Detroit, this establishment being the property of some of the defendants. There is some confusion in the record as to who were the actual owners of the drug store at the time the prescription was filled, but this question did not become material because of the directed verdict for the defendants. It is clear, however, that the prescription was filled at this drug store, and that it was delivered at the Marx home late that afternoon by one of the clerks. The bottle containing it bore a label similar to

ingredients in the serum at the time of its manufacture, sale and delivery, and that further, when parting with the medicine, a record or examination might have disclosed that certain tests had been made for the purpose of ascertaining whether any foreign substances were in the same, and that such medicine was not in a septic condition at the time of delivery. The court said that the evidence showed that the medicine was administered in a clean, sanitary and scientific manner. Judgment for plaintiff for $1,375 was affirmed.

II. Stock dip.

Plaintiff brought an action against defendant to recover damages alleged to have been sustained by him in the death of one colt and the injury to two mares, occasioned and brought about by the application upon the bodies of such animals of a certain preparation or dip, manufactured by defendant, and by it sold to plaintiff under the name of chlorozone. There was judgment for plaintiff, and defendant appealed from the action of the trial court in overruling defendant's motion for a new trial. Defendant contended that it was negligence, as a matter of law, for a man to administer medicines without knowing the character or the amount thereof, and that therefore certain instructions given by the trial court were erroneous. The court said that with that contention it could not agree, when applied to the facts in the case at bar, because it was alleged in the complaint, and there was evidence in the record to support the averment, that at the time the preparation was purchased plaintiff informed the agent of defendant that he wanted it to use as a stock dip; that it was sold to him to be used for that purpose; that he asked for instructions as to its use; that he was told by the agent that the dip was not poisonous or dangerous when applied to animals as a stock dip; that when used as a stock dip it was harmless; that it could be applied to stock by rubbing it on with a sponge without danger of any kind; and that, at the time the preparation was purchased, plaintiff informed defendant's agent that he had never used any stock dip or disinfectant of any kind and knew nothing of the properties of such medicine. The court said there was ample evidence in the record to support the material averments

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those pasted on ordinary druggist's bottles, but there was nothing to indicate the poisonous nature of the liquid. On the label appeared Dr. McNamara's name, followed by the direction: "Teaspoonful in water after meals three times daily. 11-30-15." Upon receipt of this medicine, Mrs. Marx was given a teaspoonful, in accordance with directions. Immediately thereafter she appeared to be in great agony and threw herself from side to side of the bed, complained of pains in her stomach and tried to vomit. She soon became unable to speak distinctly. Plaintiff returned to his home about five o'clock, and at that time the face and body of Mrs. Marx were swollen and she could answer the plaintiff's questions only indistinctly and with difficulty. Plaintiff immediately tried to get Dr. McNamara by telephone, but owing to the doctor's absence, was not able to get him

of the complaint, and under the issues joined, the question of defendant's negligence was for the jury. It was further held that the damages awarded, $300, were well within the evidence and could not be held to be excessive, and the judgment was affirmed. Great Western Oil Co. v. Kraus, — Ind. App. —, 122 N. E. 12 (1919).

III. Anthrax vaccine.

Plaintiff, a levee contractor, owning a number of mules and desiring to protect them from anthrax, purchased at a retail store ten bottles of anthrax vaccine, manufactured by the defendant company, which was engaged on a large scale in the manufacture of serums, vaccines, antitoxins, etc. Having had some experience in giving similar treatments, plaintiff proceeded to treat his mules by injecting this vaccine hypodermically. He poured two bottles into a cup, and with the contents filled his syringe and used it; he then emptied four bottles into the cup and took therefrom two syringes full, and then used the remaining four bottles in the same way, and within a short time all of the mules which had been treated with vaccine from the second cupful died from tetanus, none of the others being affected, and plaintiff brought this action against the defendant on the theory that, in the course of manufacture, it had permitted the vaccine in one of the bottles to become infected with the tetanus germ, whereby it became unfit for plaintiff's use, and, upon implied warranty, defendant became liable for the value of the mules thus killed. The district court directed a verdict for defendant, upon the ground that there was no evidence which supported plaintiff's theory, and was of such character as justified submission to a jury. Defendant's evidence, undisputed and apparently not subject to doubt unless inferentially, showed that the manufacture of the vaccine was carried on with the utmost skill and care, and with the most perfect precautions known to science, and there was no reason to suspect the existence of tetanus germs anywhere around defendant's factories, save that such germs were used in the manufacture of tetanus antitoxin at a place a mile distant from where the vaccine was made, the employees being separate, any inference that the fatal germ might have come into the vaccine from that source being a mere surmise, possible, but highly improbable. On the other hand, the court said the evidence that the trouble probably

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until about 12 o'clock midnight, when the doctor went to plaintiff's home.

The record shows that when the doctor arrived he was very much astonished to discover Mrs. Marx's condition, but when shown the bottle, he immediately scratched out the word "teaspoonful" and substituted "three drops" and administered an antidote for the overdose that she had taken. He thereupon left the house, stating in effect that he wished to go to the drug store to see his written prescription. In his testimony Dr. McNamara states that he found this just as he had written it—"three drops after every meal." This is undisputed, which seems to indicate conclusively that the mistake in the directions on the label was due to the negligence of some one at the drug store. Thereafter, Dr. McNamara removed the bottle

came from plaintiff's own carelessness in the operation of administering the remedy was very strong, as it appeared without dispute that stable manure and the surface soil around a stable formed the favorite habitat of this germ, and that it was commonly carried therefrom by flies or blown around by the wind; that many thousands might be carried on a fly's foot or a speck of dust hardly visible to the naked eye; that plaintiff used this cup in a feed tent adjacent to his own corral, in which a hundred mules were kept on the levee bank, and where manure was scattered about and had accumulated; that the doors were open and it was a very hot day, the wind was blowing through and the flies were thick; and that the open cup from which he filled his syringe stood all the time exposed in the tent. The court said that while it was manifest that the weight of the evidence was against plaintiff's theory, nevertheless, though the trial judge might rightly have thought it was his duty to set aside a verdict for the plaintiff, if rendered, and award a new trial at least once, the case should have been submitted to the jury if there was any substantial evidence tending to support each of the steps essential to a recovery, and then upon either the theory of negligence or of breach of warranty, plaintiff's first step was to establish that the vaccine was infected when he bought it, and if he failed in that step, it became immaterial whether there was an implied warranty of fitness in the sale of such an article. To put his case beyond the bounds of mere surmise, plaintiff relied upon the fact that tetanus germs were later found in an empty bottle; second, that all the mules inoculated from the second cup, and none of those inoculated from the others, were affected; and third, that the poison in the vaccine would have been more virulent than germs from the stable, and that the extreme rapidity with which the disease developed indicated inoculation with poison of the highest potency. Upon the first point, it appeared that, after emptying each bottle into the cup, plaintiff put back the cork and threw the bottle on the ground outside, and that five or six days afterwards all the bottles that could be found were picked up and put, unwrapped, on a shelf, and a few days later they were taken away and examined, and the evidence had some tendency to show that, when thus examined, the interior of one of them carried a large colony of tetanus germs, and that the interiors of all the others were sterile.

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containing the arsenical solution, without saying anything to the plaintiff about it. The latter missed it, and he called at the doctor's office in regard to it. The doctor admitted having it and offered it to the plaintiff, but plaintiff insisted that he return it, which he did. When it was returned, there was a label pasted over the original label, which stated in part: Directions, Poison. Fowler's Solution.

Lydia Marx suffered almost continuously from this time until the date of her death, February 7, 1916. Her condition is thus described by the nurse who took care of her:

"I found her very sick and delirious part of the time—most of the time. Her mouth and throat were very sore, they was just a solid canker. She could not eat scarcely anything. She had no appetite. What we did give her was forced, of course; liquid, something very soft. And she was very nervous and had spells, she would jerk off the bed. They would go then, and then they would come on. I am not positive but I think in the evening

The court said they thought no substantial inference that the bottles were in the same relative condition before they were first opened could reasonably rest upon that testimony, and that the high probability was that a bottle, so exposed and not tightly sealed, might have become infected during the five days was conceded, and that one cork might have been put in loosely and the others more tightly, was one of several reasons, any one of which was enough to account for the difference in their later relative condition and, furthermore, the fact that only one bottle was infected and that others, filled at the factory at the same time from the same container, were not, went far to disprove plaintiff's theory. The second point was of a similar character, as, if there were no other probable explanation, it might indicate that the contents of one of the second batch of bottles were infected when that bottle was emptied into the cup, and for that reason the contents of the first and third cupfuls were not; but it might as well indicate several other things as the cup, when used the second time, had been standing there about 20 minutes, and was then merely rinsed in a carbolic solution, too weak to be effective, and existing infection might have survived that rinsing, or there may have been a fresh infection in the cup during the few minutes before the next four bottles were all emptied, and the agitation by pouring the bottles into the cup or by filling the syringe would naturally have dissipated the germs throughout the cup, while the next rinsing might have left the cup clean, and that the danger from the exposed cup was constant and extreme, and no inference of prior infection in the bottle could safely rest on the condition of the second cupful when finally used. The court said that the third point impressed them as more serious, as the evidence showed that the disease and the symptoms which indicated the disease were not produced by the direct effect of the bacillus, or germ, but by the toxins, which the germs threw off in the multiplying process which took place when the germs had found a suitable location, and, if the vaccine had been infected at the time of manufacture, it might have been highly charged with those toxins at the time of use, and if those toxins were injected in the manner followed by plaintiff, symptoms of the poisoning would be

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she was worse that way. She seemed to be more delirious at night than she was during the day, and the bowels were very bad. They were a slimy substance streaked with blood, the urine scant."

The above described condition seems to have continued until her death, whereupon the plaintiff brought this action, claiming that the overdose of Fowler's solution had caused arsenical poisoning and was the direct and proximate cause of her death.

At the conclusion of the testimony for the plaintiff, counsel for defendant Schultz moved for a directed verdict, which motion was granted by the trial court, who, in addressing the jury, stated the following:

"In this sort of cases it becomes necessary, in this and other cases like it, it becomes necessary for the plaintiff to prove by a preponderance of evidence, by the evidence of experts, those who know, what was the cause

expected to appear in 3 or 4 days, while if the infection came from the entry of the germs into an abrasion on the skin, symptoms were not expected within 8 or 10 days. The injection took place on Saturday morning and one of the mules had a stiff neck late Monday evening, two showed distinct symptoms on Tuesday and nearly all on Wednesday, and all 41 died within the week, and plaintiff contended that the appearance of the symptoms as early as the third day distinctly tended to show that there was an injection of developed toxins, and so to show that the vaccine was infected when bought. The court said, however, that that contention overlooked the undisputed testimony from every witness whose attention was called to it, that if the bacilli were injected beneath the skin, instead of lodging in a surface abrasion, and if that injection were accompanied by the conditions of an anthrax vaccination, the development of toxins would begin promptly and symptoms would appear or should be expected in 3 or 4 days, and the court said that, in the balancing of those things, as applied to a case where there were some instances of development on the third day, many on the fourth, and others not until the fifth, it could see nothing fairly and substantially tending to show that the vaccine contained developed toxins when it was used, but that as plaintiff's expert witness frankly said when asked what conditions led to quickest symptoms, it was all speculation. Under these circumstances the court held plaintiff's proof to be insufficient, and the judgment of the district court, directing a verdict for the defendant upon the ground that there was no evidence which supported plaintiff's theory, was affirmed. Richards v. H. K. Mulford Co., 150 C. C. A. 9, 236 Fed. 677 (1916).

IV. Wrong medicine on prescription.

Certain medicine was prepared and delivered to plaintiff by defendant upon a physician's prescription upon a Tuesday, and plaintiff was given the medicine every 3 hours until Thursday, when the doctor again called, by which time she had taken two-thirds of the contents of the bottle. She had become very sick on Tuesday night, and had grown worse, and when the doctor was shown the bottle he found the contents to be of a whitish color, with much sediment,

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of the party's death, that the party died from the administration of the medicine which it is alleged was administered to the deceased. * * *

"I am satisfied, gentlemen of the jury, that the plaintiff has not shown by evidence which is necessary to establish his case, that this wife of the plaintiff in the case died from the effects of the overdose of this arsenical preparation which was administered to her out of this bottle in question and in my view it is not a case that should be submitted to the jury. * * * It is an interesting question as to who owned this drug store at that time, and that would have been a question which the judge would have felt it would be his duty to submit to you to determine on the evidence in the case as to who were the owners of this drug store and I would also have instructed you that whoever was the owner was responsible for any injury that occurred. But I direct you, gentlemen of the jury, to render a verdict of not guilty or no cause for action in this case."

KUHN, J. (after stating the facts). Fourteen assignments of error are relied upon by the plaintiff and the principal reason urged for reversal in this court is that the court erred in directing a ver-

while the medicine prescribed had a clear brownish color. After that plaintiff took no more of the medicine and continued ill and was treated by the physician for 3 months. The defendant offered no evidence and the court awarded plaintiff $500 as damages. The court found that the proof that defendant had delivered a medicine different from the one ordered by the physician was adequate, but reversed the case because no evidence was shown that plaintiff was injured thereby, as it nowhere appeared in the record what her ailment was at any time, and it did not appear that the physician himself knew, the evidence on that point being vague suggestions that plaintiff might have been suffering from so-called German measles, and the only evidence from which any inference might be drawn as to the effect of the wrong medicine was the physician's testimony that plaintiff's condition was made worse, and that the medicine certainly was bad for plaintiff, as to which the court said the witness, being unacquainted with the ingredients of the medicine, could have had no reason for his conclusion other than the circumstance that a different medicine was given, and the fact that plaintiff grew worse might, for all that appeared, have simply been due to the failure of the patient to receive the benefit of the remedy prescribed. The burden was on plaintiff, the court said, to show that the result of the giving of the medicine was the proximate cause of the injury claimed to have been suffered, and that she failed to sustain the burden of proof upon that point. Judgment was reversed and a new trial ordered. Fagan v. McRae, 169 N. Y. Supp. 577 (1918).

V. Poison instead of harmless drug.

Flynt v. Rightmeyer, 107 N. Y. Misc. 692, 177 N. Y. Supp. 842 (1919), was a motion for a new trial and to set aside a verdict in favor of defendant in an action against a chemist, from whom plaintiff ordered one ounce of bicarbonate of potassium, and received instead bichromate of potassium, a deadly poison, through the alleged negligence of defendant, which resulted in the death of plaintiff's husband. Upon the trial plaintiff's counsel requested the court to charge that under the circumstances, if the chemist misunderstood what plaintiff wanted, it was up to him to

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dict in favor of the defendants and in not submitting to the jury the question as to the cause of the death of plaintiff's wife.

Preliminary to a discussion as to whether or not there was evidence in the record to warrant the submission of the case to the jury, it is necessary to consider a claim urged now by counsel for the defendants. It is urged that the general assignment of error that "the court erred in directing a verdict in favor of the defendants" is not specific enough, and that under Supreme Court Rule No. 11 judgment should not be reversed for that reason, relying upon the case of Jackson Bridge & Iron Co. v. Insurance Co., 122 Mich. 433. We are of the opinion, however, that the present situation falls within the rule announced in Conely v. Dudley, 111 Mich. 122, which is referred to in the Bridge & Iron Co. Case, supra, as an exceptional case. Here, as in that case, no testimony was offered by the

inquire, and satisfy himself that the drug, which he thought was ordered, which was a deadly poison, was for legitimate purposes, which instruction was denied. The objections made to the instruction were that it did not clearly point out whether the terms of the statute or the exercise of reasonable care required defendant to satisfy himself that the purchaser was aware of the poisonous character of the article and that it was to be used for a legitimate purpose; and that, if the latter, the court could not make the charge because the defendant was being sued for negligence, and not for a violation of the statute, and that a violation of the statute did not necessarily constitute negligence; that it was for the jury to determine from all the facts proven whether it was negligence for defendant to make the delivery without so satisfying himself, or whether or not he was already so satisfied; and that, if the charge was made as requested, it would create in the minds of the jury the impression that, if he failed to satisfy himself as required by a statute, he was guilty of negligence for that reason alone, irrespective of other facts, though he had properly labeled the package. The statute in question enumerated a number of poisons, and any drug, chemical or preparation which was destructive to adult human life in quantities of 60 grains or less, and provided that the druggist should not deliver any of such poisons until he had satisfied himself that the purchaser was aware of its poisonous character, and that the poison was to be used for a legitimate purpose, and that any person that violated any of the provisions of the statute who was not criminally prosecuted should forfeit $50 for every such violation, those provisions being contained in the public health law, and another statute contained in the penal law, referred to the druggist satisfying himself that the purchaser was aware of the poisonous character of the drug, and that the poison was to be used for a legitimate purpose, provided that any person who violated any of the provisions of this section should be guilty of a misdemeanor, and that any person who violated any of the provisions of the article in question of the public health law, for which no other penalty was imposed, was guilty of a misdemeanor. In holding that the plaintiff was entitled to the charge requested, the court said that defend-

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defendants and there can have been no possible uncertainty as to what was meant by the assignment as made. It was equivalent to saying that there were facts in the case upon which a jury might find plaintiff entitled to recover. No one could possibly have been misled. See, also, Wolfe v. Stack, 153 Mich. 445.

Was there any testimony in the case to warrant the submission of the controversy to the jury? The following hypothetical question was submitted to Dr. Swartz, a physician of 25 years' practice and a graduate of the University of Michigan, who stated that he had made a study of the effect of arsenic on the human body:

"Q. The evidence in this case shows that on the morning of November 30, 1915, Dr. Francis W. McNamara, the physician in attendance, wrote out a prescription for Fowler's solution of arsenic as a remedy for a skin rash, from which Lydia Marx was complaining; that the prescription directed three drops of that solution after each meal as a dose, but by mistake the directions

ant was required by law to satisfy himself that the drug was to be used for a legitimate purpose and that the purchaser was acquainted with its character, and that failure to comply with an ordinance was prima facie evidence of negligence, where the omission contributed to the injury, and that there was no reason why it should be held that the provisions of the health law and penal law were passed solely for the public, and not for the protection of the purchaser, whose life might otherwise be forfeited. A new trial was ordered.

VI. Impure ether for anesthetic purposes.

In Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N. W. 541 (1918), an action was brought, in behalf of the next of kin, against two doctors who performed an operation, and against Parke, Davis & Co., the manufacturer of the ether used, alleging that the death of decedent was caused by the negligence of defendants. There was a verdict against all of the defendants, and Parke, Davis & Co. made a separate motion for judgment notwithstanding the verdict, or for a new trial, and this appeal was from the order denying that motion. Deceased was a young man 21 years old, robust and apparently in good health except for diseased tonsils, for which an operation was had, one of the defendant doctors operating and the other doctor administering the anesthetic. While the ether was being taken, it was noticed that the patient became cyanotic, and it was necessary to stop and revive him to some extent before proceeding, and after the tonsils were removed he lapsed into the same condition several times, and finally, within about 3 hours from the commencement of the operation, all efforts to revive him failed, and he died. The doctors rested their case upon plaintiff's evidence, and it was alleged that the court erred in not permitting Parke, Davis & Co. to call them for cross-examination in making its defense. The court said, however, that there was no prejudicial error, for the doctors had been thoroughly cross-examined by it when they were called to the stand by plaintiff, and that appellant had also the privilege to call them as its witnesses. Complaint was made of the rulings allowing the defendant doctors to express an opinion as to the cause of death,

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on the label of the bottle, when it came from defendants' drug store, where the prescription was filled, read 'One teaspoonful after meals.' That one teaspoonful was given Lydia Marx, according to those directions, and immediately thereafter she appeared to be in great pain, suffered inward convulsions, threw herself from one side to the other of the bed, and continually tried to vomit. That her whole body became greatly swollen. Her mouth and tongue so increased in size that she could hardly talk. That after November 30, 1915, large ulcers came in her mouth and nose; her eyes were swollen and liquid appeared therein. Her appetite was poor and she complained at times of pains about her heart and an irritable condition of her bowels. That the movement of her bowels was frequent and the substance passed therefrom was bloody and yellow in color. That she was delirious off and on from the time she received the overdose of the solution of arsenic, and her general conditions heretofore named continued down to the time of her death, February 7, 1916. In your opinion, would such conditions be caused by the overdose of Fowler's solution of arsenic which Lydia Marx received, and would the said overdose be the proximate cause of her death? * * *

"A. Those symptoms are caused by an excessive dose of arsenic and probably would result in her death."

We are of the opinion that this testimony was sufficient to war-

confirmed, as they admitted it was in part, by after acquired information concerning an analysis of the ether made by a chemist. The court, however, said there was no error, as the doctors observed and examined deceased to a certain extent before the operation began, and they noted the effects of the ether upon him, and were present frequently at intervals until death came, and, as professional men, they were competent to express an opinion as to the cause of death, the value of that opinion being for the jury, they determining whether the doctors were justified in relying, for corroboration of the opinion expressed, upon the testimony of the chemist as to impurities being present in the ether. Upon the admissibility and value of the testimony of the chemist who analyzed a can of ether delivered to him by plaintiff, and of two experts, based upon the result of that analysis, the court said that its admissibility and value depended in the first place upon its being the can from which the ether used upon the deceased was taken; in the second place, upon the impurities in the ether being due to defendant's lack of due care, and in the third place, upon the ether when analyzed being in approximately the same condition as when administered in the operation. The experts agreed that the impurities found in the analysis might be produced from oxidization of the ether, and that oxidization began as soon as air got into the can and continued until the air was exhausted, and that whether it was so negligently prepared or sealed as to account for the dangerous impurities, and whether it was so sealed and kept, after its use for the operation, that no consequential air came into the can before the analysis took place was for the jury, as was the question of identity of the ether. The court said there was no merit in defendant's contention that there was a fatal variance between plaintiff's complaint and his proof in that while the allegation was that defendant furnished the ether for the open market, the proof showed that it was sold to the hospital, as the manner in which the ether was put up and labeled clearly indicated that defendant held it out as a fit substance for anesthetic uses by surgeons, and that the evidence warranted the jury in finding that the ether, when sold, was not safe for that purpose, and that this condition

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rant the drawing of an inference favorable to the plaintiff sufficient to present the disputed question of fact—which should have been presented to the jury—as to the cause of the death of the plaintiff's wife. As to whether the testimony of the defendants' witnesses outweighed that of the plaintiff's is a question for the jury to determine in the first instance.

Some question is also made by plaintiff's counsel of the undue limitation by the trial court of the examination of Dr. McNamara, whom plaintiff was required to call. An attempt was made to show certain incidents that occurred between the doctor and the plaintiff, in order to make it appear that Dr. McNamara had become adverse and unfriendly to the plaintiff's cause. We are of the opinion that the judge should have been more liberal in allowing a showing of

was due to defendant's failure to use due care to assure its purity when sent forth for the intended use, and that the presence of the impurities contributed to or caused the death, the court saying: "It was not necessary to prove that this dangerous condition was known to appellant. It was its duty to know that the article it placed before the medical profession as fit for anesthetic use did not contain dangerous and unsafe impurities, and was so put up that these impurities could not form in the container, when kept according to directions." Defendant contended that the proof failed to substantiate the concurring negligence of the surgeons alleged in the complaint, and hence plaintiff must fail under authorities to the effect that, when several acts of negligence are alleged as concurring to produce the injury, all must be proven or the verdict must go for defendant. The court said, without approving such authorities, that, even under them, the complaint was sufficient because, after setting out the specific negligence of defendant, it charged that such negligence contributed to, and caused, and was one of the contributing causes of the death, and that a like allegation was made in respect to the negligence charged against the doctors, and that, under that pleading, if the proof showed that the death of deceased was the proximate result of the negligence charged against one defendant alone, a recovery could be had against that one, and that the separate paragraph in the complaint alleging that the several acts of negligence of the several defendants concurred to cause the death might be disregarded. Defendant contended that the jury violated the rule against basing an inference on other inferences in arriving at a conclusion, but the court said that the jury had no occasion to violate the rule because, without indulging in inferences and without invoking the doctrine of res ipsa loquitur, which the court agreed was inapplicable to the case, there was evidence, direct and circumstantial, warranting the jury in finding that there were dangerous impurities in the ether administered to deceased; that they existed because defendant had failed to use due care; that such impurities proximately contributed to cause the patient's death. Such findings, the court said, were based upon other facts established by like evidence, such as that the ether analyzed by the chemist was part of the same can used in the operation in question,

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this character to be made, in view of the fact that Dr. McNamara, being the attending physician, it was almost obligatory upon the plaintiff's counsel to put him on the stand in order to make his case.

Other questions are discussed by counsel for the defendants which might be properly before the court if judgment had been obtained against them, but as upon this record the only assignments of error are upon the part of the plaintiff, we do not consider that these questions become material in the discussion of the case at this time.

Upon the record as here presented, we are of the opinion that the trial court erred in directing a verdict for the defendants, and the cause must therefore be reversed and a new trial ordered, with costs to the appellant.

and that there was no material change in the condition of the ether, caused by the way it was stored, handled, or used, from the time it was sold by defendant until analyzed by the chemist. The order denying a motion for judgment notwithstanding the verdict or a new trial was affirmed. R. L. S.

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SOUTHERN MIRROR CO. v. NORFOLK & WESTERN RY. CO.

[Supreme Court of North Carolina, November 6, 1918.]

176 N. C. 397, 97 S. E. 47.

1. **Railroads—Runaway freight cars—Damage to property—Action—Sufficiency of evidence.**

In an action aganst a railroad company for damage to personal property struck by runaway freight cars which had been left standing on a slight grade, near the edge of a steeper grade, insufficiently secured by brakes which were not locked, and without safe chocks, and which had been set in motion by the action of a 16-year-old boy in releasing the brake and removing the brick which had been used as a chock, held that the jury were justified upon the evidence in finding that the defendant was guilty of negligence.

CASE NOTE.

Injury by runaway railroad cars.

I. Cars starting from unexplained cause, 992-1002.
A. Collision with train on main line, 992-996.
1. Injury to conductor, 992-993.
2. Injury to immigrant in car with goods, 993-996.
B. Collision with cars being coupled, 996-998.
C. Collision with car being loaded, 998-999.
D. Collision with car being repaired, 999-1000.
E. Collision with invitee on track, 1000-1002.
II. Cars escaping from control, 1002-1006.
A. Escape while being moved by hand, 1002-1004.
1. Collision with engine on main line, 1002-1003.
2. Collision with person on spur track, 1004.
B. Escape during switching operations, 1005.
C. Escape of push car, 1005-1006.
III. Escape because of broken coupling, 1006-1008.
A. Injury to volunteer attempting to recouple, 1006-1007.
B. Collision with driver at crossing, 1007-1008.

Scope of Note. This note is limited to cases in which cars were running free from control without having been intentionally put in that condition, and includes cases in which the cars were intentionally put in motion but got beyond control. Cases in which cars were purposely shunted along a track with no one in control are excluded.

I. Cars starting from unexplained cause.

A. Collision with train on main line.

1. Injury to conductor.

A conductor on a freight train had placed a caboose and tank car in front of the engine and was pushing them and pulling 36 freight cars, when 21 heavily loaded freight cars which had become loose rolled down the grade on the main line, striking his train and killing him. In response to a special issue, the jury found that deceased was killed by the negligence of defendant, though his own negligence contributed to his death, that he did not, by his own conduct, assume the risk of being killed by the collision between his train and the runaway cars, and that, by reason of his death, his widow had

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2. Railroads—Runaway freight cars—Damage to property—Intervening negligence—Proximate cause.

In an action against a railroad company for damage to personal property struck by runaway freight cars which had been left standing on a slight grade, near the edge of a steeper grade, insufficiently secured by brakes which were not locked, and without safe chocks, and which had been set in motion by the action of a 16-year-old boy in releasing the brake and removing the brick which had been used as a chock, held that the case was not one of an injury caused by intervening negligence, independent of the defendant's negligence, and without which the injury would not have occurred, but that the position of the cars was the latest and proximate cause of the damage.

3. Railroads—Runaway freight cars—Damage to property—Liability.

In an action against a railroad company for damage to personal property struck by runaway freight cars which had been left standing on a slight grade, near the edge of a steeper grade, insufficiently secured by brakes which were not locked, and without safe chocks, and which had been set in motion by the action of a 16-year-old boy in releasing the brake and removing the

sustained damages in the sum of $10,000, and that his infant son and daughter had each sustained damages in the sum of $5,000. Defendant objected to an instruction to the effect that if the jury should find from the evidence that the wreck was solely and proximately caused by the negligence of defendant's servants in not properly applying brakes on cars standing on a main line on a grade, the risk of that negligence was not assumed by the deceased in allowing the caboose in which he was riding to be pushed by the engine, even if he would have escaped injury if the caboose had been behind the engine instead of in front of it. This instruction was, however, held to be correct, as the doctrine of assumption of a risk was that the employee assumed the risk of accidents and injuries incident to the business properly operated, but did not assume the risk caused by the negligence of the company in not furnishing proper appliances or in any other respect, and if deceased, in any respect, contributed to the injury by putting the caboose and tank car in front of the engine, that was not assumption of risk but was contributory negligence, which the jury found, and because of which they apportioned damages as was required under the Federal Employers' Liability Act under which the suit was brought, such contributory negligence being the act of deceased and not a risk of the business which he assumed. Upon the question of damages, the court pointed out that there was a radical difference between the state law and the Federal Employers' Liability Act as to the measure of damages for death in that, under the state statute, the damages were based upon the present worth of the pecuniary value of the life of the deceased, while, under the federal statutes, the damages were based upon the pecuniary loss sustained by the beneficiary, and the jury must find, at least approximately, what pecuniary benefit each plaintiff had reason to expect from the continued life of the deceased, and recovery must be limited to the compensation of those relatives in the proper class who were shown to have sustained such pecuniary loss. The judgment was affirmed. Horton v. Seaboard Air Line R. Co., 175 N. C. 472, 16 N. C. C. A. 724, 95 S. E. 883 (1918).

2. Injury to immigrant in car with goods.

Plaintiff loaded a railroad car with household goods, farming implements, wearing apparel, bedding, horses and a wagon, for the purpose of shipping them to a place where he had taken

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brick which had been used as a chock, held that, although defendant was not an insurer, it was liable for injury to plaintiff's property proximately caused by its negligence.

4. Railroads—Runaway freight cars—Damage to property—Persons liable—Concurrent negligence.

In an action against a railroad company for damage to personal property struck by runaway freight cars which had been left standing on a slight grade near the edge of a steeper grade, insufficiently secured by brakes which were not locked, and without safe chocks, and which had been set in motion by the action of a 16-year-old boy in releasing the brake and removing the brick which had been used as a chock, held that, if the act of the boy and the negligence of the defendant were concurrent, the plaintiff could sue both or either of them.

Action against a railroad company for damage to personal property struck by runaway freight cars. Judgment of the superior court reversed and judgment of the county court reinstated and affirmed.

up a homestead, and the car was hauled to the junction with defendant's road. The goods were shipped under a lower rate on a contract which limited the liability of defendant and which required the shipper to sign a contract whereby he was permitted to ride in the caboose attached to the train in which his car was being transported for the purpose of carrying his stock, the contract also releasing the carrier from the duty of caring for the stock and from liability for damages or injury resulting from certain causes specified and which were shown to be directly caused by the negligence of defendant. The contract also contained a release which the shipper, if he desired to accompany his stock, was required to sign, exempting the carrier from liability by injury to himself while he was accompanying the shipment, the lower rate being optional. When the train reached the junction point the car was placed on a passing track where the unloading place for live stock was located and the car was delivered into his possession. With the assistance of another immigrant, plaintiff's husband unloaded the horses and placed them in the stockyards for the night, and afterwards he went to the car and retired for the night, although there was a hotel near and the car was protected by a padlock, his presence in the car for the night not being known to defendant. In some manner during the night the car escaped and ran out on the main line, where it collided with a train and plaintiff's husband was killed. In this action for damages plaintiff charged that defendant was negligent in failing to set the brakes on the car when it was left, and in failing to place the derail provided for that purpose, so that the car could not escape onto the main line, and in failing to capture the car after it had escaped from the passing track and before it collided with the train. The passing track descended rapidly towards the main line and the derail was installed for the purpose of protecting trains on the main line, and was so located that if a car got beyond control while on the passing track the derail, if in position, would wreck it and turn it down an embankment, the derail consisting of a movable bar which was laid on the top of the rail and placed in position to derail cars.

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For appellant—Manly, Hendren & Womble.

For appellee—Theodore W. Reath and Craige & Vogler.

The following are the pleadings in the action:

Complaint.

That plaintiff, complaining of the defendant, alleges:

I.

That the plaintiff is a corporation duly organized and existing under the laws of the state of North Carolina, with an office and place of business in the city of Winston-Salem in said state, and that the defendant is a corporation duly organized and existing and among other things is engaged in operating a line of railway from Roanoke, Virginia, to Winston-Salem, North Carolina.

II.

That the plaintiff's plant in Winston-Salem is located on the west side

The only evidence concerning the derail was that it had been properly placed in position when the track was last used. Although it was not alleged in the petition that deceased was a passenger, the case was tried by plaintiff on the theory that he was, and that at the time of the accident the relation of carrier and passenger had not been terminated. There was no evidence tending to show a verbal agreement or custom permitting the deceased to remain in the car during its transportation or after it had reached its destination, and no attempt was made to prove a verbal agreement, and the only evidence of a custom was to the effect that, prior to that time, some of the persons in charge of immigrant cars remained in them over night, but there was no evidence tending to show that they did so with the permission of the defendant, or that it ever at any time recognized in any way their right to do so. The court said that, assuming for the purpose of the case that the relation of passenger and carrier did exist by virtue of the contract entered into between deceased and defendant for its transportation, and that defendant had undertaken as to him all the duties and obligations of carrier and passenger, manifestly such relation terminated upon its arrival with his car at his destination, and after a reasonable time had elapsed for him to alight and leave the premises of the defendant, and that, after the car had been safely transported to its destination, and he had paid his freight and his live stock had been unloaded and placed in the stockyards, he stood in no closer relation to defendant than an ordinary consignee who had a carload of freight on a sidetrack at a station. The court said that if deceased was a mere trespasser, as in fact he was, the defendant owed to him no duty except that it should not, through wilful or wanton negligence, injure him, and that such negligence could not be attributed to the defendant unless it or some of its employees knew of his presence upon the cars, and that, under the circumstances, it was but reasonable for defendant's employees to suppose that, after the stock had been cared for, he would go to the nearby hotel for the night. As the plaintiff's right to recover depended upon whether the relation of passenger and carrier ex-

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of White street, a short distance north of Twelfth street, and that along its building, on the south side, is a platform, used by the plaintiff for loading and unloading its drays and wagons.

III.

That the defendant maintains and operates a sidetrack branching off from its main line at a point a few hundred feet east of the plaintiff's plant and leading to the plant of the B. F. Huntley Furniture Company, which is west of plaintiff's property; that said sidetrack crosses White street and passes along by the plaintiff's platform aforesaid, and that on April 27, 1917, there was a large solid gate about ten feet high and twelve feet wide, extending across the sidetrack, from a point near the western end of the plaintiff's platform; that the point where the sidetrack leaves the defendant's main line is considerably higher than where the sidetrack passes the defendant's plant, and for two or three hundred feet east of the plaintiff's plant and east of White street there is a heavy descending grade towards White street and plaintiff's plant.

IV.

That on April 27, 1917, a wagon with two horses hitched to it, owned by plaintiff, was standing by the plaintiff's platform being loaded with mirrors and glass, and without warning to plaintiff and without any knowledge on

isted at the time of the accident, leaving that question to the jury to determine as a question of fact was held erroneous as, under the plaintiff's evidence if it stood alone, the court should have declared as a matter of law that the relation of carrier and passenger had ceased, and the defendant's request for an instructed verdict in its favor should have been sustained. The judgment was reversed with instructions to grant a new trial. Chicago, R. I. & P. Ry. Co. v. Thurlow, 102 C. C. A. 128, 178 Fed. 894, 30 L. R. A. (N. S.) 571 (1910).

B. Collision with cars being coupled.

While deceased was between two cars for the purpose of coupling them, another car which had been left without being properly secured ran against one of the cars he was attempting to couple, causing them to come together and injuring him so that he died as a result. Action was brought by his widow and minor son and his father to recover damages. The jury returned a verdict in favor of the widow and minor son, each for $10,000, and upon that verdict judgment was rendered for the widow and minor son in the sum found by the jury, and a further judgment entered that the father recover nothing by the suit. The evidence, while circumstantial as to the purpose of deceased in going between the cars, was sufficient to show that he tried to pull the lever to cause the cars to couple and, failing in that, signaled the engineer to stop his engine, and upon the engine being stopped deceased went between the cars presumably to couple them, and just after he went between them the loose car struck one of the cars, causing the injury which resulted in the death of decedent. It was undisputed that the brakes were not set on the loose car and that it did roll down as stated by deceased at the time he was injured, when he replied to a question as to whether he was hurt, that he was hurt, and that the brakeman did not set the brake on the other car and it rolled down and caught him. The court held that the evidence justified the jury in finding that deceased was not guilty of contributory negligence in going between the cars, and also in finding that a car was left in such condition that it could roll down an incline and against the other cars. The trial court instructed

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the part of the plaintiff of their approach, three box cars which had been left by the defendant on the sidetrack aforesaid near the top of the grade above the plaintiff's plant, ran down said sidetrack, across White street and struck the plaintiff's wagon, crushed the heavy gate and dragged the wagon and team of horses through the gate, and to a point forty or fifty feet beyond where they were struck, demolishing the wagon and harness and breaking and damaging several of the mirrors, and badly injuring the two horses.

V.

That derailers or other device to stop cars are in general use by the defendant on sidings on which the grade slopes towards the defendant's main line to protect its own property against damage from cars getting loose on such sidings; that the defendant knew the grade on this siding was a dangerous one, and on former occasions while cars were being shifted on said siding, that cars had gotten away from the defendant's crews handling them and had run down this grade across White street by the plaintiff's property and into the yards of the B. F. Huntley Furniture Company; that a large number of colored people live in this vicinity and that boys and children were accustomed to play about the place where these cars were left, and that with knowledge of these facts and knowing the danger to which members of the public using White street were exposed as well as persons and property about the premises of the plaintiff and others, along said siding, the defendant care-

the jury that if the car had been left without the brake being set and without other sufficient means of holding it, then if the car moved by gravity or any cause other than an act of deceased the jury should find for plaintiff, and this instruction was objected to by defendant. The court said that no matter whether the law of gravity or any other force caused the car to move, such force would not have been able to act if the car had been properly secured, and it was negligence to leave it unsecured, and the submission of the question of gravity moving it could not have in any manner injured defendant, and that if the negligence of defendant in leaving the car without proper stays was the proximate cause of the accident it would not matter whether it was started by gravity, wind, or any other cause, and that therefore there was no merit in the assignment of error which raised the gravity question, the court saying that it was useless to argue that a car standing on an incline for several minutes could not start unless some external force exerted by man was applied to it, for the fact remained that the uncontroverted evidence showed that it did so start, and there was nothing miraculous or out of the ordinary in connection with it, and that common experience teaches that a car might so stand for a short while, although insecurely fastened, when some slight cause might start it on a run; that deceased did not start it to running, but something did, and if it had been securely fastened with brakes or by other methods it would not have moved. Defendant contended that the evidence justified a charge on assumed risk and that the court should have covered it in a charge, but it was held that the evidence did not raise the issue of assumed risk as assumed risk was based on the manner of business of the employer whose risks the employee knew and assumed, and that while to go between the cars was contrary to the rule of the company, and could not have been the master's way of doing business, and the act of deceased might, under a proper state of facts, have been contributory negligence, none of the elements of assumed risk was disclosed. Defendant attempted to raise the question of the excessiveness of the verdict by one of its assignments which was followed by a proposition to the

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lessly left three cars standing near the top of said grade and negligently failed to provide derailers or other device for the protection of the public, the plaintiff and others along said siding.

VI.

That the aforesaid injury and damage sustained by the plaintiff was caused by the carelessness and negligence of the defendant in leaving three box cars under the conditions aforesaid on the heavy grade above the plaintiff's plant, without securely fastening said cars so that they could not break loose or be loosened, or in failing to provide derailers or other device to stop the cars in the event they broke loose or were loosened and started down said grade.

VII.

That because of the negligence of the defendant as aforesaid, the plaintiff has suffered the injury set out in paragraph four, and on account thereof has been damaged in the sum of $751.05.

Wherefore, plaintiff demands judgment for the sum of $751.05, and the costs of this action to be taxed by the clerk.

Answer.

Defendant answering plaintiff's complaint says:

effect that deceased was guilty of more negligence than defendant, and the verdict was therefore grossly excessive, but the court said there was no statement whatever upon which to base the assignment, and it was not to be considered, as appellate courts could not be expected to read the whole of a statement of facts to ascertain whether a verdict was excessive. That labor should be expended by the party complaining of excess in the verdict. The judgment was affirmed. San Antonio, U. & G. R. Co. v. Galbreath, —Tex. Civ. App. —, 185 S. W. 901 (1916).

C. Collision with car being loaded.

Defendant operated a railroad about 10 miles long, and along its route were several coal mines, the hauling of coal from which constituted its principal business, the cars being furnished by the railroad with which it connected. One of the coal companies had a system of tracks so constructed that empty cars could be placed there and lowered to the tipple by the force of gravitation, and it was the custom of the coal company, when it wanted cars, to make a requisition on defendant, and the defendant would then request the main line railroad to furnish the cars, which would be delivered to the coal company and placed on its tracks above the tipple. On the occasion in question, plaintiff was inside of a box car at the tipple preparing to load it with coal, and defendant's agent placed an empty car on one of the tracks above the tipple. Five or ten minutes later the car thus placed started downgrade and ran into the car in which plaintiff was at work, striking it with such force that it, too, started downgrade at such a rate of speed that plaintiff, to save his life, jumped from the car and broke his ankle. After the car was placed above the tipple no person was about it before the accident occurred, and witnesses for plaintiff testified that they were observing the car when it was placed above the tipple and did not see anyone engaged in setting the brakes, but according to the evidence for the defendant the brake was in good condition and was properly and securely set. It appeared that defendant did not maintain any facilities for inspecting the cars but relied on the inspection made by the main line railroad. The defectiveness of the

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I.

That the allegations contained in paragraph one are true and admitted.

II.

That the allegations contained in paragraph two are true and admitted.

III.

That the allegations contained in paragraph three are untrue, and, therefore, denied.

IV.

That the allegations contained in paragraph four are untrue, and, therefore, denied.

V.

That the allegations contained in paragraph five are untrue, and, therefore, denied.

VI.

That the allegations contained in paragraph six are untrue, and, therefore, denied.

brakes and the failure of the train crew to set the brakes properly were the grounds of negligence submitted to the jury, and it was earnestly insisted that the defectiveness of the brake was neither pleaded nor proved. The court said, however, that while it was true that the original petition did not allege that the brake was defective, it appeared from the record that an amended petition was filed, and as the amendment did not appear in the record it would be presumed that the allegations of the amendment were sufficient to authorize the instruction given permitting the issue of the defective brakes. It was contended that the evidence was not sufficient to authorize the submission of the issue of defective brakes to the jury, and upon this question the court said that the car in question was placed by the agents of the defendant and they had an opportunity to inspect it and made no inspection; that cars did not move when brakes were in proper condition and properly set, and as no person was about the car after it was placed above the tipple, and no outside force was applied to the car, its movement must have been due either to the defectiveness of the brake or to the negligent manner in which it was set, and, as the man who set the brake claimed that he set it in a proper way, the car would not have moved unless the brake had been defective, and, if defective, it was highly improbable that it became defective after it was set, since the car was subjected to no unusual strain. The court therefore concluded that it was for the jury to say whether the brake was defective and whether the defect, if any, was known to the defendant or could have been known to it by the exercise of ordinary care. The court further held that as the bones in plaintiff's ankle were broken, and his injury was not only painful but permanent, the verdict for $600 was not excessive, and the judgment was affirmed. Cumberland R. Co. v. Gibson, 182 Ky. 692, 207 S. W. 301 (1919).

D. Collision with car being repaired.

While deceased was engaged in repairing a car, three cars which had been left upon a track having a grade, without the hand brakes being set thereon, moved down the track, caught him and killed him, and this action was brought under the Federal

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VII.

That the allegations contained in paragraph seven are untrue, and, therefore, denied.

Wherefore, the defendant having duly answered asks that this action be dismissed and that it go without day and recover its cost.

Amendment to Answer.

Defendant, Norfolk & Western Railway Company, by leave of court, further answering plaintiff's complaint, says:

That before and at the time of the alleged accident, plaintiff carelessly and negligently permitted its wagon and horses to be and remain, unattended upon and across the sidetrack in question; that the track itself, with its surrounding circumstances, was a proclamation of danger; that from the point of accident there was an unobstructed view for a sufficient distance to enable the plaintiff to see the approaching cars in time to remove its horses and wagon from the track had it been keeping a proper lookout; and that plaintiff's failure, as aforesaid, to use due and proper care, in carelessly and negligently permitting its horses and wagon to be and remain unattended upon and across the sidetrack in question without keeping a proper lookout for the approaching cars contributed to the accident and injury complained

Employers' Liability Act for damages because of his death. Defendant alleged that the trial court erred in refusing to direct a verdict in favor of defendant for the reason that the evidence showed that deceased was guilty of contributory negligence, in that he was working upon the car without having placed a blue flag or blue light for his protection, as was required by the rules of the company. The court said, however, that, considering the act of negligence which was submitted to the jury, and which consisted of leaving the cars without being properly braked, and the further fact that the cars moved by gravity at the time they caught deceased and fatally injured him, it was apparent that a flag or a light would have been no protection against the force of gravity which neither saw nor heard, and, as the three cars were placed upon the track before deceased commenced to repair the defective coupling, no flag or light would be expected at that time, and there was no error in refusing the instruction. It was also held that the court properly instructed the jury that if they found if the cars which caught deceased were moved by the force of gravity, the deceased did not assume the risk incident to the cars being left without the hand brakes being set, as, in the absence of knowledge that they had been so left he could rely upon the presumption that the employees of defendant had performed their duty in setting the brakes on the cars. Illinois Cent. R. Co. v. Stewart, 138 C. C. A. 444, 223 Fed. 30 (1915).

E. Collision with invitee on track.

Defendant, a corporation engaged in the mining of coal and as a common carrier in the operation of a railroad which afforded transportation facilities from its mine, had completed and equipped but had not theretofore used a spur from its main line to its mine. The father of deceased, as the company's tenant and employee, occupied a dwelling owned by it located within a few feet of the spur track, and in connection therewith used a small outhouse about the same distance from the track and 40 feet from the dwelling, there being a path along the track between the two houses which was the only reasonably available walk way, a mudhole and an embankment making

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of and was the proximate cause thereof, which contributory negligence defendant pleads in bar of plaintiff's recovery.

Wherefore, defendant having fully answered, prays: that plaintiff's action be dismissed; that it go hence without day, and that it recover its cost so wrongfully incurred herein.

CLARK, C. J. This is an action for damage to the plaintiff's property by certain cars standing upon a siding on the defendant's road in a few feet or on the edge of a heavy grade, which, being set in motion by the action of a negro boy in releasing the brake and removing the brick with which it was blocked, ran violently down said grade. On April 27, 1917, the plaintiff's wagon, with two horses hitched to it, was standing by the plaintiff's platform, on which were being loaded mirrors and glass, when three box cars loaded with lumber, which had been left by the defendant on the sidetrack near the top of the grade above the plaintiff's plant, tore

other means of access to the outhouse either inconvenient or unfit for such use. Four houses were owned by defendant near the spur in that vicinity, and all of them were occupied by persons in its employ who habitually used the path and the track in going to and from its mines. In the evening deceased, a 4-year-old girl, while on the pathway to the closet, was struck and killed by a 5-ton car owned by defendant and used by it to haul and dump ashes for ballast on the track. The car, having been used that day, was left unblocked and with brakes unset on the spur near the dwellings, and between it and the closet, and for some cause unexplained the car, as the child passed along the outside of the track, started down a slight grade from the position it had occupied for two hours prior to the injury, and caused her to fall in front of it on one of the rails, where it ran against and killed her. This action was brought by the sheriff as administrator to recover damages for her death, and on motion the trial court excluded plaintiff's evidence and directed a verdict for defendant. In reversing that decision, the court found that deceased was not a trespasser nor a mere licensee, but that she had the legal right to be at the place where she was when the injury occurred, and, having that right, defendant owed her a higher degree of duty than it would have had she been a trespasser or a mere licensee. Upon the question of negligence in the condition of the car, the court said that, presumably, deceased was not of sufficient strength to cause it to move even if she had attempted to do so, of which attempt there was not the slightest proof, so that the court was forced to conclude that the movement was induced by the track grade and the car's weight thereon, the reason why it had not previously changed its position being unexplained and perhaps unexplainable. In any event, the court said defendant knew either as a fact or as a legal inference that there were children who occupied other houses belonging to it near the place where its employees left the car on the track when they quit work that evening and who might be injured if the car moved down the grade, the probability of injury depending to some extent on the grade, and that, with that knowledge pos-

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down the steep track and, striking plaintiff's wagon, dragged the wagon and team through the heavy gate, demolishing the wagon and harness, breaking and damaging several mirrors, and badly injuring the two horses.

It was in evidence that there was no derailer or other device to stop cars, such as are in general use; that this grade was steep and dangerous, and that on former occasions, while the cars were being shifted on said siding, cars had gotten away and had run down this grade by the plaintiff's warehouse, as on this occasion; also that a large number of colored people lived near this siding, and that boys and children were accustomed to play about the place where these cars were left, but that the defendant, notwithstanding its knowledge of this fact, left three loaded cars standing near the top of said grade, and failed to provide derailers or other devices to prevent the cars starting, and did not lock the brakes, nor securely chock the wheels.

sessed by defendant or available to it, it could not with reason be said that no duty devolved upon it to anchor the car by brake or block to prevent injury to persons, whether infants or adults, who, with its acquiescence or upon its invitation, were frequently using either its tracks or a walk way in close proximity thereto. Judgment was reversed and a new trial awarded. Smith v. Sunday Creek Co., 74 W. Va. 606, 82 S. E. 608 (1914).

II. Cars escaping from control.

A. Escape while being moved by hand.

1. Collision with engine on main line.

Defendant railroad company built a sidetrack about 300 yards long on a very steep grade situated so that if a car from the sidetrack got loose it would run down the sidetrack and onto the main line for more than a mile, and the roadbed was very steep and crooked. The sidetrack was much used by a lumber dealer as a loading and shipping point, and he had built a dock along the track to store lumber on, and the custom had been to move cars on the sidetracks, which were numerous on the road, for storing and shipping lumber. The defendant had a defective derailer on a sidetrack at the cut, and about a week before the death of plaintiff's intestate a car in bad order with defective brakes had been placed on the track, the car being left, after repairs, with seven brake shoes instead of eight. On the day in question plaintiff's intestate, who was a fireman upon the railroad, was upon an engine which was being operated backwards up the hill towards the sidetrack because defendant had failed to put in a turntable or Y so that the engine could turn around. At that time the lumber dealer attempted to move a car that was on the sidetrack, but, owing to its defective brake, was unable to control it, and, the derailer also being defective, the car ran out on the main line and down it at an ungovernable speed. As the engine was being operated backwards, the engineer, who was on the other side, could not see the car coming as he could have done if his engine had been at the head of the train, and defendant had no lookout on the engine or on the leading car as the train was backing up the hill. The runaway car collided with the train,

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Essick Fields, a colored boy 16 years old, who started the cars in motion, testified that he and two other little darkies were playing on these box cars; that all three of them went on top of the cars, and turned the brakes loose, and then put them back; that then they came down and took the brick out from under the wheel, and then they stuck it back, but the cars, which had started, smashed the brick and kept on down the grade. He further testified, on cross-examination, that when he and his companions went up on the cars he loosened one brake on the middle car; that it was not tight at all, and he had no trouble in getting it loose; that the brick chock under the wheel of the front car was a small-sized brick, and he pulled it out easily with his hand; that there was no other chock on the wheel; that when he pulled the brick out the car started rolling; immediately he put the brick back, but the car smashed the brick into sand and went on; that he was the biggest of the three.

killing plaintiff's intestate and seriously injuring the engineer. In this action for the death of the brakeman plaintiff had judgment and defendant appealed. The court held that there was evidence of negligence on the part of defendant, in that it had no lookout on the rear end of the train, which was moving backwards, and that the evidence of the defective derailer was also a sufficient showing of negligence to go to the jury. The court also held that evidence was competent as to the custom prevailing on the railroad for shippers, like the lumber dealer, to shift the cars on the sidetrack, both before and after they were loaded, and to show that this was done with the implied knowledge and consent of the company, so that, if there was negligence on the part of the lumber dealer in shifting the cars down the track it was in accordance with the custom of defendant, and was with the knowledge and consent of the company, and if his negligence started the runaway car it concurred with and contributed to the negligence of the company which permitted him to do that and, by reason of the running of the train backwards without a lookout at that end, and without a sufficient derailer, which should have derailed the car before it reached the main line, caused the death of plaintiff's intestate, as the jury found, as, after the dealer released the car the injury to plaintiff would not have occurred except for the negligence of defendant in the several particulars stated. Furthermore, the court said, the death of plaintiff's intestate was caused by a collision, and that raised the presumption of negligence on the part of the carrier, and the burden was on it to rebut that presumption which carried the case to the jury. Defendant claimed that its railroad was built principally as a logging road, but the court said that it was alleged in the pleading and admitted that it was a common carrier, and the fact that it was a logging road built through a rough country would not avoid its liability for negligence as shown by the evidence, and that even if it were a logging road, defendant was liable to its employees in the same standard of duty as any other railroad system. Judgment was affirmed. Mumpower v. Black Mountain R. Co., 174 N. C. 742, 94 S. E. 515 (1917).

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His younger brother testified that the cars did not start when they took the brakes off, but as soon as they took the brick out the cars started rolling; that, though he put the brick back under there, the car just smashed the brick up and went on.

Judge Starbuck, in charging the jury, told them that, if they found that the cars were fastened with such care as the circumstances required, unless tampered with, to answer the issue as to negligence "No," unless the jury should find: (1) That the defendant knew, or could have known in the exercise of ordinary care, that children had been (in the habit of) playing around the cars; (2) that the defendant company had reason to apprehend that the boys were likely in their play to tamper with and loosen the fastenings of the car; (3) that the defendant failed to exercise the care in fastening the cars that this knowledge demanded; and (4) that if due care had been exercised the cars would not have been loosened

2. Collision with person on spur track.

Plaintiff was an employee of a manufacturing company which had a spur track connecting with defendants' railroad upon which materials for the manufacturing plant were placed in cars and the cars were then moved along by employees of the manufacturing company to the plant as needed. A car belonging to one of defendant railroad companies loaded with material for the manufacturing plant was placed by the other defendant railroad company upon the spur track, and as the brakes on the car were out of repair and wholly useless, the wheels were blocked so that it was left securely upon the track. Two employees of the manufacturing company whose duty it was to move cars to the shed, upon undertaking to move this car, found that the brakes were out of order, but undertook to move it by blocking it with a piece of timber, but it got away from them and ran against other cars which struck plaintiff, who was employed in picking up coal upon the premises of the manufacturing company. This action was brought against the two railway companies and the manufacturing company to recover damages for the injuries sustained, and at the conclusion of all the evidence the court, upon motion, gave a peremptory instruction as to the railroad companies and plaintiff appealed from a refusal of a motion for a new trial. The court, in affirming this judgment, said it was certain that defendant railroad companies, in failing to provide the car with a reasonably safe brake, violated no duty they owed to plaintiff, and as it was left by them it was entirely harmless and, even when in motion, was not necessarily dangerous, and that while it remained in the condition in which it was left by defendant railroad companies, plaintiff ran no risk in going upon the spur track in performing his work, but that it was rendered dangerous by the act of the employees of the manufacturing company in removing the blocks and undertaking to move the cars to the place for unloading it after they had investigated and fully understood the defective condition of the brakes. Logan v. Cincinnati, N. O. & T. P. R. Co., 139 Ky. 202, 129 S. W. 575 (1910).

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by the children, and the injury caused to the plaintiff's property. The jury found that the property of the plaintiff was injured by the negligence of the defendant, as alleged in the complaint; that plaintiff did not contribute to the injury to its property by its own negligence, as alleged in the amended answer, and that the plaintiff was entitled to recover $700.

The above states the essential facts, and the jury were justified upon the evidence in finding that the defendant was guilty of negligence. It had three cars on the siding, upon or near the edge of a steep grade, above the plaintiff's platform, which he [it] was in the habit of loading and unloading furniture, of which fact the defendant was aware. It was in evidence, also, that of the three cars on this siding only two were tied—i. e., had the brakes "set"; that the defendant knew that numerous children lived in the neighborhood, and that many of them were in the habit of playing around this siding; that the brakes were not locked, and that the only chock was

B. Escape during switching operations.

While the employees of the F W railway company were running an engine slowly along a track which connected with a switch track, it became the duty of deceased to throw the switches for the engine, and after he had done so, and while the engine was passing him, a caboose came down an inclined switch track and ran into the side of the engine, catching deceased between the caboose and the engine and killing him. The caboose in question had been kicked upon the switch track by defendant's servants, and one of the brakemen ran after it to stop it but failed to catch it, and the court held that to permit the caboose to run down the inclined track while no person was on it for the purpose of controlling its movement tended to prove negligence of defendant's brakeman or conductor, or both. The principal defense of defendant was that the employees who were handling the caboose and deceased were fellow-servants, but the court found contrary to defendant's contention and affirmed a judgment for $5,000, the maximum fixed by the statute. Pittsburgh, C., C. & St. L. R. Co. v. Bovard, 223 Ill. 176, 79 N. E. 128 (1906), aff'g 121 Ill. App. 49 (1905).

C. Escape of push car.

While plaintiff was walking down defendant's spur track a truck car, which was a small flat car operated by hand, got beyond the control of the section men running it and started rapidly down a grade towards plaintiff, all of the employees jumping from it except one, who stayed on and endeavored to stop it by applying the brakes and also shouted to warn plaintiff, which warning, however, plaintiff did not hear because of the noise of an engine near him. He was struck by the car and received injuries for which he brought suit. He recovered judgment for $3,091.66. The court said the weight of evidence tended to prove that as the truck started down the grade and before plaintiff was seen by those in charge of it, it got beyond their control, and that it was impossible for the employees upon the car to stop it after they saw plaintiff and discovered his

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one small brick, which was insufficient to stop the cars when they began to roll down the siding; and that by reason of the cars getting away, and the failure of the defendant to have a derailer to keep the cars from smashing into defendant's [plaintiff's] wagon and team, injury to them, and also damage to the furniture loaded therein, resulted.

This is not the case of an injury caused by an intervening negligence, independent of the defendant's negligence, and without which an injury would not have occurred; but the negligence of the defendant furnished the means by which thoughtless children, without malice or intent, started the cars in motion, which wrecked the plaintiff's property. The defendant should have foreseen this and guarded against such occurrence. The witness Kinney, one of the defendant's brakemen, who assisted in placing these cars, testified that he had seen children on cars on this siding three or four times,

danger. The court held that plaintiff was a trespasser upon the railroad track, and therefore defendant's servants owed to him no duty to keep a lookout for his presence on the track or to operate the truck with a view to his safety unless, upon discovering his danger, they could, by ordinary care, have stopped the car or warned him of its coming in time to have prevented his injury, and that the proof failed to show such negligence on the part of defendant's servants. The court also said that plaintiff could not complain of the noise made by the freight train though it had been unusual or unnecessary. It was also held that the trial court should have excluded evidence as to the use of the spur track by pedestrians, as the fact that such use of a railroad track by the public was frequent or even customary and with the knowledge of the railroad company, did not amount to a license to so use it or to make the railroad company liable to a trespasser for injuries he might sustain thereon. A judgment was reversed and a new trial ordered. Illinois Cent. R. Co. v. Johnson, 30 Ky. L. Rep. 142, 97 S. W. 745 (1906).

III. Escape because of broken coupling.

A. Injury to volunteer attempting to recouple.

In Eversole v. Wabash R. Co., 249 Mo. 523, 155 S. W. 419 (1913), it appeared that plaintiff, an experienced railroad man, employed by another company than defendant, upon seeing that a string of cars had broken away from a switching engine upon a grade, stepped upon the front board of the engine and signaled the engineer to increase the speed of the engine so as to catch up with the cars and permit him to adjust the coupling, but that the speed of the engine was not increased quickly enough and, at about the time the engine reached the cars, the other end of the cars came in contact with another train standing on the track and plaintiff was injured in the resulting collision between the engine upon which he was riding and the loose cars. Negligence was charged on the part of defendant in permitting the coupling to remain in a defective condition, causing the cars to separate from the engine, and also on the part of the engineer in not in-

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and that cars had gotten from under control of the train crew and run down this grade, doing damage, prior to this time, and that on one occasion two cars had gotten loose and ran down the grade in the nighttime, when no members of the crew were present.

There were other exceptions, but they do not require discussion. The chief controversy, as stated in both briefs, is whether or not the defendant's motion for judgment of nonsuit should have been sustained. The defendant contends that it was not an insurer, which is true; still it was liable for injury to plaintiff's property caused by its negligence, as found by the jury upon sufficient evidence of proximate cause.

It is true that the act of the boy or boys in removing the brick chock preceded the starting of the car, but the position of the cars on a slight grade, near the edge of a steeper grade, insufficiently secured by brakes, which were not locked, and without safe chocks,

creasing the speed of the engine quickly enough. There was a verdict and judgment for $10,000 for plaintiff, which, however, was reversed upon the ground that, while plaintiff's case was based upon the theory that he volunteered for the purpose of saving the lives of persons in imminent peril from a collision between the loose cars and the train standing on the track, there was no evidence to sustain that theory by showing that there were any persons in peril.

B. Collision with driver at crossing.

Deceased was about to drive across defendant's track, and, after waiting for a freight train which was passing, started across, when he was struck by a detached portion of the train which was running wild, and received the injuries causing his death. An ordinance was placed in evidence limiting the speed of trains, and it was contended by defendant that too much importance was attached to the ordinance. The court held that the city ordinance did not contemplate controlling or regulating the speed of a train separated by accident from the main part of the train, because such a regulation and control would necessarily contemplate a commission or license to run or operate such wild or loose sections of a train within the city limits, subject to the condition only that they be operated within the stated limits fixed by the ordinance, which the court considered was not contemplated by such ordinance, as a wild or separated section of a train, running without an engine, was in itself necessarily dangerous, but that the speed ordinance was applicable under such a situation only to the extent that the speed of the separated section was acquired as a result of the speed of the train from which it became separated, while, on the other hand, any speed which the separated part acquired under its own momentum after the separation, and because of any incline in the grade of the track, would not be within the purview and control or regulation of the ordinance, but that such speed might be evidence of bad management and lack of prompt and efficient control by those in charge of the separated or loose part of the train, from which lack of prompt and efficient control the negligence of defendant might be inferred by the jury. The court distinguished the case in question

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transmuted the force of gravity into motion, and was the latest and proximate cause. If the cars had not been on a grade, negligently secured, the boy could not have started them; but, if the act of the boy and the negligence of the defendant were concurrent, then the plaintiff could sue both or either. Ridge v. Railroad, 167 N. C. 510, 83 S. E. 762, L. R. A. 1917 E 215.

Upon consideration of all the grounds assigned in the judgment of LANE, J., in the superior court, we think that judgment should be reversed, and that of STARBUCK, J., in the county court, should be reinstated and affirmed.

Reversed.

from cases in which a loose car was knowingly and purposely sent on its way over a crossing without any warning and without any means of control, saying that in that case such action would undoubtedly be negligence per se, while in a case where the separated portion of the train was not purposely and intentionally sent on its way, but its going in the manner in which it did was the result of accident, the rule did not apply, because the rule was not that a presumption had arisen or existed which the defendant was required to rebut, but that, having better opportunity of knowing the facts relating to the occurrence than plaintiff had, it ought to introduce evidence concerning the affair, whether plaintiff had established by his evidence any negligence or not, or, stated otherwise, under circumstances making it difficult for plaintiff to prove his charges of negligence, the defendant owed the duty of furnishing material which might be adopted and used as a basis for a conclusion as to negligence. There were witnesses who testified to the strength of the coupler, and that an extraordinary jerk or strain was necessarily required to break it, and judging from that and other evidence the jury had the right to infer that it was due to negligence in operation of the train, either at the time of or before the separation, and that as defendant's agent was the person in charge of the operation and management of the train, such negligence was attributable to defendant, and while the evidence was meager, there was enough to prevent the court from directing a verdict. It was held that the verdict for $4,000 was excessive. The beneficiary of the action was the widowed mother of deceased, and it appeared that she was 54 years of age, with an expectancy of 18.28 years when her son was killed, and the son was 24 years of age, with an expectancy of 39 or 40 years. The mother testified that he had contributed to her support and that, since her husband's death, had been her sole support, the estimate as to the amount contributed by him being $150 a year, he being a good, faithful and industrious son with no bad habits. The court pointed out that at the time of his death the mother could have purchased an annuity of $150 per year for less than $2,000, and that the proper rule under such circumstances was that the amount of damages should be predicated upon the conditions existing and the contributions being made by deceased at the time of and prior to his death, rather than upon speculation as to a possible decrease or increase of such contributions. The judgment was reversed with instructions to grant a new trial. Chicago & E. I. R. Co. v. Vester, 47 Ind. App. 141, 93 N. E. 1039 (1911). R. L. S.

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CONNECTICUT VALLEY LUMBER CO. v. MAINE CENTRAL R. R.

[Supreme Court of New Hampshire, February 5, 1918.]

— N. H. —, 103 Atl. 263.

1. **Conflict of laws—Remedial procedure—Lex fori.**
Ordinarily remedial procedure is governed by the law of the place where the suit is brought although it may differ materially from the remedy established in the state or jurisdiction within which the cause of action arose.

2. **Conflict of laws—Rules of procedure—Lex fori.**
Each state is entitled to adopt for the guidance of its courts such rules or laws pertaining to the methods of procedure for the vindication of rights and the promotion of justice as it may deem convenient and reasonable, and litigants who resort to its courts or are compelled to appear therein cannot in-

CASE NOTE.

What law governs an action to recover damages for loss or injury inflicted in one jurisdiction by a negligent act or omission in another jurisdiction.

I. Injuries on railroads, 1013-1018.
  A. Negligent inspection, 1013-1016.
    1. Breaking of coupling, 1013-1014.
    2. Explosion of locomotive, 1014-1015.
    3. Defective step on engine, 1015-1016.
  B. Improperly loaded car, 1016-1017.
  C. Insufficient instruction as to danger, 1017-1018.
  D. Collision, 1018.
II. Negligent filling of prescription, 1018-1020.
III. Injury by dog allowed loose, 1020-1021.
IV. Rock thrown by blast, 1021.
V. Admiralty cases, 1021-1029.
  A. Fire, 1021-1023.
    1. Fire commencing on vessel communicated to dock, 1021-1022.
    2. Sparks from funnel starting fire ashore, 1022-1023.
  B. Drowning after collision at sea, 1023-1024.
  C. Articles precipitated into water by negligence of wharfinger, 1024-1025.
  D. Injury to boat by projection from dock, 1025.
  E. Injury to passenger alighting during storm, 1025-1026.
  F. Accidents while loading and unloading, 1026-1029.
    1. Workman on wharf injured by load escaping down incline, 1026.
    2. Workman on shore struck by swing load of lumber, 1026-1028.
    3. Person on dock struck by rock falling from defective tackle, 1028.
    4. Workman injured while assisting in carrying barrel ashore, 1029.
    5. Workman in hold injured by lumber slid down chute, 1029.
    6. Goods injured by breaking of dock due to negligent unloading, 1029.

Cross-references. Extraterritorial effect of workmen's compensation acts, see 15 N. C. C. A. 919-926, 9 N. C. C.

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sist upon the trial of their rights by some other or different rules of procedure which may prevail in the place where the cause of action arose.

3. **Conflict of laws—Remedy in tort action—Lex fori.**
The law of the forum governs the remedy in the case of a tort as well as in the case of a contract.

4. **Limitation of actions—Extraterritorial effect of statutes.**
Statutes of limitation which do not abolish rights that have become barred thereby have been held with few exceptions to relate to the procedure and not to the essential rights of the parties and to have therefore no extraterritorial effect.

5. **Limitation of actions—Foreign statute—Defense.**
The mere fact that no action can be maintained upon a contract or for a tort in the state where the parties have lived since a right of action accrued which appears to be barred by the local statute of limitations does not constitute a valid defense to the merits of the controversy in another state nor can it be set up as a bar to the action.

6. **Limitation of actions—Foreign statute—Effect.**
If merely the remedy upon a cause of action has ceased to exist, in consequence of the statute of limitations of the state where the obligations or duties involved arose, an action upon the merits may be maintained in another jurisdiction, the foreign limitation in such a case being designed to regulate or limit the use that may be made of local procedure and not to apply to or modify the essential duties assumed by the parties or to regulate or limit their method of procedure in another forum.

A. 918-932, 10 N. C. C. A. 888; action for death where injury occurs in one state and death in another, see 9 N. C. C. A. 765-771.

Scope of Note. It should be noted that the question under discussion is what law applies where negligence occurs in one jurisdiction, and injury results therefrom in another, which is distinct from the question as to the place where a suit may be brought. While the cases included in the note involving the jurisdiction in admiralty when negligence occurring upon navigable waters results in injury upon the land, or vice versa, may seem to involve the latter question, it has been deemed advisable to include them, because the difference in practice and remedies applicable in the admiralty jurisdiction from those of the common-law courts is such that the practical question seems to be as to what law is applicable rather than in what jurisdiction suit may be brought. Numerous cases involving the question under discussion have arisen out of negligence in the transmission or delivery of interstate telegrams, due to the fact that some states permit recovery for mental suffering unconnected with physical injury or pecuniary loss, while other states adhere to the common-law rule, that such damages are not recoverable, unless connected with pecuniary injury or property loss. However, a question has arisen as to whether the Act of Congress of June 18, 1910, amending the Interstate Commerce Act, Fed. St. Ann. 1912 Supp. 112, has not taken that whole question out of the jurisdiction of the state courts, so that the common-law rule adopted by the federal courts in not allowing damages for mental suffering apart from physical or other pecuniary injury, is applicable in all cases involving interstate telegrams, the majority of the courts taking the view that the statutes of the various states upon that question have been superceded by the federal act of 1910. As illustrating this view, see Western Union Tel. Co. v. Lee, 174 Ky. 210, 15 N. C. C. A. 1, Ann. Cas. 1918 C 1026, 192 S. W. 70 (1917), and Norris v. Western Union Tel. Co., 174 N.

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7. **Limitation of actions—Foreign statute—Enforcement.**
It would doubtless be competent for the legislature to provide that, when a foreign statute of limitations has become a bar to the maintenance of a suit upon a cause of action which arose in the foreign jurisdiction, such statute may be pleaded in bar of such suit here, but, in the absence of such a legislative provision, the remedial procedure of another state or country cannot be enforced by the courts of this state.

8. **Limitation of actions—Foreign statute—Enforcement.**
The principle of construction which refuses to enforce foreign statutes of limitation is not of unlimited application and is usually confined to causes of action which are recognized at common law and which are not discharged under the foreign law by the statutory lapse of time.

9. **Railroads—Setting fire to international bridge—Action for damages—Limitations—Burden of proof.**
In an action against a railroad company for the burning of plaintiff's bridge which reached from a point in Canada to a point in this state, where the cause of action, had it been prosecuted in the Canadian courts, might have been barred by limitations, held that, with reference to so much of the bridge as was in Canada, the burden was on the plaintiff to show that it had a valid cause of action under the law of that country against the defendant for the injury alleged.

10. **Limitation of actions—Canadian statute—Construction—Question of fact.**
The question of the construction of a Canadian statute of limitations is one of fact to be found from all of the competent evidence submitted, includ-

C. 92, 93 S. E. 465 (1917), Askew v. Western Union Tel. Co., 174 N. C. 261, 93 S. E. 773 (1917). Apparently Texas is the only state taking the contrary view, and its views will be found in Western Union Tel. Co. v. Bailey, 108 Tex. 427, 196 S. W. 516 (1917), the opinion of the court of civil appeals being found in earlier reports of the same case, — Tex. Civ. App. —, 171 S. W. 839 (1914), and — Tex. Civ. App. —, 184 S. W. 519 (1916). Apparently the situation which would bring a telegraph case within the scope of the present note has not been passed upon by the Supreme Court of the United States. In Western Union Tel. Co. v. Brown, 234 U. S. 542, 58 L. Ed. 1457, 5 N. C. C. A. 1024, 34 Sup. Ct. 955 (1914), where negligence occurred in the delivery of a telegram in the District of Columbia, and the injury arose there, the telegram having been sent from South Carolina, the plaintiff brought action in South Carolina and recovered damages in the state courts for mental anguish under the South Carolina statutes, and this petition was reversed on the ground that the South Carolina statute, as so applied, was violative of the federal constitution. The cause of action in that case arose in 1908, before the passage of the act of 1910, and it did not, of course, decide what the effect would be of the application by a state of its law permitting damages for mental suffering where the negligence occurred in another jurisdiction, but the injury occurred in the state where the suit was brought. However, in the recent case of Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co., 251 U. S. 27, — L. Ed. —, 40 Sup. Ct. 69 (1919), involving the extent of the liability of a telegraph company for an unrepeated interstate message, governed by a contract limiting the liability of the company for missending an unrepeated message, the court held that the act of 1910 was designed to and did subject such companies, as to their interstate business, to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the act to regulate commerce to es-

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ing the testimony of experts, when its solution is difficult and doubtful, and the determination of such question is within the exclusive province of the tribunal charged with the duty of ascertaining litigated facts and is not within the province of the law court.

11. Railroads—Setting fire to international bridge—Limitation of actions—Right of action.

In an action against a railroad company for the burning of plaintiff's bridge which reached from a point in Canada to a point in this state, where the cause of action, had it been prosecuted in the Canadian courts, might have been barred by limitations, held that, if it was found by the superior court that the Canadian statute of limitations related merely to the remedy and did not obliterate the right, plaintiff's right of action existed and was maintainable here for the burning of the Canadian part of the bridge.

12. Common law—Presumption as to that of foreign jurisdiction—Conclusiveness.

The presumption that the common law of a foreign jurisdiction is the same as that of the forum is not conclusive but may be rebutted by evidence that it is different.

13. Railroads—Setting fire to international bridge—Limitation of actions—Existence of cause of action.

In an action against a railroad company for the burning of plaintiff's bridge which reached from a point in Canada to a point in this state, where the cause of action, had it been prosecuted in the Canadian courts, might have been barred by limitations, held that, as the statute of limitations of

tablish, a purpose which would be wholly destroyed if, as was held by the court below, the validity of contracts made by telegraph companies as to their interstate business continued to be subjected to the control of divergent and probably conflicting local laws; and that such act was an expression by congress of this authority to bring under federal control the interstate business of telegraph companies, and therefore was an occupation of the field by congress which excluded state action. In view of this decision, it seems probable that, if a case should be taken to the supreme court involving the application by a state of its statute permitting a recovery of damages for mental suffering in an action for damages arising within the state because of negligence occurring in another state in the delivery of a telegram, the court would hold that the act of 1910 had superseded the state statute, and that the federal rule as to such damages would apply, especially in view of the fact that the court, to sustain its position, cited several state decisions holding that the act of 1910 had the effect of superseding the state statute upon the question of damages for mental suffering, including the North Carolina and Kentucky decisions above cited. Because, therefore, of the probability that the question under discussion, in so far as it applies to interstate telegrams, may be disposed of by the application of the federal rule in all such cases, it does not seem advisable to set out at length the cases involving negligence in the transmission or delivery of telegrams where the negligence occurred in one jurisdiction and the injury in another, and such cases are merely cited. Western Union Tel. Co. v. Burris, 102 C. C. A. 386, 179 Fed. 92 (1910); Western Union Tel. Co. v. Woodard, 84 Ark. 323, 13 Ann. Cas. 354, 105 S. W. 579 (1907); Western Union Tel. Co. v. Hanley, 85 Ark. 263, 107 S. W. 1168 (1908); Western Union Tel. Co. v. Griffin, 92 Ark. 219, 122 S. W. 489 (1909); Western Union Tel. Co. v. Crenshaw, 93 Ark. 415, 125 S. W. 420 (1910); Western Union Tel. Co. v.

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this state had not run against the enforcement of the claim and as the resulting damage caused by the alleged negligence occurred in this state, a cause of action thereupon arose in favor of plaintiff which was governed and defined by the law of this state.

14. **Negligence—Damage to property in foreign jurisdiction—Locality of act.**
If a person while in one jurisdiction performs a negligent act which is the proximate cause of damage to property in another jurisdiction, the locality of the act is deemed at common law to be the same as that of the damage.

15. **Railroads—Setting fire to international bridge—Proximate result of foreign negligence—Right of recovery.**
In an action against a railroad company for the burning of plaintiff's bridge which reached from a point in Canada to a point in this state, where the cause of action, had it been prosecuted in the Canadian courts might have been barred by limitations, held that, if by defendant's negligence the bridge was set on fire in Canada and the conflagration extended to the part of the bridge in this state and consumed it, such damage was the proximate result of the defendant's negligence for which it might be held responsible in the action brought against it.

16. **Railroads—Setting fire to international bridge—New Hampshire statute—Right of recovery.**
In an action against a railroad company for the burning of plaintiff's bridge which reached from a point in Canada to a point in this state, where defendant was operating its engine in Canada when the damage was done, held that recovery could not be had under P. S. ch. 159, § 29, providing that

See, 94 Ark. 86, 126 S. W. 78 (1910); Western Union Telegraph Co. v. Turley, 108 Ark. 92, 156 S. W. 836 (1913); Western Union Tel. Co. v. Lacer, 122 Ky. 839, 5 L. R. A. (N. S.) 751, 121 Am. St. Rep. 502, 93 S. W. 34 (1906); Hornthal v. Western Union Tel. Co., 166 N. C. 602, 82 S. E. 851 (1914); Balderston v. Western Union Tel. Co., 79 S. C. 160, 60 S. E. 435 (1908); Fail v. Western Union Tel. Co., 80 S. C. 207, 60 S. E. 697 (1908); petition for rehearing denied, 61 S. E. 258 (1908); Western Union Tel. Co. v. Cooper, 29 Tex. Civ. App. 591, 69 S. W. 427 (1902); Western Union Tel. Co. v. Blake, 29 Tex. Civ. App. 224, 68 S. W. 526 (1902); Western Union Tel. Co. v. Christensen (Tex. Civ. App.), 78 S.W. 744 (1904).

Cases in which negligence and the accident resulting therefrom occurred in the same jurisdiction, but the death of the injured person, for which suit was brought, occurred in another jurisdiction, also have been excluded.

Cases involving injuries to bridges and other structures from negligent operation of vessels are excluded because in those cases the question is generally as to whether the injury occurred upon the land or upon the water, due to the contention being made that the structure was not a part of the land.

I. Injuries on railroads.

A. Negligent inspection.

1. Breaking of coupling.

Plaintiff, a citizen of Alabama, was employed as a brakeman under a contract made in Alabama by defendant, an Alabama corporation, operating a railroad extending from Tennessee through Alabama into Mississippi, the freight train upon which plaintiff was engaged running from a point in Alabama to a point in Mississippi. He was injured through the breaking of a link between two cars in a freight train which was proceeding over this route, the break occurring in Mississippi. The negligence, if any, causing the injury, was that of fellow-servants of plaintiff in failing to properly inspect the links, and there was evidence tending to show that

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the proprietors of a railroad shall be liable for all damages to any person or property by fire from any locomotive or other engine upon their road, and that this was true even though the defendant was authorized by the legislature to operate a railroad in this state and was so operating one.

Action against a railroad company for the burning of plaintiff's bridge which reached from a point in Canada to a point in New Hampshire. Case discharged.

For plaintiff—Herrick, Smith, Donald & Farley, Daniel J. Lyne and Sullivan & Daley (Daniel J. Lyne, orally).

For defendant—Rich & Marble (George F. Rich, orally).

Case for damages caused by a fire alleged to have been set by the defendant. Facts agreed. On July 14, 1911, the plaintiff was the owner of a trestle bridge extending from Auckland in the Province of Quebec and Dominion of Canada to Pittsburg in this state, spanning Hall stream, which is the international boundary at that

this negligence occurred in Alabama. By the statute of Alabama, the fellow-servant rule was abolished, but it was in force in Mississippi, and an instruction was tendered that, as the negligence which produced the casualty transpired in Alabama, recovery could be had there, regardless of where the consequences of that negligence manifested itself. The court held, however, that the cause of action arose in Mississippi where the injury occurred, and that recovery must be had, if at all, under the laws of that state, saying: "For all that occurred in Alabama, therefore, no cause of action whatever arose. The fact which created the right to sue—the injury—without which confessedly no action would lie anywhere, transpired in the state of Mississippi. It was in that state, therefore, necessarily that the cause of action, if any, arose; and whether a cause of action arose and existed at all, or not, must in all reason be determined by the law which obtained at the time and place when and where the fact which is relied on to justify a recovery transpired." For the error in refusing to instruct the jury to find for defendant, the judgment in favor of plaintiff was reversed. Alabama G. S. R. Co. v. Carroll, 97 Ala. 126, 13 Am. Neg. Cas. 58, 18 L. R. A. 433, 38 Am. St. Rep. 163, 11 So. 803 (1892).

2. Explosion of locomotive.

Due to the failure of the railroad company to properly inspect and repair a locomotive in Pennsylvania, an explosion occurred in New Jersey, injuring a flagman and resulting in his death, for which action was brought in Pennsylvania. There was a judgment for plaintiff, and upon appeal the judgment was at first reversed upon the assumption that the death occurred in New Jersey, the court saying that, no matter how great the negligence of the defendant nor where it began or continued, there was no cause of action in favor of anybody until an injury was received, and, as soon as decedent was injured, he had a common-law right of action which was transitory and enforceable in any

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point. On that date one of the defendant's locomotives, which it was operating within Auckland, set fire to the bridge, which was burned and destroyed. The fire originated in that town, but spread to that part of the bridge located in Pittsburg and destroyed it. The defendant claimed that the statute of Canada (chapter 37, Rev. Stats. § 306) applicable to the facts, requiring suit to be commenced within one year after the injury occurred, was a bar to this action, which was begun November 18, 1916. The sole question transferred without a ruling from the April term, 1917, of the superior court, is whether the Canadian statute is a bar.

WALKER, J. It is admitted by the plaintiff that its cause of action, if prosecuted in the courts of Canada, is barred, or may be barred by statutory limitation. The statute referred to (chapter 37, Rev. Can. Stats. 1906) provides in section 298 for the recovery of damages from a railroad caused by a fire started by a locomotive used by the railroad, whether guilty of negligence or not, and in section 306 that:

common-law jurisdiction where defendant could be served. However, when he died without having brought suit, his right died with him, and there was no survivorship to any one; but by statute, a new right arose, derivative in its nature and not maintainable when, if he had lived, he could not have recovered, this new right being based entirely on statute and vesting in the party to whom it was given by the statute of the jurisdiction in which it arose. On rehearing it appeared that decedent, after the accident, was brought back to Pennsylvania and died there, and the judgment of the trial court was therefore affirmed, the court saying that the case was tried in the court below, and on the first argument was argued on the theory that the initial negligence of the defendant occurred in Pennsylvania and continued and became part of the proximate cause of the accident in New Jersey, and that, owing to that view, the fact was not disclosed that deceased, although injured in New Jersey, had been brought home and died in Pennsylvania. Hoodmacher v. Lehigh Val. R. Co., 218 Pa. 21, 66 Atl. 975 (1907).

3. **Defective step on engine.**

Plaintiff, a locomotive fireman, sustained an injury resulting in the amputation of one of his legs, due to a step on the engine upon which he was employed becoming loose and turning when he stepped upon it. The route upon which he was employed extended from a point in Missouri to a point in Tennessee, running through Arkansas, where the accident occurred. The accident, however, was due, in part at least, to the negligence of defendant's employee whose duty it was to inspect engines at a point in Missouri. It was contended by defendant that its duties were imposed and governed by the laws of Missouri, where plaintiff was employed and the contract of service was entered into, and that the risks assumed by the contract of employment were determined by the laws of that state; that the relation of master and servant could be created between them by

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"All actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained, or, if there is continuation of damage, within one year next after the doing or committing of such damage ceases, and not afterwards."

As to so much of the plaintiff's bridge as was located within the territorial boundaries of Canada, it is not doubted that the statutes of that province would be applicable in an action there. Hence the question arises whether, since the statutory period of limitation prescribed in section 306 became complete long before this suit was begun, it constitutes a defense which may be relied upon in this state.

It is too well settled to require the citation of authorities that, ordinarily, remedial procedure is governed by the law of the place where the suit is brought, although it may differ materially from the remedy established in the state or jurisdiction within which the cause of action arose. Each state is entitled to adopt for the guidance of its courts such rules or laws pertaining to the methods of procedure for the vindication of rights and the promotion of justice

contract, and that the duties and risks assumed grew out of that relation. The court held that while the relation was created by contract, the duty upon which the plaintiff relied to recover in the action, if it existed, was imposed by law and arose from the relation rather than the contract, and held that the liability was governed by the law of Arkansas, which excluded as fellow-servants those employees of a railroad placed in any other department or service of the corporation, and that, under that statute, the inspector in the state of Missouri was not a fellow-servant with plaintiff, and judgment for plaintiff was affirmed. Kansas City, Ft. S. & M. R. Co. v. Becker, 67 Ark. 1, 46 L. R. A. 814, 77 Am. St. Rep. 78, 53 S. W. 406 (1899).

B. Improperly loaded car.

While plaintiff, a member of a bridge gang, was riding in a box car upon defendant's road, lumber, which had been negligently loaded upon a car ahead of the one in which he was riding, fell from the car, one end of a piece of timber striking the ground and the other entering the door of the car striking plaintiff, and causing severe injuries for which this action was brought. It was held that there was no error in the refusal of the trial court to allow defendant to prove that, under the laws of New Mexico where the car of lumber was loaded, it would not be liable if the injury sustained was caused by the act of plaintiff's fellow-servant, as the injury occurred in Texas, and, if it was caused by the negligence alleged, the laws of that state, and not of New Mexico, would determine the liability of defendant for the injury. The plaintiff alleged that his jaw was strained; that his teeth were knocked out, together with a large piece of the jaw bone, and that the blow also injured his spine, loins, legs, arms and chest, causing debilitation and pain in all those parts, and there was a judgment for $5,000, which, however, was reversed for an error in instructions. El Paso & N. W. Ry. Co. v. McComas (Tex. Civ. App.), 72 S. W. 629

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as it may deem convenient and reasonable; and litigants who resort to its courts or are compelled to appear therein cannot insist upon the trial of their rights by some other or different rules of procedure which may prevail in the place where the cause of action arose. While the rights and liabilities of parties under a foreign contract are to be determined according to the foreign law, the remedies of the forum must be observed. And this is equally true with reference to actions of tort. Beacham v. Portsmouth Bridge, 68 N. H. 382, 40 Atl. 1066, 73 Am. St. Rep. 607; McDonald v. Railway, 71 N. H. 448, 450, 52 Atl. 982, 59 L. R. A. 448, 93 Am. St. Rep. 550.

Statutes of limitation of actions, which do not abolish rights which have become barred thereby, have been held, with few exceptions, to relate to the procedure, and not to the essential rights of the parties, and to have therefore no extraterritorial effect. The mere fact that no action can be maintained upon a contract or for a tort in the state where the parties have lived since a right of action accrued, which appears to be barred by the local statute of limitations, does not constitute a valid defense to the merits of the controversy in an-

(1903). Upon a second appeal of this case from a judgment for $4,500 in favor of plaintiff, the court adhered to its former opinion upon the question under consideration, and affirmed the judgment for plaintiff. 36 Tex. Civ. App. 170, 81 S. W. 760 (1904).

C. Insufficient instruction as to danger.

A train consisting of four engines and other cars was sent out from a point in Pennsylvania to clear the track of snow, and while proceeding through a cut in New Jersey the four engines rushed into a mass of snow and the first two were thrown off the track, and deceased, an engineer upon the second engine, was pinned by his engine against the embankment, receiving injuries from which he died the next day in Pennsylvania, and this action was brought by his widow for damages for his negligent death. From a denial of a motion to set aside a judgment of nonsuit plaintiff appealed. It appeared to have been conceded that it was necessary to show an act of negligence in Pennsylvania, which was the proximate cause of the injury received in New Jersey, and the act of negligence alleged was that deceased was sent out upon the road without sufficient information concerning the obstruction in his path and the work he was to do, and that the failure of the company to give him such information before he left Pennsylvania was the proximate cause of the injury which resulted in his death, and the court said that, unless a negligent act or omission in Pennsylvania which was directly responsible for the injury received in New Jersey was shown by the evidence, there was no question of jurisdiction to be submitted. The court found that the testimony showed that none knew better than the trainmen the condition of the road, the nature of the work on which they entered, and the dangers incident to it, and that the risks involved in the work of opening the road were intelligently assumed by deceased, and, as there was a failure to show negligence, the judgment was affirmed. Derr v. Le-

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other state, nor can it be set up as a bar to the action. If merely the remedy upon the cause of action has ceased to exist, in consequence of the statute of limitations of the state where the obligations or duties involved arose, an action upon the merits may be maintained in another jurisdiction. The foreign limitation in such a case is designed to regulate or limit the use that may be made of local procedure, and not to apply to or modify the essential duties assumed by the parties, or to regulate or limit their method of procedure in another forum. This is in effect a finding of legislative intention, which has been so often recognized and enforced by common-law courts that it has assumed the form and force of positive law in most jurisdictions.

Nearly 100 years ago Judge Story held, in Le Roy v. Crowninshield, 2 Mason 151, 176, Fed. Cas. No. 8,268, that a plea of the statute of limitations of the state where a contract was made is no bar to a suit brought in a foreign tribunal to enforce the contract. This result was reached, notwithstanding his severe criticism of the doctrine which upon principle he believed was wrong, because:

high Val. R. Co., 158 Pa. 365, 17 Am. Neg. Cas. 249n, 38 Am. St. Rep. 848, 27 Atl. 1002 (1893).

D. Collision.

In Chicago, St. L. & N. O. R. Co. v. Doyle, 60 Miss. 977, 16 Am. Neg. Cas. 367n (1883), an action for damages for the killing of plaintiff's husband, an engineer, in a collision occurring in Tennessee, was brought under the statute of that state in Mississippi. The court held that the right of plaintiff was determinable by the law of Tennessee, in which state the killing occurred, and said that the view that no recovery could be had in Mississippi except for a result traceable to an omission of duty in that state was unfounded, and, while physical force proceeding from one state and inflicting injury in another might give rise to an action in either state, the omission of some duty in one state could not transfer a consequence of it which was manifested physically in another state. The true view, the court said, was that the legal entity called the corporation was omnipresent on its railroad, and the presence or absence of negligence with respect to an occurrence at any point on the line was not to be resolved by the place at which any officer or employee failed to perform his duty, but that the question was as to the duty operating effectually at the place where its alleged failure caused harm to result, and, as the locality of the collision was in Tennessee, it was there, if anywhere, that the company was remiss in duty, for it was there that its proper caution should have been used. The court found that there was no negligence on the part of the railroad company and affirmed the judgment of the trial court upon the first trial in excluding all the evidence for the plaintiff and instructing the jury to find for defendant, and reversed a judgment setting aside the first verdict, and also reversed a judgment for plaintiff upon the second trial.

II. Negligent filling of prescription.

Plaintiff's intestate was sick in Maryland with typhoid fever, and the

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"The error, if any has been committed, is too strongly ingrafted into the law, to be removed without the interposition of some superior authority."

See Story, Confl. Laws, § 576; Townsend v. Jemison, 9 How. 407, 13 L. Ed. 194; 1 Wood, Lims. 36.

Although the parties had lived in the state under whose laws the liability was incurred until the statutory limitation of that state took effect, it has been held in accordance with the general rule that such limitation was of no avail in the courts of another state. Perkins v. Guy, 55 Miss. 153, 30 Am. Rep. 510; Bulger v. Roche, 11 Pick. (Mass.) 36, 22 Am. Dec. 359; Townsend v. Jemison, supra; Thompson v. Reed, 75 Me. 404. And Wharton (2 Confl. Laws, § 537), says:

"This is undoubtedly the rule in the absence of a statute of the forum to the contrary."

See Wood, Lims. 323; Angell, Lims. 62.

In Paine v. Drew, 44 N. H. 306, 320, the general rule was stated as follows:

"We believe that the authorities, both from the civil and the common law,

attending physician gave him a prescription which was taken to defendant's drugstore in the District of Columbia where it was erroneously filled, and the medicine taken by intestate, which, it was alleged, caused his death, and this action was brought for damages. At the conclusion of plaintiff's evidence, defendant moved the courts to direct a verdict in his favor on the grounds that the evidence did not tend to show an injury done and happening within the limits of the District of Columbia, as alleged in the declaration, but in the state of Maryland, and that, under the declaration, the plaintiff's cause of action, if he had one, was not given by the District Code but by the Maryland statute. The court announced that under the pleadings and evidence as the case then stood, it would direct a verdict in favor of defendant, whereupon plaintiff asked for time to apply for leave to amend by referring to the declaration to the statutes of both Maryland and the District of Columbia similar to Lord Campbell's Act. The motion was overruled, and the court gave plaintiff leave to amend by declaring upon the Maryland statute alone, which plaintiff declined to do, and it was stipulated that a juror should be withdrawn with authority to the court to enter judgment in favor of defendant if it should deny plaintiff's motion to amend, such judgment to have the same effect and to preserve to plaintiff the same right as if the court had directed verdict for defendant and entered judgment thereon, and plaintiff, upon the court's refusal to allow the proposed amendment and ruling equivalent to a direction to the jury to return a verdict for defendant, brought this appeal. The court held that, since a tort like the one declared upon included both the act which caused the injury and the damage consequent thereon, the action might be maintained in the District of Columbia where the negligence which caused the death occurred, inasmuch as both jurisdictions had statutes permitting recovery for death, and that, while the action lay to recover damages for death, the gist

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concur in establishing the rule that the nature, validity, construction, and effect of contracts is to be determined by the law of the place where the contract is made or is to be performed (lex loci contractus), but that all the remedies for enforcing such contracts are regulated by the law of the place where such remedies are pursued (lex fori), and that ordinarily the statute of limitations of a state does not in any way attach itself to or affect the contract; it is no part of the lex loci, but affects and limits the remedy merely, and belongs purely to the lex fori; that it does not operate as a discharge of the contract, or as a defense against the contract itself, but is interposed as a bar to the maintenance of an action; it limits the time within which the remedy must be pursued or applied."

It was accordingly held that an action may be maintained in our courts, when not barred by our statute of limitations, upon a contract made in another state, though action thereon was barred by the statute of that state. Doubtless it would be competent for the legislature to provide that when a foreign statute of limitations has become a bar to the maintenance of a suit upon a cause of action which arose in such foreign jurisdiction, it may be pleaded in bar of such suit here. Wharton, Confl. Laws, § 537a. But in the absence of such legislative provision, the remedial procedure of another state or country cannot be enforced by the courts of this state.

of the action for the tort was the wrongful act itself resulting in death, and the place of death ought not to determine the existence or nonexistence of a cause of action. The judgment was reversed and a new trial ordered. Moore v. Pywell, — App. D. C. —, 9 L. R. A. (N. S.) 1078 (1907).

III. Injury by dog allowed loose.

The defendant resided and was engaged in business in Massachusetts, where he kept a dog which strayed into New Hampshire and bit plaintiff. This action was brought to recover damages for the injury sustained. There was a verdict for plaintiff, to which defendant excepted. The court held that to maintain an action in tort founded upon an injury to person or property, and not upon a breach of contract, the act which was the cause of the injury and the foundation of the act must at least have been actionable or punishable by the law of the place in which it was done, if not, also, by the law of the place in which redress is sought, and that an action could not be maintained at common law for an injury done by a dog without proof that the defendant knew that the dog was accustomed to attack and bite mankind, and that no evidence of such knowledge or of the law of New Hampshire was introduced at the trial. The plaintiff relied upon the statute of Massachusetts, which provided that every owner or keeper of a dog should forfeit to any person injured by it double the amount of the damage sustained by him, to be recovered in an action of tort, but the court held that the wrong done to the plaintiff consisted, not in the act of the master in owning or keeping, or neglecting to restrain the dog, but in the act of the dog for which the master was responsible, and that defendant, having done no wrongful act in Massachusetts, and the injury for which plaintiff sought to recover damages having taken place in New Hampshire and not being the subject of action or indictment by the laws of that state, the action could not be

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This principle of construction, however, is not of unlimited application. It is usually confined to causes of action which are recognized at common law, and which are not discharged under the foreign law by the statutory lapse of time. 1 Wood, Lims., § 8; Lamberton v. Grant, 94 Me. 508, 518, 519, 48 Atl. 127, 80 Am. St. Rep. 415; Eingartner v. Steel Co., 103 Wis. 373, 79 N. W. 433, 74 Am. St. Rep. 871; Davis v. Mills, 194 U. S. 451, 454, 24 Sup. Ct. 692, 48 L. Ed. 1067; The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; Rodman v. Railway, 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 704; Negaubauer v. Railway, 92 Minn. 184, 99 N. W. 620, 104 Am. St. Rep. 674, 2 Ann. Cas. 150.

With reference to so much of the bridge as was in Canada, the burden is on the plaintiff to show that it has a valid cause of action under the law of that country against the defendant for the injury alleged. The claim is made that it is entitled to recover under the statute of Canada, as well as at common law. The defendant pleads that the plaintiff's cause of action is barred because it was not brought within the time limited by the Canadian statute. The plain-

maintained. Leforest v. Tolman, 117 Mass. 109, 1 Am. Neg. Cas. 138, 19 Am. Rep. 400 (1875).

IV. Rock thrown by blast.

In Cameron v. Vandegriff, 53 Ark. 381, 13 S. W. 1092 (1890), plaintiff brought action for injuries received when he was struck by a rock thrown by a blast near the place where he was at work, which was fired by defendant without giving such notice as would enable him to escape from danger. The rock which occasioned the injury was put in motion by defendant in Indian Territory, but, by the same force, this motion was continued and the injury done in Arkansas, and it was held that the cause of action arose in Arkansas.

V. Admiralty cases.

A. Fire.

1. Fire commencing on vessel communicated to dock.

Appellants were the owners and occupants of a private wharf and two large packing houses connected therewith, situated immediately on the bank of the Chicago river. A steam vessel owned by appellee and employed by it in transporting merchandise upon the great lakes, anchored for the night beside the wharf and was fastened thereto against the appellants' will and contrary to their express prohibition. During the night, through the carelessness of the officers and crew on board the vessel, it took fire, and the fire was communicated to the wharf and packing houses which were totally consumed, together with considerable personal property stored upon the wharf, and appellants commenced libel proceedings to recover the damages sustained, which proceedings were dismissed by the district court for want of jurisdiction. This action of the trial court was sustained on the ground that the entire damage complained of by libelant, proceeding from the negligence of the master and crew, and for which the owners of the vessels were sought to be charged, occurred

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tiff, admitting that it could not sustain its action in Canada, because of the limitation, insists that the cause of action alleged was not affected by the mere expiration of the time limit within which suit could be sustained in that country, because the limitation related to the remedy and not to the right. The defendant insists that the expiration of the limitation destroyed the right as well as the remedy.

The question thus presented is whether the statutory limitation of Canada in its application to the plaintiff's alleged cause of action is merely remedial and of no effect in this state, or whether it also obliterated the right upon which an action might have been maintained before the limitation expired. In effect this court is asked to construe the Canadian statute; that is, to determine judicially what the statute was intended to mean by the enacting body. It seems to be assumed that it is the duty of the court to decide the question in the same way it would decide a similar question involving the construction of a New Hampshire statute, by considering the legislative language, the apparent purpose, and the pertinent authorities. But the assumption is unsound, in view of the recent decision in Hansen v.

not on the water, but on the land, and, while the origin of the wrong was on the water, the substance and consummation of the injury was on land, and therefore the admiralty courts would not have jurisdiction, as that jurisdiction depended upon locality, the high seas or other navigable waters within admiralty cognizance, and was limited to the sea or navigable waters not extending beyond high-water mark. The court said further that they could give no particular weight or influence to the consideration that the injury originated from the negligence of the servants of the respondent on board of the vessel, except as evidence that it originated on navigable waters and, as the whole damage was done upon land, the cause of action not being complete on navigable waters, such negligence afforded no ground for exercise of the admiralty jurisdiction, as the negligence of itself furnished no cause of action. Hough v. Western Transp. Co., 3 Wall. (U. S.) 20, 18 L. Ed. 125 (1866).

2. Sparks from funnel starting fire ashore.

While a vessel was proceeding into the harbor at Green Bay, sparks flying from its smoke stacks set fire to a planing mill on shore, and the planing mill and a number of other buildings near by were destroyed, and various suits were begun in the state courts against the corporation owning the vessel for damages for the loss sustained. The defendant in such suit filed in the District Court of the United States a petition for a limitation of its liability as owner of the steamer, claiming the benefit of the provision of a federal statute under which the liability of the owner of any vessel for any act, matter or thing lost, damaged, forfeited, occasioned or incurred without the authority or knowledge of the owner, should in no case exceed the amount or value of the interest of such owner in the vessel and her freight, and the company offered to pay into the court the value of the vessel and

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Railway, 102 Atl. 625. The question is one of fact to be found from all the competent evidence submitted, including the testimony of experts, when its solution is difficult and doubtful. Jenne v. Harrisville, 63 N. H. 405. It may involve the drawing of inferences relating to the credibility of witnesses or the reasonableness of their views or the extent of their knowledge upon the subject in issue. Obviously work of that character falls within the exclusive province of the tribunal charged with the duty of ascertaining litigated facts, and is not within the province of the law court. The decision in Hansen v. Railway, supra, renders further discussion of this subject unnecessary.

As there has been no trial of the facts and no ruling or finding has been made upon the effect of the statute, and as it does not conclusively appear from the statute and the authorities which counsel have called to our attention (Canadian Northern Railway v. Pszenienzy, 20 Can. Ry. Cor. 417; Greer v. Railway, 31 Ontario Law, 419; s. c., 51 Can. S. C. 338; Levesque v. Railway, 29 N. B. 588), even if they were deemed to be evidence in the present situation of the case,

the freight, to be returned to it or distributed to the claimants according to the determination of the question of negligence. The court held, however, that it had no jurisdiction in admiralty of the petition for limitation of liability, because, inasmuch as the damage occurred on shore, it would have no jurisdiction of a suit either in rem or in personam by any of the sufferers by the fire to recover damages from the vessel or her owner. Ex parte Phenix Ins. Co., 118 U. S. 610, 30 L. Ed. 274, 7 Sup. Ct. 25 (1886).

B. Drowning after collision at sea.

In Rundell v. La Compagnie Générale Transatlantique, 40 C. C. A. 625, 100 Fed. 655 (1900), an administrator filed a bill to recover damages for the death of his intestate due to the French vessel upon which he was crossing the Atlantic colliding with another vessel through the negligence of the officers and crew of the French vessel, intestate being drowned. The libel was brought upon the theory that, the vessel being French, the liability was governed by the laws of France, which permitted recovery for negligent death. The district court dismissed the libel, and this action was affirmed on the ground that it did not appear from the libel that the death of deceased occurred upon the steamship, the averment being merely that he lost his life by drowning as a result of a collision and consequent sinking of the vessel, and that the plain implication therefrom was that he was drowned upon the high seas apart from the vessel, or at least there was nothing to show the contrary, and, as the locus of a tort must always be determined by the place where the injury and damage arose rather than where the negligent act was committed, the tort in this case must be considered as being upon the high seas rather than upon French territory, and that, in cases arising in tort upon the high seas, the United States District Court, sitting in admiralty, could not enforce the local law of France even if, in terms, it

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what the true construction of the statute in a case like the present would be in the Dominion of Canada, or that the plaintiff's position is correct, it is for the superior court to find the fact from such competent evidence as may be submitted to it at the trial. Ferguson v. Clifford, 37 N. H. 86, 98. If it is found that the limitation relates merely to the remedy and does not obliterate the right, the plaintiff's right of action exists and is maintainable here for the burning of the Canadian part of the bridge. Hill v. Railroad, 77 N. H. 151, 89 Atl. 482, Ann. Cas. 1914 C 714.

It is suggested that, as the plaintiff's right to damages arose by virtue of the foreign statute in question, and was apparently maintainable without proof of negligence on the part of the defendant, the liability is one unknown to the common law of Canada, and that the limitation, according to some of the authorities above cited, extinguished the right. But if the principle thus invoked is sound and there is a distinction in this respect between causes of action at common law and those created by statute, the difficulty is in determining what the common law of Canada is under the facts of

applied to the case, which did not appear, but that such cases must be adjudged and governed by the general maritime admiralty law as understood and administered in the United States courts. As an action would not lie for a wrongful death either by the common law nor by the general maritime law, or by any law of congress, the action could not be sustained in the courts of the United States.

C. Articles precipitated into water by negligence of wharfinger.

A libel was filed against a steamship to recover damages done to steel blooms which were unloaded from a vessel upon a wharf and were precipitated into the water by the breaking down of the wharf. In the progress of the cause a petition was filed by the defendant alleging that the wharf broke down through negligence of the wharfinger, and thereupon the owners of the wharf were brought in as parties defendant, and exceptions were filed by them to the jurisdiction of the court upon the ground that the negligence alleged, viewed as a tort, was, if proved, a tort committed upon land, and therefore not within the jurisdiction of the court. The court held that, while the wharfinger's negligence was wholly upon the land, or in reference to a structure resting upon and built into the ground, the injury to the steel blooms was effected wholly in the water into which they were thrown through the breaking down of the wharf, and therefore the whole substance and consummation of the injury were in the water, as it was the water that did the damage, and that was the place of the damage, and, consequently, the place of the tort for the purposes of jurisdiction. The court said that had the goods been, for instance, crockery or glassware which were broken or otherwise injured through the breaking down of the wharf, but without being thrown into the water, the injury in that case would have been consummated upon the land, and no jurisdiction in admiralty would have attached. The court found that the breaking down of the wharf was due

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this case. If, for instance, the doctrine of Fletcher v. Rylands, L. R. 1 Ex. 265; s. c., L. R. 3 H. L. 330, which has been repudiated in this state (Garland v. Towne, 55 N. H. 55, 20 Am. Rep. 164; Moore v. Maryland Casualty Company, 74 N. H. 305, 64 Atl. 1099; Garland v. Railroad, 76 N. H. 556, 566, 86 Atl. 141, 46 L. R. A. [N. S.] 338, Ann. Cas. 1913 E 924), is deemed to be the law of Canada, it might be held that the statute as applied to the plaintiff's damage was merely a re-enactment of the common law and did not create a new or distinct cause of action. At most an attempt to solve the question in the present state of the case would be little more than speculation as to a controverted fact, in the absence of competent evidence.

The presumption that the common law of a foreign jurisdiction is the same as that of the forum is not conclusive, but may be rebutted by evidence that it is different. Trafton v. Garnsey, 78 N. H. 256, 99 Atl. 290. The parties are entitled to litigate that issue of fact before the superior court.

So far as that portion of the bridge which was situated in this state is concerned the plaintiff may recover the damages it suffered

to the negligence of the owner in failing to properly inspect and repair the same, and also to the negligence of the vessel in selecting an unsafe wharf and not properly distributing the weight of the cargo thereon. A judgment was rendered against both defendants. Post v. City of Lincoln, 25 Fed. 835 (1885).

D. Injury to boat by projection from dock.

Libels were filed to recover for damage to a canal boat moored along a pier, leased by defendant, the damage being done by bolts projecting into the water from the pier, and not visible except during low tide; the injury to the boat being due to want of ordinary care and necessary repair of the pier, and defects which were obvious to inspection and were known or ought to have been known by respondent. Counsel contended against the jurisdiction of the district court in the case, on the grounds that the tort was not a maritime one, since the bolts that did the injury were attached to the pier, and belonged to the land and not to the water. The court sustained the jurisdiction in admiralty, however, on the grounds that the place where the injury was consummated and the damage was actually received was regarded as the locus of the tort, and the bolts which caused the injury were obstructions to navigation, the damage done being inflicted upon a vessel afloat, the locus of the damage and of the tort therefore being upon navigable waters. Leonard v. Decker, 22 Fed. 741 (1884).

E. Injury to passenger alighting during storm.

Plaintiff brought action for injury received in attempting to alight upon a pier from a passenger launch during a storm, when he was caught between the awning of the launch and the pier, it being alleged that the pilot of the boat misdirected and misguided it, so that it collided with and against the pier, and that the pilot then became frightened and negligently jumped to the pier and abandoned the boat, and ordered plaintiff to jump from the boat to the pier. The trial

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by its destruction under the count in the declaration for negligence, by virtue of the law of this state upon that subject. As our statute of limitations has not run against the enforcement of this claim, and as the resulting damage caused by the alleged negligence occurred in this state, a cause of action thereupon arose in favor of the plaintiff which is governed and defined by New Hampshire law. While the defendant's negligent acts occurred in Canada, the resulting injury to the plaintiff's property occurred in this state. If one, while in one jurisdiction, performs a negligent act which is the proximate cause of damage to property in another jurisdiction, the locality of the act is deemed at common law to be the same as that of the damage. Worster v. Winnipiseogee Lake Co., 25 N. H. 525; Thompson v. Crocker, 9 Pick. (Mass.) 59; Barden v. Crocker, 10 Pick. (Mass.) 383; Thayer v. Brooks, 17 Ohio 489, 49 Am. Dec. 474; 1 Bish. Cr. Law, § 110; Whart. Confl. Laws, § 835. Whether a cause of action also arises where the negligent act was in fact performed (Worster v. Winnipiseogee Lake Co., supra), it is unnecessary to consider. If by the negligence of the defendant the bridge was set on fire in Can-

court committed the case to the jury, plaintiff recovered a verdict and judgment for $500, and defendant brought error, contending that if plaintiff had a cause of action against defendant it should have been litigated in the courts of admiralty. It was held, however, that the courts of admiralty did not have jurisdiction, because while the alleged negligence originated on the boat, the tort was consummated upon land. The judgment was affirmed. Gordon v. Drake, 193 Mich. 64, 159 N. W. 340 (1916).

F. Accidents while loading and unloading.

1. Workman on wharf injured by load escaping down incline.

While libelant was assisting in unloading a vessel and was working upon the wharf, a large quantity of sheet iron which was loaded upon a wheeled vehicle was, by the mate of the vessel, ordered to be wheeled down a steep descent along the gangplank from the vessel to the dock, and, it was alleged by libelant, by reason of the carelessness and negligence of the libelee in not providing suitable and safe machinery and appliances for the proper unloading of certain sheet iron, and by reason of the carelessness and negligence of the libelee in not causing the sheet iron to be put in a safe and suitable condition for being handled, such sheet iron fell upon libelant, and caused the injury for which he brought this action *in rem* against the steamboat. Libelee excepted to the jurisdiction of the court, and the exceptions were sustained on the ground that the injury took place upon the land. The court saying that it was immaterial, in so far as the admiralty jurisdiction was concerned, that the tort originated on water, so long as the injury happened on land. The Mary Garrett, 63 Fed. 1009 (1894).

2. Workman on shore struck by swing load of lumber.

While plaintiff was working upon lumber which was being loaded upon a vessel by means of a hoisting apparatus upon and controlled from the

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ada and the conflagration extended to the part of the bridge in New Hampshire and consumed it, such damage was the proximate result of the defendant's negligence for which it may be held responsible in this action. Hooksett v. Railroad, 38 N. H. 242.

The plaintiff's contention that recovery may be had under P. S. c. 159, § 29, cannot be sustained under the facts presented. The statute provides that:

"The proprietors of every railroad shall be liable for all damages to any person or property by fire or steam from any locomotive or other engine upon their road."

Evidently the legislature did not attempt to exercise extraterritorial control over engines operating in a foreign country. The fact that a railroad while negligently operating an engine in another state or country damages property within this state may be liable therefor under the common law as administered here, as above indicated, does not prove that it is also liable here under the statute. If one while in Canada throws a lighted squib or other combustible material across the line and burns the buildings of another, he may

vessel, he was struck by a sling load of lumber, due to the negligence of the mate of the boat in not warning him when the sling load was about to be hoisted. Action was instituted under the Oregon Boat Lien Law in the state courts against the steamship to recover damages for personal injury, and the action was removed to the federal courts because of diversity of citizenship. Defendant demurred to the complaint on the ground that it did not state sufficient facts to constitute a cause of action. It was held that the cause of action was not a maritime tort, of which courts of admiralty had jurisdiction, as the consummation of the tort took place on land and not on navigable waters, and therefore there was no lien on the boat under the maritime law, and the fellow-servant statute as applied to the proceedings in admiralty and the ruling of the court in another case that the Oregon Employers' Liability Law did not control proceedings in admiralty, had no bearing upon the case. It was contended that the Oregon Boat Lien Law had no application to the case made by the complaint, because the injury complained of was not caused by the boat or vessel within the meaning of the law; that the Oregon Employers' Liability Act did not apply to actions brought against a boat to enforce a lien given by the state statute; and that the defendant's vessel was owned in California; and the law of that state governed the relations between the vessels and their owners on the one hand, and the employees of the ship on the other, and that, under such law, the mate, whose negligence was alleged to have caused the injury, was a fellow-servant of the plaintiff, for whose act neither the vessel nor the owner was liable. Upon these questions, it was held that the complaint showed that the injury to plaintiff was due to the careless and negligent use and operation of the ship's appliances by her officers, and therefore was caused by the ship within the law; that while the action was against the boat or vessel by name rather than *in personam* against the owner, nevertheless, after the seizure of the vessel and

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be indictable under P. S. c. 277, § 1, for arson (see Johnson v. State, 92 Ga. 36, 17 S. E. 974; State v. Hall, 114 N. C. 909, 19 S. E. 602, 28 L. R. A. 59, 41 Am. St. Rep. 822; Brown on Juris. § 92), if the legislature intended the statute to have that effect. But if, as in this case, the true construction of the statute limits the effect of the statute in question to railroads when operating locomotives upon roadbeds in this state, it cannot be extended to the defendant, which was operating its engine in Canada when the damage was done. While it might be argued that the language of the statute does not necessarily exclude the idea that it was intended to have that effect, it is clear that such was not the intent embodied in the original statute passed in 1840, which provided that:

"Every railroad corporation or company now established, or which may hereafter be established within the limits of this state, shall be deemed and held liable to pay fully for all damages which shall hereafter accrue to any person or property within the same, by reason of fire or steam from any locomotive or other engine, used, or to be used upon said roads respectively, for purposes of transportation or otherwise." Laws 1840, c. 561.

There can be no doubt that this act was not intended to apply

the return of the warrant, the proceedings were to be had against the vessel in the same manner as if the action had been commenced against the person on whose account the damages accrued, and therefore under the Oregon decision the Employers' Liability Law would apply; and that, while it appeared from the record that the boat was owned in California, the law of Oregon controlled because, where the act of a ship occasioned an actionable personal injury, not maritime, the law was that the rights of the parties were to be determined by the law of the place where the injury occurred, and not that of the home port of the vessel. The demurrer to the complaint was overruled. The Bee, 216 Fed. 709 (1914).

3. **Person on dock struck by rock falling from defective tackle.**

Deceased was standing upon a dock adjoining a plant where rock was being unloaded from a boat which was moored to the dock. The rock was being hoisted by means of a block and fall to which there was attached a bucket which was filled upon the boat and dumped upon the dock, and, while a bucket load of rock was being hoisted from the boat and over the dock, the bucket opened because of a defective latch and released the load, causing the bucket to tip and the rock to fall, striking deceased and bringing about the injuries which resulted in his death, and to recover damages therefor, this libel was brought. Respondent excepted to the libel on the grounds that, deceased having been killed while standing on the dock, the admiralty courts had no jurisdiction over the cause of action based on the tort to recover damages for his death, and the exceptions were sustained on the ground that where a tort was caused by an act which was started on a vessel, and ended in death or injury on the land, the locus of the act was the place where the injury was actually inflicted, and, as in this case it was inflicted upon the land, the admiralty had no jurisdiction. Keator v. Rock Plaster Mfg. Co., 256 Fed. 574 (1919)

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to an engine of a foreign corporation operating in another state. The legislation was directed to corporations "established within the limits of this state" and using engines "upon said roads," that is, upon roads or roadbeds within the limits of the state. A constructive location of an engine at the place of the fire in contradistinction to its actual situs was not included in the language of the statute, and was not intended. In subsequent revisions verbal changes and condensations of the language were made, with no apparent purpose to extend the application of the statute beyond its original meaning as above construed. See R. S. c. 142, § 8; G. S. c. 148, § 8; G. L. c. 162, § 8; P. S. c. 159, § 29.

Nor does the fact the defendant is authorized by the legislature to operate a railroad in this state, and does so operate one, change the result, since at the time of the fire it was not exercising its corporate authority under the laws of New Hampshire, but under the laws of Canada. Its status at that time was that of a foreign corporation which was not subject to the provisions of our railroad fire statute.

Case discharged. All concurred.

4. Workman injured while assisting in carrying barrel ashore.

Libelant was ordered by the mate of a vessel to assist in carying a large barrel of oil to shore and, as he stepped off the end of the stage, he fell into a deep hole and the barrel struck him, causing severe injuries for which an action *in rem* was brought. The court held that, as the injury occurred on land, there was no jurisdiction in admiralty, though the origin of the wrong was on the water. Price v. The Belle of the Coast, 66 Fed. 62 (1894).

5. Workman in hold injured by lumber slid down chute.

A libel *in personam* was instituted against defendant to recover damages for personal injury to libelant, who was employed by defendant upon a vessel while it was being loaded with lumber, and was injured while in the hold of the vessel by a piece of lumber which was slid down a chute from the wharf without giving the customary warning. Exceptions were filed to the libel on the ground that the court had no jurisdiction because the tort alleged originated on the land. The exception to the jurisdiction of the admiralty courts was overruled because, while the tort originated upon the land, the substance and consummation of it was upon the water. Hermann v. Port Blakely Mill Co., 69 Fed. 646 (1895).

6. Goods injured by breaking of dock due to negligent unloading.

For injury to cargo from breaking of wharf, due to improper unloading, see Post v. City of Lincoln, V, C, *ante*.

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ADMIRALTY.

Annotation: Application of common-law and state statutes to actions for personal injury to or death of seaman 19:309-336

1. Action for injuries to seaman—At common law.

A seaman, injured at sea, cannot maintain a common-law action for full indemnity for the injuries sustained. Chelentis v. Luckenbach Steamship Co., Inc., 247 U. S. 372, 62 L. Ed. 1171, 38 Sup. Ct. 372, aff'g 156 C. C. A. 234, 243 Fed. 536.....19:309-336

2. — Jurisdiction.

Where the employment of a seaman was a maritime contract, the work about which he was engaged when injured was maritime in its nature, and the injuries received were also maritime, the rights and liabilities of such seaman and the shipowner were matters clearly within admiralty jurisdiction. Chelentis v. Luckenbach Steamship Co., Inc., 247 U. S. 372, 62 L. Ed. 1171, 38 Sup. Ct. 372, aff'g 156 C. C. A. 234, 243 Fed. 536..... ..... 19:309-336

3. — Effect of Judiciary Act.

Under the saving clause of section 9, Judiciary Act of 1789, 1 Stat. 76, 77, whereby District Courts of the United States were given exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it" (Judicial Code, secs. 24, 256), a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law, but there is nothing therein which reveals an intention to give an injured seaman, whose rights are those recognized by the law of the sea, an election to determine whether the shipowner's liability for his injury shall be measured by common-law standards rather than by those of the maritime law. Chelentis v. Luckenbach Steamship Co, Inc., 247 U. S. 372, 62 L. Ed. 1171, 38 Sup. Ct. 372, aff'g 156 C. C. A. 234, 243 Fed. 536.....19:309-336

4. — Effect of Seamen's Act.

Section 20 of the Act to Promote the Welfare of American Seamen, approved March 4, 1915, ch. 153, 38 Stat. 1164, 1185, which provides "that in any suit to recover damages for any injury sustained on board vessel or in its service, seamen having command shall not be held to be fellow-servants with those under their authority," does not disclose any intention to impose upon shipowners the same measure of liability for injuries suffered

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by the crew while at sea as the common law prescribes for employers in respect of their employees on shore. Chelentis v. Luckenbach Steamship Co., Inc., 247 U. S. 372, 62 L. Ed. 1171, 38 Sup. Ct. 372, aff'g 156 C. C. A. 234, 243 Fed. 536.....19:309-336

5. — **Measure of recovery.**

Under maritime law, an injured seaman can properly demand only wages, maintenance and cure. Chelentis v. Luckenbach Steamship Co., Inc., 247 U. S. 372, 62 L. Ed. 1171, 38 Sup. Ct. 372, aff'g 156 C. C. A. 234, 243 Fed. 536 .....19:309-336

6. — **Power of state to grant full indemnity.**

No state has power to abolish the well-recognized maritime rule concerning a seaman's measure of recovery for injuries and substitute therefor the full indemnity rule of the common law; such a substitution would distinctly and definitely change or add to the settled maritime law and would be destructive of the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states. Chelentis v. Luckenbach Steamship Co., Inc., 247 U. S. 372, 62 L. Ed. 1171, 38 Sup. Ct. 372, aff'g 156 C. C. A. 234, 243 Fed. 536.. ..... 19:309-336

AGRICULTURE.

Annotation: What are "agricultural" and "domestic" pursuits within exemption provisions of compensation acts.....19:372

1. **Escaped wild animal attacking plaintiff's children — Fright occasioning bodily illness—Instructions.**

In an action against the owner of a chimpanzee for negligence in permitting the escape of the animal, which entered plaintiff's dwelling and attacked plaintiff's children, with the result that plaintiff, who fought the animal and rescued her children, was greatly frightened and shocked and made sick in body and mind, it was not error for the court to refuse to instruct the jury, as requested by defendant, that no recovery could be had unless her fright was accompanied by some personal and bodily injury, and that the injury must be a physiological one, since plaintiff pleaded physical detriment, and the rule which defendant invoked by the refused instructions is applicable only in a case in which fright alone is made the gravamen of the action. Lindley v. Knowlton, 179 Cal. 298, 176 Pac. 440.....19:95-111

2. — — —.

In an action against the owner of a chimpanzee for negligence in permitting the escape of the animal, which entered plaintiff's dwelling and attacked plaintiff's children with the result that plaintiff, who fought the animal and rescued her children, was greatly frightened and shocked and made sick in body and mind, it was not error for the court to refuse to instruct the jury, as requested by defendant, that no recovery could be had on account of fright produced by apprehended danger or peril to a third person, where, although plaintiff was greatly and perhaps chiefly concerned for her children, there was nothing in the testimony to indicate that she was not concerned for her own safety, and all of the circumstances connected with the unexpected appearance of the animal, its attacks upon her children, and her own conflict with it, make it impossible that she should have been devoid of fear for herself. Lindley v. Knowlton, 179 Cal. 298, 176 Pac. 440 .....19:95-111

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APPEAL AND ERROR.

1. Assignment of error—When sufficiently specific.

A general assignment of error that "the court erred in directing a verdict in favor of the defendants" is equivalent to saying there were facts in the case upon which the jury might find for plaintiff and is sufficiently specific when no testimony was offered by defendants. Marx v. Schultz, 207 Mich. 655, 175 N. W. 182 ..... 19:976-991

2. Review — Preservation of grounds below—Failure to urge question.

Inconsistency in pleading both fraud and mutual mistake in avoidance of a release for personal injuries cannot be urged for the first time on appeal. Malloy v. Chicago Great Western R. Co., — Iowa —, 170 N. W. 481 .....19:753-821

3. — — Necessity of objection in trial court.

Where no specific objection was made to an unimportant variance between the allegata and probata at the time the testimony was taken, an objection thereto cannot be made on appeal. Heiser v. Reynolds, — Pa. —, 106 Atl. 888.....19:362-371

4. — — Waiver of error in overruling motion for directed verdict by introducing evidence.

The introduction of evidence by the defendant operates as a waiver of any error in the action of the trial court in overruling defendant's motion, made at the close of plaintiff's testimony, for a directed verdict in its favor. Pittsburgh, C., C. & St. L. Ry. Co. v. Cole, — C. C. A. —, 260 Fed. 357 .....19:559-585

5. — Errors considered—Order granting new trial.

When a motion for a new trial is granted on the ground of error of law it may be sustained by showing other errors, properly raised, aside from the one on which it was granted. Gutmann v. Anderson, — Minn. —, 171 N. W. 303.....19:968-975

6. — — —.

When a motion for a new trial is granted upon the ground of error of law it cannot be sustained upon the ground of insufficiency of evidence or excessive damages. Orders for new trials upon such grounds are not appealable. When the motion is made upon the grounds of errors of law, insufficiency of evidence, and excessive damages, and granted solely on the first, without a consideration of the others, and the order is reversed, the second and third are for consideration by the trial court upon the going down of the remittitur. Gutmann v. Anderson, — Minn. —, 171 N. W. 303.....19:968-975

7. — Conclusiveness of finding by jury—Weight of evidence.

It is the duty of the supreme court, on appeal, under Comp. Laws 1915, § 12587, to review a finding which it is asserted is against the clear weight of evidence. American Ins. Co. of Newark v. Martinek, 203 Mich. 108, 168 N. W. 982.....19:953-960

8. — —.

In an action against a school district for personal injuries sustained by a child while playing on a teeter board on a public school playground, held that, although the weight of the testimony was to the effect that the child was not injured at the time or place claimed, such question was not one for the supreme court to decide, the jury having decided otherwise and the lower court having denied a new trial. Bruenn v. North Yakima School Dist. No. 7, Yakima County, 101 Wash. 374, 172 Pac. 569..... ..... 19:857-871

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9. — — Federal Supreme Court — Weight of evidence.

It is not the province of the Federal Supreme Court on writ of error to weigh conflicting evidence; to ascertain whether the record shows testimony supporting the verdict is as far as such court enters upon a consideration of such question. Great Northern Ry. Co. v. Donaldson, Adm'x of Thoms, 246 U. S. 121, 62 L. Ed. 616, 38 Sup. Ct. 230, aff'g 89 Wash. 161, 154 Pac. 133.....19:391-406

10. — — Speed of train.

A finding of a jury as to the speed of a train at the time of a collision, based upon conflicting evidence, will not be disturbed on appeal. Ellis v. Chicago & N. W. Ry. Co., 167 Wis. 392, 167 N. W. 1048.....19:142-257

11. — Presumption—Preliminary finding as to qualification of witness as expert.

Where the record on appeal shows that there was only a general objection to the testimony of a witness, assuming that the testimony was opinion evidence, and the record showing that the witness was fully qualified as an expert, the presumption is either that there was a preliminary finding by the court that the witness was an expert or that such a finding had been waived. Jones v. Norfolk Southern R. Co., 176 N. C. 260, 97 S. E. 48... ..... 19:258-278

12. — Determination of case on record notwithstanding view by jury.

Whether a jury is ordered by the court to inspect or examine premises as an aid in ascertaining the truth of any matter in dispute between the parties to an action, under Evidence Act (2 Comp. St. 1910, p. 2229), § 30, or to view any place to enable the jury better to understand the evidence given in the cause under Jury Act (3 Comp. St. 1910, p. 2976), §§ 31-35, the judgment rendered by the jury should nevertheless be reversed, if legally unsupportable in and by the record under review, as the questions presented to an appellate court should be decided upon what appears in the record brought up from the court below, notwithstanding a view was had by the jury which tried the cause. Garland v. Furst Store, — N. J. L. —, 107 Atl. 38 .....19:586-618

13. — Exclusion of evidence on question not submitted to jury.

In an action against a school district for personal injuries sustained by a child while playing on a teeter board on a public school playground, held that the exclusion of testimony that a teeter board constructed as was the one involved was not in itself a dangerous instrumentality, was not error when the court eliminated from the consideration of the jury the question of the original construction of the teeter board and submitted to it only the question of failure or inadequacy of supervision. Bruenn v. North Yakima School Dist. No. 7, Yakima County, 101 Wash. 374, 172 Pac. 569 .....19:857-871

14. — Right to allege error—Evidence —Withdrawal of objections after witness discharged.

Defendant, in a personal injury action, cannot complain of its being deprived of the benefit of certain testimony by plaintiff's withdrawal of her objections to such testimony only after the witness had been discharged and was not readily available when it made no request for a postponement nor for an opportunity to get the witness back. Lang v. Marshalltown Light, Power & Railway Co., — Iowa —, 170 N. W. 463.....19:69-94

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15. Harmless error—Cross-examination of witness.

Refusal of the trial court, in an action for personal injuries to a married woman, to permit the defendant to ask plaintiff's husband, on cross-examination, whether he had an action against the defendant, pending in the same court and based on the same alleged accident, for injuries to his wife, held, under the record, not reversible error. Lang v. Marshalltown Light, Power & Railway Co., — Iowa —, 170 N. W. 463.....19:69-94

16. — Admission of evidence of danger of operation.

In an action for personal injury, wherein the permanency of the injury was not disputed, held that the fact that plaintiff was permitted to introduce evidence of the danger of a certain operation, which operation, as claimed by defendant, was not contemplated, did not, under the circumstances of the case, constitute reversible error. Feldman v. Chicago Rys. Co., 289 Ill. 25, 124 N. E. 334, rev'g 212 Ill. App. 482.....19:279-297

17. — Instructions.

Though it is technically erroneous to give an instruction embodying applicable law in abstract form, it is not reversible error nor ground for a new trial. Bond v. Baltimore & Ohio R. Co., — W. Va. —, 96 S. E. 932.... ..... 19:674-699

18. Reversal of judgment of appellate court—Necessity of remand for new trial.

On reversal of the judgment of the appellate court which reversed the trial court's judgment for plaintiff in a personal injury action, held that, under the views of the case taken by the supreme court, the contention of the defendants that the cause should be remanded for a new trial under the Practice Act could not be sustained since the judgment of the trial court was required to be affirmed. Feldman v. Chicago Rys. Co., 289 Ill. 25, 124 N. E. 334, rev'g 215 Ill. App. 482 .....19:279-297

ASSIGNMENTS.

Validity—Choses in action.

Where separate actions are brought by the parties injured in a collision between a street car and a railroad train at a crossing against the street railroad company and the railroad company, and one of the actions is tried and a verdict rendered against the street railroad company, but afterwards discontinued, a nonsuit having been rendered as to the railroad company, and no evidence was offered regarding the negligence of the latter, and later a stockholder of the street railroad company purchased the claims of the plaintiffs and took an assignment thereof, borrowed the money from the street railroad company and gave his note therefor, and paid the injured parties the amount agreed upon as consideration of the purchase, the mere fact that the stockholder was interested in the street railroad company and took the assignments because of such interest and with a view of aiding his company did not render the assignments to him void or ineffectual, if in fact he purchased the claims and took the assignments for himself and at his own risk, even though he might have believed that such purchase would eventually operate for the benefit of the street railroad company. Ellis v. Chicago & N. W. Ry. Co., 167 Wis. 392, 167 N. W. 1048.....19:142-257

ASSUMPTION OF RISK.

Annotation: Assumption of risk of injury through violation of safety statutes, under Federal Employers' Liability Act 19:391-406

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Annotation: Assumption of risk of negligence of other employees, under Federal Employers' Liability Act.... ..... 19:461-514

Annotation: Assumption of risk of injury through defective or inadequate tools, appliances or equipment, under Federal Employers' Liability Act.... ..... 19:559-585

Annotation: Assumption of risk of injury through defects of track, roadbed or right of way generally, under Federal Employers' Liability Act.... ..... 19:641-673

Annotation: Assumption of risk under the Federal Employers' Liability Act as to unsafe place or dangerous method of work.....19:723-752

BAILMENT.

Annotation: Liability of person holding himself out as competent craftsman for loss or damage due to negligent or unskilful performance of work in his trade undertaken for reward 19:879-889

Negligence—Machinist repairing engine—Liability.

One holding himself out as a machinist and accepting employment to repair a steam engine is presumed to know the nature and the character of the work he is about to do and the results likely to follow a negligent performance of his work, and is therefore liable for the damage proximately resulting from a negligent and unskilful performance of his work. Arkansas Machine & Boiler Works v. Moorhead, — Ark. —, 205 S. W. 980 ..... 19:879-889

BANKS.

Annotation: Liability of bank, investment company or broker for loss through investment negligently advised or made for customer or client 19:362-371

BROKERS.

Annotation: Liability of bank, investment company or broker for loss through investment negligently advised or made for customer or client 19:362-371

1. Action for loss of customer's money—Pleading and proof—Variance.

In an action against an investment broker, held that the statement of claim, averring a contract to loan for plaintiff only upon first liens, an actual loan on a third incumbrance, and loss by reason thereof, averred negligence growing out of a breach of contract, and, therefore, that the claim that the allegata and probata did not agree in that the statement of claim was in deceit and the evidence at most showed negligence—upon which latter ground the case was submitted to the jury—could not be sustained. Heiser v. Reynolds, — Pa. —, 106 Atl. 888.....19:362-371

2. — — —.

In an action against a broker for his negligent loss of money intrusted to him for investment, held that where the plaintiff averred and the jury found that no loan was to be made whether to a named or an unnamed person unless secured as a first lien on real estate, any variance between the allegata and probata, in that the statement of claim was so drawn as to lead to the conclusion that plaintiff did not know, at the time he agreed to advance the money, to whom it was to be loaned, and the evidence showed the borrower's name was stated at such time, was unimportant. Heiser v. Reynolds, — Pa. —, 106 Atl. 888.....19:362-371

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BUILDING AND LOAN ASSOCIATION.

Annotation: Liability of officers and directors of building and loan association for loss due to negligence.. ..... 19:539-545

1. Directors—Negligence—Loss on investment in mortgages—Liability.

A building and loan association loaned money on a mortgage of a city lot; its solicitor certified that the mortgage was a first and valid lien; in fact, there was a prior mortgage held by an estate of which the defendant, one of the directors of the association, was an executor; the property was described by reference to the street lines as the only monument and by a number on a land company map; the name of the mortgagor in the mortgage held by the estate was different from the name of the mortgagor in the association's mortgage; the defendant had nothing to do with making the loan; he had no actual knowledge that the property covered by the two mortgages was identical; he held as executor many mortgages, and in the course of his business examined many properties; he knew his mortgages by street numbers, and not by numbers on a land company map; the association's mortgage was accompanied by a regular abstract of title in which defendant's mortgage was not mentioned and attached to which was a certificate by the association's solicitor, then a lawyer in good standing, that the association's mortgage was a first and valid lien. Held, that the defendant could not be found guilty of negligence for failing to apprise the association of the existence of the prior mortgage, that the directors had the right to pursue the usual business custom and trust the solicitor to close the loan and record the mortgage, and that, as the loss did not come until the solicitor turned aside the money from its proper destination—the satisfaction of the first mortgage—the association had already suffered the loss without the defendant having had any opportunity to prevent it, and he cannot be held for negligence. Four Corners Building & Loan Ass'n v. Schwarzwaelder, 88 N. J. Eq. 545, 103 Atl. 240, rev'g 88 N. J. Eq. 212, 101 Atl. 564 .....19:539-545

2. — — — Proximate cause.

A building and loan association loaned money on a mortgage of a city lot; its solicitor certified that the mortgage was a first and valid lien; in fact there was a prior mortgage held by an estate of which the defendant, one of the directors of the association, was an executor. The defendant had examined and valued the property for the purpose of a loan on the application of one Wagner and had reported to the association; the estate's mortgage was given by Daly; the title was at the time of Wagner's application in Crocker, the solicitor of the association; the minutes of a subsequent meeting of the directors at which defendant was not present recite that Wagner had sold the property (which was untrue); that all the committee, including the defendant, reported in favor of a loan to Sims (which was untrue as far as defendant is concerned). The defendant never actually had to do with the loan to Sims; his knowledge is claimed to have come from hearing the minutes with these false recitals read over at a later meeting; this fact was not sufficiently proved, but if the defendant knew all the facts, he knew the loan was large enough to enable Sims to satisfy the prior mortgage to the estate, and up to the time the check of the association for the loan was cashed might anticipate that the estate's mortgage would be paid before the solicitor closed the

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loan with Sims; the defendant had no reason to anticipate that the solicitor would forge a discharge of the estate mortgage; when the check had been cashed and the money turned aside from the satisfaction of the prior mortgage, the loss was already incurred. Held, the proximate cause of the loss was the rascality of the complainant's own solicitor, and the defendant cannot be held for negligence. Four Corners Building & Loan Ass'n v. Schwarzwaelder, 88 N. J. Eq. 545, 103 Atl. 240, rev'g 88 N. J. Eq. 212, 101 Atl. 564 .....19:539-545

CARRIERS.

Annotation: Duty of street railway company to passenger during period of transfer from car to car.19:279-297

Annotation: Liability of transfer company for loss of or damage to goods intrusted to it, to move..... ..... 19:337-361

Annotation: Liability of carrier for personal injury to or death of passenger on line of connecting carrier.. ..... 19:407-427

Annotation: Application of rule res ipsa loquitur in action for injury to passenger by derailment...19:822-856

1. Goods — Theft by employees — Liability.

When the employees of a transfer company, employed to move household goods, stole jewelry from a safe in a cabinet which was among the articles moved, the company violated the common-law obligation of a carrier to safely carry and deliver the goods. Heuman v. M. H. Powers Co., — N. Y. —, 123 N. E. 373, rev'g 175 N. Y. App. Div. 627, 162 N. Y. Supp. 590.. ..... 19:337-361

2. — — — Nondisclosure of valuables.

The failure of the owner of household goods, employing a transfer company to move such goods, to disclose the fact that there was, in a cabinet which was among the articles to be moved, a safe containing valuable articles, did not relieve the company from liability for the theft of jewelry from such safe by its employees. Heuman v. M. H. Powers Co., — N. Y. —, 123 N. E. 373, rev'g 175 N. Y. App. Div. 627, 162 N. Y. Supp. 590.. ..... 19:337-361

3. — Limitation of liability—Special contract—Theft by employees.

The clause in the contract between the owner of household goods and the transfer company, employed to move the goods, providing that the responsibility of the company was limited to a specified sum for any article, together with the contents thereof, referred to the company's responsibility as a carrier, and did not include the misfeasance or nonfeasance of the company or its employees, and hence did not limit the company's liability for jewelry stolen by its employees from a safe in a cabinet which was among the articles moved. Heuman v. M. H. Powers Co., — N. Y. —, 123 N. E. 373, rev'g 175 N. Y. App. Div. 627, 162 N. Y. Supp. 590...19:337-361

4. Passengers—Existence of relation of carrier and passenger—Street car passenger changing cars.

Where a street car passenger, in pursuance of a continuous journey, transfers from one car to another, the relation of carrier and passenger continues throughout the necessary acts of such transfer, and, although during the transfer the carrier can exercise no control over the passenger's movements so as to render it liable for injury received by the passenger from some source other than the carrier, such fact does not change the relation of carrier and passenger in the case of such transfer nor lessen the degree of care which the carrier is bound to

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use to avoid injury to such passenger through the negligence of its own servants or agencies while such passenger is engaged in the necessary acts of such transfer. Feldman v. Chicago Rys. Co., 289 Ill. 25, 124 N. E. 334, rev'g 212 Ill. App. 482....19:279-297

5. — — —.

The ticket of transfer given a street car passenger who must change cars in order to reach his destination is not that which establishes the relation of carrier and passenger during the time of the act of changing from one car to another, but is merely the evidence of the fact that the passenger is engaged in a continuous journey, whether he is so engaged being the determinative factor on the question of the existence of such relation during the time of transfer. Feldman v. Chicago Rys. Co., 289 Ill. 25, 124 N. E. 334, rev'g 212 Ill. App. 482..... ..... 19:279-297

6. — Termination of relation of carrier and passenger — Passenger alighting at end of journey.

Where a passenger alights into a public street from a street car at the end of his journey, he ceases to be a passenger. Feldman v. Chicago Rys. Co., 289 Ill. 25, 24 N. E. 334, rev'g 212 Ill. App. 482.....19:279-297

7. — Contract for transportation—Evidence.

Where a special contract for a lake steamship trip is made by a navigation company pursuant to which the latter agrees to furnish transportation for the round trip, including side trips, but a final coupon ticket is given in exchange, one of the coupons of which provides for a land trip by automobile furnished by a livery company, and contains a stipulation that the navigation company assumes no responsibility beyond its own line, but acts merely as agent, the coupon ticket is not the sole evidence of the contract, and it may be shown that the real contract was for transportation by the navigation company for the entire trip. Thurston v. Northern Navigation Co., 205 Mich. 278, 171 N. W. 423.....19:407-427

8. — Extraterminal liability of carrier—Presumption—Special contract.

The presumption against extraterminal liability of a carrier of passengers where the initial carrier sells a passenger a ticket entitling him to ride over the lines of the initial and connecting carrier, but without any stipulations as to liability for accidents, is not applicable where a claim is made upon a special contract for the entire trip. Thurston v. Northern Navigation Co., 205 Mich. 278, 171 N. W. 423.....19:407-427

9. — — Sufficiency of evidence to show special contract.

In an action against a navigation company operating lake passenger steamships to recover for personal injuries sustained while riding in an automobile owned by a livery company on a side-trip furnished as part of the cruise, evidence held to establish a special contract by which the navigation company assumed responsibility for the entire trip, so as to render it liable for negligence of the livery company. Thurston v. Northern Navigation Co., 205 Mich. 278, 171 N. W. 423 .....19:407-427

10. — Limitation of liability—Requisite of special contract.

The rule is that where a common carrier desires by special contract to exonerate itself from the effect of its own acts or omissions, or those of its employees, the special contract must openly and plainly express that intention so that it cannot, in the slightest degree, be misunderstood. Heuman v. M. H. Powers Co., — N. Y. —, 123

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N. E. 373, rev'g 175 N. Y. App. Div. 627, 162 N. Y. Supp. 590...19:337-361

11. — Limitation of liability to carrier's own line—Validity.

A carrier in selling a ticket beyond its own line may appropriately limit its liability to its own line, there being no obligation on its part to assume extraterminal liability. Thurston v. Northern Navigation Co., 205 Mich. 278, 171 N. W. 423.....19:407-427

12. — — Binding effect on passenger of conditions on ticket.

In case of a full fare ticket a passenger is not bound by conditions thereon, limiting the common-law or contractual liability of the carrier, unless such conditions are called to the attention of the passenger, and are assented to by him. Thurston v. Northern Navigation Co., 205 Mich. 278, 171 N. W. 423.....19:407-427

13. — Degree of care and diligence required.

The law holds common carriers of passengers to the highest degree of care and diligence which is known to careful, diligent and skilful persons engaged in such business. Central of Georgia R. Co. v. Robertson, — Ala. —, 83 So. 102.....19:822-856

14. — —.

The law exacts of those using steam power for carriage extraordinary diligence—that which very careful men take in their own affairs. Central of Georgia R. Co. v. Robertson, — Ala. —, 83 So. 102.....19:822-856

15. — — Diligence required in general prosecution of business.

But for special legislation, railroad companies would be bound only to such diligence in the general prosecution of their business as would be dictated by sound reason applied to the successful use of their necessary privileges. Central of Georgia R. Co. v. Robertson, — Ala. —, 83 So. 102.. ..... 19:822-856

16. — — Skill and care required—Construction, etc., of agencies.

The law enjoins upon a carrier the utmost skill and care as to original construction, selection, maintenance and operation of its agencies. Central of Georgia R. Co. v. Robertson, — Ala. —, 83 So. 102.....19:822-856

17. — — Street railway company—Care required as to passenger.

A street car company must use the highest degree of care to avoid injuring a passenger. Feldman v. Chicago Rys. Co., 289 Ill. 25, 124 N. E. 334, rev'g 212 Ill. App. 482..19:279-297

18. — — Duty to use safety devices.

The law enjoins upon carriers the duty to use such means of safety as science has made known and demonstrated to be useful, protective, and necessary to safety; they are required to keep pace with the science and art of their business; they are not required to adopt every new device unless it contributes to safety, but they must adopt those improved modes known to conduce safety; they must adopt those which are up to the standard of those in general use and which are necessary for the safety of their passengers. Central of Georgia R. Co. v. Robertson, — Ala. —, 83 So. 102 .....19:822-856

19. — — — Failure to use—Burden of proof.

Impossibilities are not exacted of railroads, but the onus rests on them to show the fruitlessness of employing appliances which were not employed but which ordinarily prevent injury actually suffered. Central of Georgia R. Co. v. Robertson, — Ala. —, 83 So. 102 .....19:822-856

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20. — — **Duty to employ careful and prudent servants—Duty of servants.**

The law requires of railroad companies that they employ very careful and prudent servants, and requires of such servants that they exercise such degree of diligence as very careful and prudent persons take of their own affairs, but infallibility is not expected. Central of Georgia R. Co. v. Robertson, — Ala. —, 83 So. 102.. ..... 19:822-856

21. — — **Suitable and safe equipment and appliances—Latent defects.**

Carriers are under the highest duty to provide and maintain suitable and safe equipments and appliances; their safety should be established by the very best and surest tests recognized by experts in the business, and nothing can exempt a carrier from liability as for defects therein except that such defects are latent ones which no reasonable degree of skill and diligence would discover or prevent. Central of Georgia R. Co. v. Robertson, — Ala. —, 83 So. 102..... ..... 19:822-856

22. — — **Roadbed, machinery, etc.**

A carrier is not an absolute insurer of the safety of its passengers, but it is bound to use the utmost care, as far as human skill and foresight can go to secure their safety and to prevent possible accidents which may arise from the condition of its roadbed, machinery of all kinds, and all other acts of negligence on the part of it itself, its agents or servants, and this duty extends to safe and properly constructed bridges, trestles, culverts, ties, rails, and the proper and safe spiking of the latter to the crossties. Central of Georgia R. Co. v. Robertson, — Ala. —, 83 So. 102..19:822-856

23. — — **Rails, cars and engines.**

The law does not contemplate that railroad companies will in general make their own rails, cars, or engines; all that they can reasonably be expected to do is to purchase such cars and other necessaries as they have reason to believe will be safe and proper, giving them such inspection as is usual and practicable as they buy them; when they make such an examination and discover no defects, they do all that is practicable, and it is no neglect to omit attempting what is impracticable; they have a right to assume that a dealer of good repute has also used such care as was incumbent on him, and that the articles purchased of him which seem right are right in fact. Central of Georgia R. Co. v. Robertson, — Ala. —, 83 So. 102 ..... 19:822-856

24. — — **Speed permitted in Alabama.**

It is still the right of railroads in Alabama to run trains at any speed that is safe for their passengers and freight except under the circumstances when statutory precautions are exacted. Central of Georgia R. Co. v. Robertson, — Ala. —, 83 So. 102.... ..... 19:822-856

25. — **Injuries to passenger—In transferring from one car to another—Res ipsa loquitur.**

In an action by a street car passenger for personal injuries sustained when, while in the act of transferring from one car to another in the course of a continuous journey, he was struck by the car, from which he had alighted, as a result of such car's splitting a switch, held that the doctrine of res ipsa loquitur applied, and that, there being no evidence to overcome the prima facie case thus made out, the jury were justified in returning a verdict for plaintiff. Feldman v. Chicago Rys. Co., 289 Ill. 25, 124 N. E. 334, rev'g 212 Ill. App. 482.19:279-297

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26. — — Derailment and overturning of coach—Presumption of negligence.

When, during the relation of carrier and passenger, the passenger is injured by the car in which he is being carried being derailed, wrecked, etc., or occurrence which would not happen without some negligence on the part of the carrier, this raises the presumption, prima facie only, however, that the injury was proximately caused by the negligence of the carrier, which presumption will authorize a recovery of damages against the carrier for the injuries suffered by the passenger unless the carrier can rebut this prima facie presumption by reasonably satisfying the jury that the derailment or other occurrence causing the injury could not have been prevented by the exercise of the highest degree of care on the part of the carrier, his agents or servants. Central of Georgia R. Co. v. Robertson, — Ala. —, 83 So. 102 .....19:822-856

27. — — — — Sufficiency of evidence to rebut.

In an action by a passenger against a carrier for personal injuries sustained by the former when the coach in which he was riding was derailed and overturned, the derailment being due to a 'transverse fissure'' in a rail, held that the evidence rebutted all presumptions of negligence, on the part of the defendant, proximately causing the injuries, and that the general affirmative charges requested by the defendant should have been given. Central of Georgia R. Co. v. Robertson, — Ala. —, 83 So. 102..19:822-856

28. — — — Allegations of negligence —Res ipsa loquitur.

If, in an action by a passenger against a carrier for personal injuries sustained by the former when the coach in which he was riding was derailed and overturned, the negligence be sufficiently charged in general terms only, it will include cases within the doctrine of res ipsa loquitur, but if the plaintiff charges negligence in general terms and then specifies particular acts, it may be doubtful whether he is limited to proof and the right to recover to the particular acts so specified. Central of Georgia R. Co. v. Robertson, — Ala. —, 83 So. 102 .....19:822-856

29. — — — —.

When a passenger, suing a carrier for personal injuries sustained by the former when the coach in which he was riding was derailed and overturned, alleges in one count that his ''wounds, injuries and damages were the proximate consequence, and caused by reason of the negligence of the defendants, their servants or agents as aforesaid,'' and in other counts ''that the defendants' servants or agents, while acting within the line and scope of their employment, so negligently conducted themselves in and about the business of carrying the plaintiff as such passenger as aforesaid that the plaintiff received the wounds, injuries, and damage set out,'' held that either allegation was sufficient to avail of the prima facie presumption of negligence or to be within the doctrine of res ipsa loquitur. Central of Georgia R. Co. v. Robertson, — Ala. —, 83 So. 102.... ..... 19:822-856

30. — — — Liability as question for court or jury.

If, in an action by a passenger against a carrier for personal injuries sustained by the former when the coach in which he was riding was derailed and overturned, the defendant shows that the accident was an inevitable one or such as the highest degree of care and foresight could not have prevented or provided

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against, it is not liable as a matter of law, but, if not so shown without dispute, it is a question for the jury and it is proper for the trial court to decline to take the question from the jury. Central of Georgia R. Co. v. Robertson, — Ala. —, 83 So. 102.... ..... 19:822-856

31. — — Lack of knowledge of defects as defense.

Mere lack of knowledge of defects will not excuse a carrier for personal injuries sustained by a passenger unless it has exercised the proper degree of care and diligence to discover and prevent the defects. Central of Georgia R. Co. v. Robertson, — Ala. —, 83 So. 102.....19:822-856

32. — — Unavoidable accidents—Liability.

The law has never attempted to hold carriers of passengers liable for anything which they could not avoid by their own diligence. Central of Georgia R. Co. v. Robertson, — Ala. —, 83 So. 102 .....19:822-856

33. — Crossing track to board train—Negligence—Last clear chance.

The fact that an intending passenger who, in crossing from the railroad station to the boarding platform, would have been run down by the train which she intended to board and which was coming in at a low rate of speed had it not been for her rescue by a third person, was guilty of negligence, did not absolve the railroad company from liability for its subsequent negligence. Bond v. Baltimore & Ohio R. Co., — W. Va. —, 96 S. E. 932.....19:674-699

34. — — — Contributory negligence.

An intending passenger who, in crossing from the railroad station to the boarding platform, would have been run down by the train which she intended to board and which was coming in at a low rate of speed had it not been for her rescue by a third person, was guilty of negligence where the train was visible for a distance of 540 feet from the place where she crossed the tracks. Bond v. Baltimore & Ohio R. Co., — W. Va. —, 96 S. E. 932.....19:674-699

CONFLICT OF LAWS.

Annotation: What law governs an action to recover damages for loss or injury inflicted in one jurisdiction by a negligent act or omission in another jurisdiction 19:1009-1029

1. Remedial procedure—Lex fori.

Ordinarily remedial procedure is governed by the law of the place where the suit is brought although it may differ materially from the remedy established in the state or jurisdiction within which the cause of action arose. Connecticut Valley Lumber Co. v. Maine Cent. R. R., — N. H. —, 103 Atl. 263.....19:1009-1029

2. Remedy in tort action—Lex fori.

The law of the forum governs the remedy in the case of a tort as well as in the case of a contract. Connecticut Valley Lumber Co. v. Maine Cent. R. R., — N. H. —, 103 Atl. 263 ..... 19:1009-1029

3. Rules of procedure—Lex fori.

Each state is entitled to adopt for the guidance of its courts such rules or laws pertaining to the methods of procedure for the vindication of rights and the promotion of justice as it may deem convenient and reasonable, and litigants who resort to its courts or are compelled to appear therein cannot insist upon the trial of their rights by some other or different rules of procedure which may prevail in the place where the cause of action arose. Connecticut Valley Lumber Co. v. Maine Cent. R. R., — N. H. —, 103 Atl. 263.....19:1009-1029

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CONSTITUTIONAL LAW.

Amendment—Meaning of terms—Legislative definition.

The terms "employers," "employees," and "employment," as used in section 21, article 20, of the Constitution, as amended in October, 1911, must be construed in the light of their meaning at the time of the adoption of the amendment, and cannot be extended by legislative definition, since such an extension would, in effect, be an amendment of the Constitution, if accepted as authoritative. Perry v. Industrial Accident Commission of California, — Cal. —, 181 Pac. 788.....19:298-308

CONTRIBUTION.

Annotation: Actions and proceedings between joint tort-feasors to enforce contribution or indemnity for damages paid as result of their negligence 19:142-257

1. Joint tort-feasors—When rule not applicable.

The rule that there can be no contribution between joint tort-feasors has no application where the element of moral turpitude is not involved and there is no wilful or conscious wrong between the parties against whom a judgment in a tort action is recovered. Ellis v. Chicago & N. W. Ry. Co., 167 Wis. 392, 167 N. W. 1048.... ..... 19:142-257

2. — Collision between railroad train and street car.

Where a railroad train runs at an unlawful rate of speed in approaching a crossing, where a collision results with a street car, but the acts of the railroad company are not intentional or wilful and involve no conscious wrong, and the acts of the street railroad company are likewise not wilful and involve no conscious wrong, contribution between the companies is proper, upon payment of the judgment by one of them. Ellis v. Chicago & N. W. Ry. Co., 167 Wis. 392, 167 N. W. 1048 .....19:142-257

CORPORATIONS.

Annotation: Liability of officers and directors of building and loan association for loss due to negligence.. ..... 19:539-545

DAMAGES.

Annotation: Recovery for sickness or permanent injury to health proximately caused by fright or shock.... ..... 19:95-111

Annotation: Actions and proceedings between joint tort-feasors to enforce contribution or indemnity for damages paid as result of their negligence 19:142-257

1. Personal injuries—Amount.

In an action under the Federal Employers' Liability Act against a railroad company for personal injuries sustained by its yard engine foreman, where plaintiff as a result of his injury was suffering from a double hernia which would be permanent unless relieved by an operation which might or might not be a success, and which, according to the evidence, would be attended with danger to life, and plaintiff was still suffering pain at intervals, and was compelled to wear a truss, and his capacity for work had been materially reduced, held that, while the verdict for $15,000 was large, it could not, on the evidence, be safely said that it was the result of passion, prejudice, or corruption on the part of the jury. Yazoo & M. V. R. Co. v. Dees, — Miss. —, 83 So. 613 .....19:641-673

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2. — — Child.

A verdict for $5,000 for personal injuries sustained by a child who suffered much pain, underwent a number of operations and was permanently injured, held not to indicate passion or prejudice. Bruenn v. North Yakima School Dist. No. 7, Yakima County, 101 Wash. 374, 172 Pac. 569..... 19:857-871

3. — Instructions authorizing allowance for mental suffering—When justified.

An injury severe enough to cause pain, require professional treatment, and inflict disability to perform labor for a week or two, justifies the giving of instructions authorizing an allowance for mental suffering in the assessment of damages. Bond v. Baltimore & Ohio R. Co., — W. Va. —, 96 S. E. 932.....19:674-699

DEAD BODIES.

Annotation: Negligence in respect of cremation of corpse as actionable.. 19:872-878

Loss of ashes of deceased after cremation—Right to recover for mental anguish and suffering.

In the absence of physical injury and pecuniary loss, parents cannot recover against a cremation society for mental anguish and suffering caused by the loss of the ashes of plaintiffs' infant child by the society in violation of its contract to cremate the child's body and keep the ashes until they were called for. Kneass v. Cremation Society of Washington, 103 Wash. 521, 175 Pac. 172....19:872-878

DISEASE.

Annotation: Liability of master to servant for disease or illness due to nature or condition of employment... 19:890-903

DRUGS.

Annotation: Liability of druggist or manufacturer for negligence in the sale of drugs or in filling prescription 19:976-991

Mislabeling prescription—Action for death—Sufficiency of evidence.

In an action for the death of plaintiff's wife, alleged to have been caused by an overdose of arsenic due to an error in labeling a prescription at defendants' drug store, in which it was contended by defendants that her death was due to disease not connected with the poisoning, the answer of a physician to a hypothetical question, embodying the circumstances of the giving of the overdose of arsenic and the symptoms displayed by the wife soon thereafter, that "Those symptoms are caused by an overdose of arsenic and probably would result in her death," warranted the drawing of an inference favorable to plaintiff sufficient to present a disputed question of fact as to the cause of death, which should have been presented to the jury. Marx v. Schultz, 207 Mich. 655, 175 N. W. 182.....19:976-991

ELECTRICITY.

1. Death of city fireman by electrocution—Liability of electric company—Deceased not mere licensee.

In an action against an electric company for the death of a city fireman by electrocution, resulting from the deceased's coming in contact, while fire fighting, with one of the company's wires strung several feet away from the burning building and above a sheet-iron awning extending from such building, held that, as to such company, such fireman was not a mere licensee who was required to take the premises as he found them. City of Shreveport v. Southwestern Gas & Electric Co., 145 La. 680, 82 So. 785 .....19:112-141

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2. — — Defenses.

In an action against an electric company for death by electrocution, resulting when the deceased came in contact with one of the company's wires, wherein there was evidence to the effect that the insulation of wires is not for protection but only for preventing a wasteful escape of the fluid, held, that such view of the matter did not recommend itself to the humanity, not to say the common sense, of the court. City of Shreveport v. Southwestern Gas & Electric Co., 145 La. 680, 82 So. 785.....19:112-141

3. — — —.

It is no defense to an action against an electric company for death by electrocution, resulting when the deceased came in contact with one of the company's wires, that the insulation of wires soon deteriorates under the action of sun and rain, and that therefore it is not commercially possible to keep wires safely insulated. City of Shreveport v. Southwestern Gas & Electric Co., 145 La. 680, 82 So. 785 ..... 19:112-141

4. — — — Contributory negligence of deceased.

In an action against an electric company for the death of a city fireman by electrocution, resulting from the deceased's coming in contact, while fire fighting in the nighttime, with one of the company's wires strung several feet away from the burning building and above a sheet-iron awning extending from such building, held, that the deceased was guilty of no negligence, and that the fact that the two firemen who preceded him onto the awning saw the wire and avoided it did not argue against him. City of Shreveport v. Southwestern Gas & Electric Co., 145 La. 680, 82 So. 785.....19:112-141

EVIDENCE.

Annotation: Admissibility in evidence of X-ray photographs, and testimony as to physical conditions shown thereby 19:69-94

Annotation: Testimony of railroad engineer as to correct use and operation of locomotive, as opinion evidence; admissibility thereof and necessity of qualification as expert.... ..... 19:258-278

1. Best and secondary—X-ray photographs—Expert opinions.

Skiagraphs or X-ray photographs are the best evidence of what appears thereby, and physicians should not be permitted, in a personal injury action in which such evidence is introduced, to interpret and explain the same. Lang v. Marshalltown Light, Power & Railway Co., — Iowa —, 170 N. W. 463 ..... 19:69-94

2. Admissibility of adversary's pleadings.

It is a settled rule of procedure in North Carolina that a party may offer in evidence a portion of his adversary's pleadings containing an allegation or admission of a distinct and separate fact relevant to the inquiry and without introducing qualifying or explanatory matter, and that, in such case, it is open to the opposing party to introduce such qualifying matter if he so desires. Jones v. Norfolk Southern R. Co., 176 N. C. 260, 97 S. E. 48.....19:258-278

3. — Allegations of pleading to explain portion introduced by other party.

Under the rule that, where a party offers, in evidence, a portion of his adversary's pleadings containing an allegation or admission of a distinct and separate fact relevant to the inquiry and without introducing qualifying or explanatory matter, the op-

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posing party may introduce such qualifying matter, it will not be error for the court to refuse to permit such an opposing party to introduce certain of its allegations which are, in no sense, qualifying or explanatory of the fact admitted. Jones v. Norfolk Southern R. Co., 176 N. C. 260, 97 S. E. 48 .....19:258-278

4. Opinion evidence—Proper manner of making flying switches—Competency of locomotive engineer.

In an action by a freight brakeman for injuries received when, in the making of a flying switch and as a result of the engineer's bringing his engine to an unnecessary, unusual and sudden stop, he was thrown from a box car upon the track in front of the car and run over, held that where a locomotive engineer, who was called as a witness by plaintiff and whose testimony as to the customary and proper manner of making flying switches and the use of the appliances on the engine provided for the purpose was admitted over defendant's objection, was qualified by training and experience to express an opinion calculated to aid the jury in arriving at a correct conclusion, and where he testified to the operation and use of engines and appliances exactly similar in structure and operation to the one involved, his estimates and statement of the correct use of such appliances were facts relevant to the issue and were properly received in evidence whether, in strictness, expert evidence or not. Jones v. Norfolk Southern R. Co., 176 N. C. 260, 97 S. E. 48 .....19:258-278

EXPLOSIONS.

1. Gasoline—Storage and handling—Care required.

In storing upon its premises and handling for its purposes large quantities of gasoline, the owner is bound to exercise such reasonable care to avoid accident as is commensurate with the apparent dangers attending such use. Woods v. Chalmers Motor Car Co., 207 Mich. 556, 175 N. W. 449 .....19:932-952

2. Gasoline—Destruction of houseboat—Negligence—Presumption and burden of proof.

In an action for damages by the owner of a houseboat for its destruction by fire, communicated to it from a fire and explosion on premises on the adjoining shore where large quantities of gasoline and oil were stored and used, no presumption of negligence arose from the bare proof of the explosion, but the burden was upon plaintiff to prove facts from which it might be fairly inferred that defendant's negligence was the proximate cause of the explosion and injury. Woods v. Chalmers Motor Car Co., 207 Mich. 556, 175 N. W. 449... ..... 19:932-952

3. — — Contributory negligence—Question for jury.

If the testimony of the owner of a houseboat, that he had noticed the condition of the surface of the water surrounding it, which was covered with oil and greasy scum, and was trying to find a new location to get away from the fumes of gasoline, permitted an inference that he was actuated by any thought or appreciation of danger from explosion or fire, it was for the jury, rather than the court, and the trial court did not err in submitting the question of his contributory negligence to the jury, in an action by his assignee for damages for the loss of the houseboat by fire, communicated to it through the air or over the surface of the water, from an explosion and fire upon the premises of defendant upon the adjoining shore. Woods v. Chalmers

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Motor Co., 207 Mich. 556, 175 N. W. 449 ..... 19:932-952

4. — — Negligence — Question for jury.

Testimony that defendant stored gasoline upon its premises in a sunken tank holding 12,000 gallons, from which it was elevated by a continuously operated vacuum pump into a gravity tank with a capacity of three or four barrels, from which it was piped into defendant's building to motors which were being tested, the overflow from the gravity tank being returned by a pipe to the storage tank; that an open ditch was maintained along the testing building leading to a creek; that a trench system for drainage was maintained in the testing building and communicated with the open ditch; that the overflow from the gravity gasoline tank was not properly cared for, but that quantities of gasoline were permitted to overflow into the open ditch and to stand in pools; and that a sewer system was maintained in the building, which carried off water from the motors, and might also carry some lubricating oil, and which emptied into the creek, amounted to much more from which negligence could be inferred than the bare fact of the explosion, in an action by the owner of the houseboat, which was moored in the creek near defendant's premises, for its destruction by fire communicated to it through the air or over the oily surface of the water, following an explosion and fire upon defendant's premises, and such evidence was sufficient to give room for a reasonable inference or permissible presumption of negligence on the part of defendant to the damage of plaintiff and to authorize submission of that question to the jury. Woods v. Chalmers Motor Car Co., 207 Mich. 556, 175 N. W. 449 ..... 19:932-952

FEDERAL BOILER INSPECTION ACT.

Use of improper type of construction —Necessity of inspector's disapproval.

The fact that the use of a certain type of button-head on the boiler of an oil-burning engine has not been disapproved by the government inspector is not conclusive of the sufficiency of such type, since there is nothing in the Federal Boiler Inspection Act to warrant the conclusion that there is no liability for an unsafe locomotive, in view of the provisions of section 2 of the act, because some particular feature of construction, which has been found unsafe, has not been disapproved by the federal boiler inspector. Great Northern Ry. Co. v. Donaldson, Adm'x of Thoms, 246 U. S. 121, 62 L. Ed. 616, 38 Sup. Ct. 230, aff'g 89 Wash. 161, 154 Pac. 133.....19:391-406

FEDERAL EMPLOYERS' LIABILITY ACT.

Annotation: Employees within Federal Employers' Liability Act..19:1-68

Annotation: Assumption of risk of injury through violation of safety statutes, under Federal Employers' Liability Act 19:391-406

Annotation: Assumption of risk of negligence of other employees, under Federal Employers' Liability Act.... ..... 19:461-514

Annotation: Assumption of risk of injury through defective or inadequate tools, appliances or equipment, under Federal Employers' Liability Act 19:559-585

Annotation: Assumption of risk of injury through defects of track, roadbed or right of way generally, under Federal Employers' Liability Act.... ..... 19:641-673

Annotation: Assumption of risk under the Federal Employers' Liability

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Act as to unsafe place or dangerous method of work.....19:723-752

1. Controlling effect in proper case.

In a case coming under the Federal Employers' Liability Act, the act itself affords the exclusive and controlling rule of liability, and, where the question presented involves the assumption by plaintiff of the risk of a fellow-servant's negligence, such question must be determined in accord with the provisions of the act and applicable and authoritative federal decisions construing them. Jones v. Norfolk Southern R. Co., 176 N. C. 260, 97 S. E. 48.....19:258-278

2. Interstate commerce—What work constitutes employment in.

The doing of work by an interstate railroad employee which has for its immediate purpose the furthering of the conduct of interstate commerce constitutes an employment in such commerce within the meaning of the Federal Employers' Liability Act. Kinzell v. Chicago, M. & St. P. Ry. Co., 250 U. S. 130, 63 L. Ed. 893, 39 Sup. Ct. 412, rev'g 31 Idaho 365, 171 Pac. 1136.....19:1-68

3. — When employee engaged in—Guide for determining.

What is at least a guide to a determination of the question whether an interstate railroad employee, engaged in work on the railroad right of way, was engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act, may be found in the questions: Was the work being done independently of the interstate commerce in which the railroad company was engaged or was it so closely connected therewith as to be a part of it, and was its performance a matter of indifference as far as such commerce was concerned, or was it in the nature of a duty resting upon the carrier? Kinzell v. Chicago, M. & St. P. Ry. Co., 250 U. S. 130, 63 L. Ed. 893, 39 Sup. Ct. 412, rev'g 31 Idaho 365, 171 Pac. 1136..... 19:1-68

4. — — Keeping interstate track free from earth and stones falling on it as result of filling work.

Where an interstate railway company was engaged in filling a trestle-work bridge which spanned a dry gulch and which was, during the progress of the work, used for interstate trains, and the fill had reached the level of the tops of the ties, and had become of such width that the earth when dumped would pile up near the track so as to fall back on it if not removed, such fill had become a part of the railway and an employee of the company who was employed to keep the track clear of earth and stones, by means of "dozer" and shovel, was employed in interstate commerce within the meaning of the Federal Employers' Liability Act. Kinzell v. Chicago, M. & St. P. Ry. Co., 250 U. S. 130, 63 L. Ed. 893, 39 Sup. Ct. 412, rev'g 31 Idaho 365, 171 Pac. 1136.....19:1-68

5. Negligence of fellow-servant—Liability of carrier.

In cases within the purview of the Federal Employers' Liability Act, the carrier is not shielded by the fellow-servant rule, but must answer for the negligence of an employee as well as for that of an officer or agent. Boldt v. Pennsylvania R. Co., 245 U. S. 441, 62 L. Ed. 385, 38 Sup. Ct. 139, aff'g 134 C. C. A. 175, 218 Fed. 367..... 19:461-514

6. Assumption of risk—Applicability of doctrine.

The doctrine of assumption of risk applies in actions under the Federal Employers' Liability Act except where, as provided in section 4 of

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the act, there has been a violation by the carrier of a statute enacted for the safety of employees. Boldt v. Pennsylvania R. Co., 245 U. S. 441, 62 L. Ed. 385, 38 Sup. Ct. 139, aff'g 134 C. C. A. 175, 218 Fed. 367..... ..... 19:461-514

7. — — **Injuries to yard engine foreman—Unlighted switch lamp.**

In an action under the Federal Employers' Liability Act against a railroad company by its yard engine foreman when, in the nighttime, he fell over a yard switch stand, the lamp on which was not burning, held that plaintiff assumed the risk of the lamp's going out without fault on the part of defendant, but that, since plaintiff claimed and the jury believed that the lamp went out because defendant's employee in charge thereof had negligently failed to keep it filled with oil, the question of whether or not the plaintiff assumed the risk of its unlighted condition could not arise unless he had, before he was injured, either actual or constructive knowledge of such condition. Yazoo & M. V. R. Co. v. Dees, — Miss. —, 83 So. 613.....19:641-673

8. — **When not defense.**

While the Federal Employers' Liability Act clearly recognizes assumption of risk as a defense in certain instances, under section 4 thereof such a position is absolutely inhibited in cases where the violation of a federal statute, enacted for the protection of the employees, contributed to the injury or death complained of, and by correct deduction from the terms and meaning of section 1, the negligence of fellow-servants is withdrawn from the class of assumed risks in cases of unusual and instant negligence and under circumstances which afforded the injured employee no opportunity to know of the conditions or appreciate the attendant dangers. Jones v. Norfolk Southern R. Co., 176 N. C. 260, 97 S. E. 48.....19:258-278

9. — — **Negligence of employer.**

Under the Federal Employers' Liability Act, an employee does not assume the risks of his employer's negligence unless he is given fair opportunity to know and appreciate the risks to which he is thereby subjected. Jones v. Norfolk Southern R. Co., 176 N. C. 260, 97 S. E. 48..... ..... 19:258-278

10. — — **Negligence of fellow-servants.**

The effect of section 1 of the Federal Employers' Liability Act is to place the conduct of fellow-servants on the same plane as the conduct of the employer as far as the matter of assumption of risk is concerned. Jones v. Norfolk Southern R. Co., 176 N. C. 260, 97 S. E. 48.....19:258-278

11. — — **Negligent operation of train —Injury to section man.**

In an action against a railroad company by a section man employed by it for personal injuries sustained by plaintiff when, in going to work, he stepped from the one of the defendant's two double tracks, on which he was walking, onto the other for the purpose of permitting a train to pass, and was struck and run over by an engine, backing on the second track, which ran into him without signal or warning, held that, even conceding that the Federal Employers' Liability Act applied, the plaintiff, under the circumstances, did not assume the risk attributable to the negligent operation of the train, if the jury found it to be such, unless the consequent danger was so obvious that an ordinarily prudent person in his situation would have observed and appreciated it. Erie R. Co. v. Purucker, 244 U. S. 320, 61 L. Ed. 1166, 37 Sup. Ct. 629 .....19:723-752

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12. — — Injuries in making flying switch.

In an action, under the Federal Employers' Liability Act, by a freight brakeman for injuries received when, in the making of a flying switch and as a result of the engineer's bringing his engine to an unnecessary, unusual and sudden stop, he was thrown from a box car upon the track in front of the car and run over, held that the court correctly ruled that the defense of assumption of risk was not available to the defendant Jones v. Norfolk Southern R. Co., 176 N. C. 260, 97 S. E. 48.....19:258-278

13. — — Violation of statute enacted for safety of employees—Boiler Inspection Act.

The Federal Boiler Inspection Act was enacted for the safety of employees within the meaning of section 4 of the Federal Employers' Liability Act, providing that an employee shall not be held to have assumed the risks of his employment in any case where the violation by the carrier of any statute enacted for the safety of employees contributed to such employee's injury or death. Great Northern Ry. Co. v. Donaldson, Adm'x of Thoms, 246 U. S. 121, 62 L. Ed. 616, 38 Sup. Ct. 230, aff'g 89 Wash. 161, 154 Pac. 133...19:391-406

14. — Instructions—Action for death of yard conductor.

In an action under the Federal Employers' Liability Act for the death of an experienced yard conductor who was killed while assisting in an effort to adjust a faulty coupler at the end of a string of cars and while violating instructions, when a second string of cars was permitted to move by gravity against the first one, held that the plaintiff's requested charge to the jury that the risk which, since the passage of such act, the employee assumes, "is the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of defendant's officers, agents, or employees," did not accurately state any applicable rule of law, and was properly refused. Boldt v. Pennsylvania R. Co., 245 U. S. 441, 62 L. Ed. 385, 38 Sup. Ct. 139, aff'g 134 C. C A. 175, 218 Fed. 367.....19:461-514

15. — — —.

In an action under the Federal Employers' Liability Act for the death of an experienced yard conductor who was killed while assisting in an effort to adjust a faulty coupler at the end of a string of cars and while violating instructions, when a second string of cars was permitted to move by gravity against the first one, held that a charge to the jury that the deceased assumed the ordinary risks of his employment was more favorable than plaintiff could properly demand. Boldt v. Pennsylvania R. Co., 245 U. S. 441, 62 L. Ed. 385, 38 Sup. Ct. 139, aff'g 134 C. C. A. 175, 218 Fed. 367.. ..... 19:461-514

16. — — Boiler explosion.

Charge on assumption of risk, requested by the defendant carrier, sued under the Federal Employers' Liability Act for the death of one of its engineers as the result of the explosion of an engine boiler, held inconsistent with the provisions of section 4 of the Federal Employers' Liability Act and section 2 of the Federal Boiler Inspection Act. Great Northern Ry. Co. v. Donaldson, Adm'x of Thoms, 246 U. S. 121, 62 L. Ed. 616, 38 Sup. Ct. 230, aff'g 89 Wash. 161, 154 Pac. 133.....19:391-406

17. — — —.

Charge on assumption of risk, given in an action against a carrier, sued under the Federal Employers' Liabil-

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ity Act for the death of one of its engineers as the result of the explosion of an engine boiler, held more favorable to the defendant than the law required. Great Northern Ry. Co. v. Donaldson, Adm'x of Thoms, 246 U. S. 121, 62 L. Ed. 616, 38 Sup. Ct. 230, aff'g 89 Wash. 161, 154 Pac. 133 ..... 19:391-406

18. — — Injuries to section man while going to work—Refusal of requested instruction.

In an action against a railroad company by a section man employed by it for personal injuries sustained by plaintiff when, in going to work, he stepped from the one of the defendant's two double tracks, on which he was walking, onto the other of such tracks for the purpose of permitting a train to pass and was struck and run over by an engine, backing on the second track, held that even conceding that the Federal Employers' Liability Act applied, it was not error for the trial court to refuse defendant's requested charge that, "If the plaintiff in getting off the track on which he saw a train approaching could with safety and reasonable convenience have stepped to the right or south of such track, and by his own choice stepped onto a parallel track and was struck by a train on such parallel track, he assumed the risk of such choice," since such request failed to call attention to the circumstances under which the testimony tended to show the plaintiff was using the tracks at the time and the knowledge of conditions which should have been taken into consideration in order to attribute assumption of risk to him, and failed to take into account the undisputed testimony that the engine ran into him without signal or warning to him, and was more properly applicable to the defense of contributory negligence, concerning which the court must be presumed to have given proper instructions. Erie R. Co. v. Purucker, 244 U. S. 320, 61 L. Ed. 1166, 37 Sup. Ct. 629.....19:723-752

19. — — — —.

In an action against a railroad company by a section man employed by it for personal injuries sustained by plaintiff when, in going to work, he stepped from the one of the defendant's two double tracks, on which he was walking, onto the other for the purpose of permitting a train to pass and was struck and run over by an engine, backing on the second track, held that, even conceding that the Federal Employers' Liability Act applied, it was not error for the trial court to refuse to give defendant's requested charge that "if the plaintiff, for his own convenience, voluntarily went along the tracks of the railroad, and this road was being at the time used and operated as a highway of interstate commerce, he assumed the risk and danger of so using the tracks," since such request failed to call attention to the circumstances under which the testimony tended to show the plaintiff was using the tracks at the time and the knowledge of conditions which should have been taken into consideration in order to attribute assumption of risk to him, and failed to take into account the undisputed testimony that the engine ran into him without signal or warning to him. Erie R. Co. v. Purucker, 244 U. S. 320, 61 L. Ed. 1166, 37 Sup. Ct. 629.....19:723-752

20. — — Injuries to yard engine foreman.

An instruction requested by a railroad company, sued under the Federal Employers' Liability Act for personal injuries sustained by its yard engine foreman, is properly refused when it is sought thereby to charge the jury, when the law is to the contrary, that an employee assumes a risk created by

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his employer's negligence merely because he had as good an opportunity as his employer of knowing of its existence. Yazoo & M. V. R. Co. v. Dees, — Miss. —, 83 So. 613..... ..... 19:641-673

21. — — — Unlighted switch lamp.

In an action under the Federal Employers' Liability Act against a railroad company by its yard engine foreman for personal injuries sustained when, in the nighttime, he fell over a yard switch stand, the lamp on which was not burning, where plaintiff claimed that the lamp had gone out because the defendant's employee in charge thereof had negligently failed to keep it filled with oil, held that the refusal of an instruction requested by the defendant was proper because of the erroneous charge therein that, if the plaintiff had been working in the yard in which the switch was located, and knew that the switch stand over which he fell was there, and had known it for years prior to the alleged accident, he assumed the risk of such danger, if any there was, from such unlighted switch, such charge being objectionable because, while plaintiff admitted knowing the location of all of the switches, he fell over the switch stand in the dark, not knowing that he was then in its vicinity, which fact would have been disclosed to him had the lamp been burning. Yazoo & M. V. R. Co. v. Dees, — Miss. —, 83 So. 613..... ..... 19:641-673

22. — Question for jury—Injuries to yard engine foreman — Unlighted switch lamp.

In an action under the Federal Employers' Liability Act against a railroad company by its yard engine foreman for personal injuries sustained when, in the nighttime, he fell over a yard switch stand, the lamp on which was not burning, where the plaintiff claimed that the lamp had gone out because the defendant's employee in charge thereof had negligently failed to keep it filled with oil, held that, under the evidence, the question whether plaintiff had, before he was injured, either actual or constructive knowledge of the fact that the lamp was out was for the jury. Yazoo & M. V. R. Co. v. Dees, — Miss. —, 83 So. 613.....19:641-673

23. Injuries to yard engine foreman—Unlighted switch lamp—Duty of railroad company to keep switch lamps lit.

In an action under the Federal Employers' Liability Act against a railroad company by its yard engine foreman for personal injuries sustained when, in the nighttime, he fell over a yard switch stand, the lamp on which was not burning, where plaintiff claimed that the lamp had gone out because the defendant's employee in charge thereof had negligently failed to keep it filled with oil, held that defendant's placing of lights on its switch stands, whatever its primary purpose in so doing may have been, was in effect an invitation to its employees to use such lights for the purpose of locating and avoiding the switch stands, a use for which they were suitable and to which from their very nature the defendant must have known its employees would put them, and therefore that the defendant was charged with the duty of exercising reasonable care to keep them burning so that its employees would not be misled by their absence in locating and avoiding the switch stands. Yazoo & M. V. R. Co. v. Dees, — Miss. —, 83 So. 613.....19:641-673

24. Explosion of boiler on oil-burning engine—Approval of type of button-head used—Sufficiency of evidence

In an action, under the Federal Em-

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ployers' Liability Act, against a carrier for the death of one of its engineers as the result of the explosion of the boiler on an oil-burning engine, held that the testimony did not show an approval by government inspectors of the use of the large type of button-head upon an oil-burning engine, the actual use of which was alleged by plaintiff to have made the engine unsafe to operate. Great Northern Ry. Co. v. Donaldson, Adm'x of Thomo, 246 U. S. 121, 62 L. Ed. 616, 38 Sup. Ct. 230, aff'g 89 Wash. 161, 154 Pac. 133.....19:391-406

25. Questions for jury—Effect of employer's acquiescence in nonuse of safety devices—Action for injuries to steel-car repairer.

In an action under the Federal Employers' Liability Act by a steel-car repairer for injuries to his eyes when, while using a pneumatic hammer under the direction of the leader of his gang to drive out a rivet which had stuck—the hammer being used without a safety spring and plaintiff's eyes being unprotected by goggles, a piece of steel was driven through one of his eyes as a result of the escape of the hammer's set and plunger, held that, whatever might be, the merit of a safety spring or the need of using one on the hammer, it was not error on the part of the trial judge to decline to hold as matter of law that defendant could both indulge its employees in a practice not to use such springs and insist that their failure to use them absolved it from all duty respecting their use. Pittsburgh, C., C. & St. L. Ry. Co. v. Cole, — C. C. A. —, 260 Fed. 357.....19:559-585

26. Federal Employers' Liability Act —Action for injuries to steel-car repairer—Question for jury.

In an action under the Federal Employers' Liability Act by a steel-car repairer for injuries to his eyes when, while using a pneumatic hammer under the direction of the leader of his gang to drive out a rivet which had stuck—the hammer being used without a safety spring and plaintiff's eyes being unprotected by goggles, a piece of steel was driven through one of his eyes as a result of the escape of the hammer's set and plunger, held that the question whether the gang leader was such a vice principal of defendant that his order to plaintiff was binding on the latter was one for the jury. Pittsburgh, C., C. & St. L. Ry. Co. v. Cole, — C. C. A. —, 260 Fed. 357 .....19:559-585

27. — — Negligence of employer as to safety devices and instruction—Sufficiency of evidence.

In an action under the Federal Employers' Liability Act by a steel-car repairer for injuries to his eyes when, while using a pneumatic hammer under the direction of the leader of his gang to drive out a rivet which had stuck—the hammer being used without a safety spring and plaintiff's eyes being unprotected by goggles, a piece of steel was driven through one of his eyes as a result of the escape of the hammer's set and plunger, held that the testimony fairly and substantially tended to sustain the allegations of negligence on the part of defendant in the matter of the absence of the safety spring and the order of the leader of the gang. Pittsburgh, C., C. & St. L. Ry. Co. v. Cole, — C. C. A. —, 260 Fed. 357.....19:559-585

28. Damages — Instruction — "Full measure."

In a personal injury action under the Federal Employers' Liability Act, held that it was not prejudicial error for the court to charge that, in certain aspects, the plaintiff should recover the "full measure of damages," where, having charged that the damages must be proportionately reduced

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in case there was contributory negligence on the part of the plaintiff, the court used the term "full measure" to express correctly the rule of adjustment in case there was no negligent default on plaintiff's part. Jones v. Norfolk Southern R. Co., 176 N. C. 260, 97 S. E. 48.....19:258-278

HIGHWAYS AND STREETS.

Annotation: Liability for injury from overhead wires during passage of buildings, pile drivers and like objects being transported along highways 19:515-538

Annotation: Absence or inadequacy of light as actionable defect in city street 19:619-632

1. Streets—Failure to light as rendering it "defective."

A failure to light a city street may, under some circumstances, render the street "defective." Sexton v. City of Rockhill, 107 S. C. 506, 93 S. E. 180 .....19:619-632

2. — Failure to light intersection—Want of ordinary care.

Where, in an action against a city for personal injuries sustained by plaintiff as a result of the city's failure to light the street intersection at which plaintiff, while riding a bicycle, was struck by an automobile, it was admitted that the city owned the electric light plant and there was testimony tending to prove that an electric lamp was suspended at the place of the accident and that the lamps had been unlighted for at least five nights prior to the accident, held that, considering the place and all of the circumstances, a jury might reasonably infer that the city had failed to exercise ordinary care in the premises. Sexton v. City of Rockhill, 107 S. C. 506, 93 S. E. 180..19:619-632

3. — — "Mismanagement" of lamp.

Where the electric lighting plant belongs to the city and the city has placed a lamp at a certain street intersection and lights such lamp upon occasion, a negligent failure to have it lit when a bicyclist, injured in a collision with an auto at such intersection, is traveling in that part of the street will be "mismanagement" of such lamp. Sexton v. City of Rockhill, 107 S. C. 506, 93 S. E. 180..... ..... 19:619-632

INSTRUCTIONS.

See also FEDERAL EMPLOYERS' LIABILITY ACT.

1. Request—What requisite to.

A request to charge must be calculated to give the jury an accurate understanding of the law having reference to the phase of the case to which it is applicable. Erie R. Co. v. Purucker, 244 U. S. 320, 61 L. Ed. 1166, 37 Sup. Ct. 629.....19:723-752

2. Duty of trial court — Issue not within pleading.

It is not incumbent on the trial court, in charging the jury in a personal injury action, to submit to them any issue not within the pleading. Bruenn v. North Yakima School Dist. No. 7, Yakima County, 101 Wash. 374, 172 Pac. 569.....19:857-871

3. Refusal of request—Substance repeatedly given.

There is no error in refusing an instruction when the substance thereof was given in charge to the jury over and over again for both sides. Yazoo & M. V. R. Co. v. Dees, — Miss. —, 83 So. 613.....19:641-673

4. — Subject-matter covered by other instructions.

Refusal of the trial court, in a personal injury action, to give defend-

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ant's requested instruction withdrawing from the jury injuries, alleged but not proven, held not error in view of instructions given. Lang v. Marshalltown Light, Power & Railway Co., — Iowa —, 170 N. W. 463..... ..... 19:69-94

5. — Not based on evidence.

An instruction stating an hypothesis having no basis in the evidence is properly refused. Bond v. Baltimore & Ohio R. Co., — W. Va. —, 96 S. E. 932 .....19:674-699

6. Right of court to limit number.

Trial courts are required to, and should only, grant instructions sufficient in number and character to guide the jury in determining the issues involved in the case on trial, and they have the right to limit the number of instructions to be considered by them accordingly. Yazoo & M. V. R. Co. v. Dees, — Miss. —, 83 So. 613..... ..... 19:641-673

7. Number to which court may limit counsel.

The number of instructions to which the trial court limits counsel cannot be an arbitrary one applicable to all cases alike, but must depend in each case upon the number of issues therein involved. Yazoo & M. V. R. Co. v. Dees, — Miss. —, 83 So. 613 .....19:641-673

INSURANCE.

Annotation: Negligence of assured as defense on action on insurance policy 19:428-440

Annotation: Liability of insurance company or its agent for negligent failure to issue insurance policy..... ..... 19:700-706

Annotation: Failure of insurance agent to obey principal's instructions to cancel policy as negligence, and applicability of defenses of assumed risk and contributory negligence in action to recover damages because of such failure....19:953-960

1. Life — Policy as contract — Necessity of meeting of minds of parties.

Life insurance is a contract, and the meeting of the minds of the parties is essential to the execution of a policy. Myer v. Central States Life Ins. Co., — Neb. —, 173 N. W. 578.. ..... 19:700-706

2. — Failure to give notice to applicant—Omission to notify of result of medical examination—Effect.

In an action against an insurance company for failure to deliver a policy of life insurance during the lifetime of the applicant therefor, etc., held that defendant's failure to give notice to the applicant of the report of excessive blood pressure was not evidence of negligence. Myer v. Central States Life Ins. Co., — Neb. —, 173 N. W. 578.....19:700-706

3. — — Issuance and registration of policy as evidence of negligence.

In an action against an insurance company for failure to deliver a policy of life insurance during the lifetime of the applicant therefor, etc., held that the issuance of the policy and its registration by the state insurance department in order to hasten delivery upon a subsequent approval of the application did not tend to prove negligence. Myer v. Central States Life Ins. Co., — Neb. —, 173 N. W. 578.....19:700-706

4. — — Relation of examining physician to insurer—Liability of insurer for physician's mistake.

In an action against an insurance company for failure to deliver a policy of life insurance during the lifetime of the applicant therefor, etc., held that the relation of the examining physician to the defendant was

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that of an independent contractor, and that as such his mistake resulting from the use of a scientific instrument and causing delay was not chargeable to defendant. Myer v. Central States Life Ins. Co., — Neb. —, 173 N. W. 578 .....19:700-706

5. — — Right of court to fix arbitrary period for performance by insurer.

In an action against an insurance company for failure to deliver a policy of life insurance during the lifetime of the applicant therefor, etc., held that, in construing the conduct of the parties in relation to time, courts are not at liberty to fix an arbitrary period. Myer v. Central States Life Ins. Co., — Neb. —, 173 N. W. 578 .....19:700-706

6. — — Sufficiency of evidence.

In an action against an insurance company for negligence in delaying action on an application for life insurance, in failing to notify the applicant of the delay or of the occasion for it, and in failing to deliver a policy during his lifetime, the evidence summarized in the opinion held insufficient to sustain a judgment in favor of plaintiff. Myer v. Central States Life Ins. Co., — Neb. —, 173 N. W. 578.....19:700-706

7. Fire—Liability of insurer—Negligence of insured—Effect.

Mere negligence on the part of an insured does not prevent recovery on the insurance policy; one of the objects of insurance is to protect the insured from loss due to carelessness. Todd v. Traders' & Mechanics' Ins. Co., 230 Mass. 595, 120 N. E. 142.... ..... 19:428-440

8. — — Fraudulent loss.

An insurer is not liable for a fraudulent loss, due to the intentional destruction of property by the insured or to such reckless and inexcusable negligence as tends to show a fraudulent purpose or design. Todd v. Traders' & Mechanics' Ins. Co., 230 Mass. 595, 120 N. E. 142..19:428-440

9. — Negligence of insured—Starting fire without permit — Burden of proof.

In an action on a fire policy, held that the burden was on the defendants to show that they were relieved from liability by the failure of the insured to secure the statutory permit to set out the fire which had spread to the burned buildings. Todd v. Traders' & Mechanics' Ins. Co., 230 Mass. 595, 120 N. E. 142...19:428-440

10. — — — Evidence of negligence.

In an action on a fire policy, held that the fact that the insured had failed to secure the statutory permit to set out the fire which had spread to the burned buildings might be considered as "evidence of negligence." Todd v. Traders' & Mechanics' Ins. Co., 230 Mass. 595, 120 N. E. 142.... ..... 19:428-440

11. — — — Question for jury.

In an action on a fire policy, wherein it appeared that the fire which had spread to the burned buildings had been set out by the insured without his having secured the statutory permit, held that the plaintiffs were properly permitted to go to the jury. Todd v. Traders' & Mechanics' Ins. Co., 230 Mass. 595, 120 N. E. 142... ..... 19:428-440

12. — — — Proximate cause — Question for jury.

In an action on a fire policy, held that it was a question of fact for the jury whether the failure of the insured to secure the statutory permit to set out the fire which had spread to the burned buildings was a contributing cause or merely a condition

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of the loss. Todd v. Traders' & Mechanics' Ins. Co., 230 Mass. 595, 120 N. E. 142.....19:428-440

13. — Agent failing to cancel policy —Liability to insurer.

When instructed so to do, it is the duty of an insurance agent to cancel a policy of insurance issued by him, and, if he fails to cancel, he is liable to his principal for the damage sustained by the principal, unless the agent can show some valid reason for his failure to follow instructions. American Ins. Co. of Newark v. Martinek, 203 Mich. 108, 168 N. W. 982.. ..... 19:953-960

14. — — Failure of insurer to cancel direct as contributory negligence.

A fire insurance company was not guilty of contributory negligence, barring recovery of the amount of a fire loss from an agent who did not comply with instructions to cancel a policy, by failing to cancel the policy direct, where the fire occurred nearly four months after notice to the agent to cancel the policy, but the agent had, under the instructions of the company, canceled a great many policies, and he clearly understood it to be his duty, when instructed to do so, and the company supposed that its positive instructions in the particular case had been carried out. American Ins. Co. of Newark v. Martinek, 203 Mich. 108, 168 N. W. 982..19:953-960

15. — — Retention of premium — When insurer not estopped.

A fire insurance company is not estopped to recover from an agent the amount paid on a fire loss due to the failure of the agent to cancel a policy, as instructed to do, because of the retention of the premium, where it was the custom of the agent to make monthly current statements, and all he had to do was to pay the return premium out of funds of plaintiff in his hands, give himself credit for that amount, charge it to the company, deduct it from his next statement, and return the policy in lieu of cash. American Ins. Co. v. Martinek, 203 Mich. 108, 168 N. W. 982..19:953-960

16. — — Knowledge on part of insurer—Sufficiency of evidence.

In an action by a fire insurance company against an agent to recover damages for a fire loss which it was compelled to pay because of the failure of the agent to cancel a policy, according to instructions, evidence held insufficient to show that plaintiff knew that the policy was not canceled and to show that it supposed its instructions had been carried out. American Ins. Co. of Newark v. Martinek, 203 Mich. 108, 168 N. W. 982 ..... 19:953-960

INVESTMENT COMPANIES.

Annotation: Liability of bank, investment company or broker for loss through investment negligently advised or made for customer or client 19:362-371

LIMITATION OF ACTION.

1. Extraterritorial effect of statutes.

Statutes of limitation which do not abolish rights that have become barred thereby have been held with few exceptions to relate to the procedure and not to the essential rights of the parties, and to have therefore no extraterritorial effect. Connecticut Valley Lumber Co. v. Maine Cent. R. R., — N. H. —, 103 Atl. 263..... ..... 19:1009-1029

2. —.

The mere fact that no action can be maintained upon a contract or for a tort in the state where the parties have lived since a right of action accrued which appears to be barred by

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the local statute of limitations does not constitute a valid defense to the merits of the controversy in another state, nor can it be set up as a bar to the action. Connecticut Valley Lumber Co. v. Maine Cent. R. R., — N. H. —, 103 Atl. 263....19:1009-1029

3. — Foreign statute affecting remedy only.

If merely the remedy upon a cause of action has ceased to exist, in consequence of the statute of limitations of the state where the obligations or duties involved arose, an action upon the merits may be maintained in another jurisdiction, the foreign limitation in such a case being designed to regulate or limit the use that may be made of local procedure and not to apply to or modify the essential duties assumed by the parties or to regulate or limit their method of procedure in another forum. Connecticut Valley Lumber Co. v. Maine Cent. R. R., — N. H. —, 103 Atl. 263..... ..... 19:1009-1029

MANUFACTURER.

Annotation: Liability of druggist or manufacturer for negligence in the sale of drugs or in filling prescription 19:976-991

MASTER AND SERVANT.

Annotation: Liability of master to servant for disease or illness due to nature or condition of employment... ..... 19:890-903

1. Nondelegable duties of master—What constitute.

The law puts upon the employer certain duties or obligations which are nondelegable in the sense that he cannot authorize them to be done by some one else and escape responsibility for the manner or lack of their doing. Such in general is the furnishing of a reasonably safe place in which to work; the furnishing of reasonably safe tools and instrumentalities; the proper supervision of the work in certain cases; sometimes warning and instruction; the guarding or fencing of machinery; and in general the doing of such things as are necessary to meet the positive requirements of a statute enacted for the safety of employees. Gutmann v. Anderson, — Minn. —, 171 N. W. 303.. ..... 19:968-975

2. — How dischargeable.

The nondelegable duties or obligations of a master can be discharged only by performance. Gutmann v. Anderson, — Minn. —, 171 N. W. 303 ..... 19:968-975

3. Injuries to servant—Rule for determining negligence on part of master.

The correct rule for determining negligence on the part of a master is that where there is reason to anticipate, from the character of the services required and the manner of their performance, some injury may result to the servant, the duty is incumbent to exercise such care demanded by the relationship as will prevent the injury, and the failure so to do becomes actionable in the event injury follows the breach of duty. Collins v. Pecos & Northern Texas Ry. Co., — Tex. Civ. App. —, 212 S. W. 477..... ..... 19:890-903

4. Assumption of risk—Statement of doctrine.

At common law, a servant assumes extraordinary risks incident to his employment or risks caused by his master's negligence which are obvious or fully known and appreciated by him. Boldt v. Pennsylvania R. Co., 245 U. S. 441, 62 L. Ed. 385, 38 Sup. Ct. 139, aff'g 134 C. C. A. 175, 218 Fed. 367.. ..... 19:461-514

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5. — Basis of doctrine.

The doctrine of assumption of risk is based upon knowledge or a fair and reasonable opportunity to know, and usually this knowledge and opportunity must come in time to be of use. Jones v. Norfolk Southern R. Co., 176 N. C. 260, 97 S. E. 48.....19:258-278

6. — Ordinary risks.

It is probably a universal rule that the servant merely by entering the service of the master assumes the ordinary risks of the service, and, if he is injured solely because of them, he cannot recover. Yazoo & M. V. R. Co. v. Dees, — Miss. —, 83 So. 613.. ..... 19:641-673

7. — Negligence of master — Necessity of knowledge and of appreciation of danger.

At common law and under the Federal Employers' Liability Act, risks created by the master's negligence are not assumed by the servant unless with an actual or constructive knowledge thereof and appreciation of the danger therefrom he voluntarily enters or continues in the employment of the master. Yazoo & M. V. R. Co. v. Dees, — Miss. —, 83 So. 613..... ..... 19:641-673

8. — Negligence of fellow-servant.

At common law or under the later decisions of the common-law courts, the negligence of a fellow-servant was classed among the risks assumed by an employee engaged in a common service. Jones v. Norfolk Southern R. Co., 176 N. C. 260, 97 S. E. 48.... ..... 19:258-278

9. Fellow-servants — Engineer and brakeman of freight train.

In making a flying switch, the engineer and brakeman of a freight train are undoubtedly fellow-servants within the common-law rule, making the negligence of a fellow-servant an assumed risk. Jones v. Norfolk Southern R. Co., 176 N. C. 260, 97 S. E. 48 ..... 19:258-278

10. Vice principal—Definition.

A vice principal is one, whatever his work, who with competent authority discharges a primary or nondelegable duty of the employer. Gutmann v. Anderson, — Minn. —, 171 N. W. 303.....19:968-975

11. — Test in action for injuries to minor servant by unguarded machinery.

The plaintiff, a minor under 16, was injured while working at a grinder with an unguarded intake gear in the defendant's meat shop. He claimed that he was put to work at the grinder by one Victor, who to some extent, was in charge, and that the work was a dangerous employment forbidden by Gen. St. 1913, §§ 3848, 3870, to boys under 16. No other fault was attached to Victor. Unless the plaintiff was employed in violation of the statute, he could not maintain a common-law action, for, if his employment was "legally permitted," his rights and the liability of the defendant were fixed by the Workmen's Compensation Act (Gen. St. 1913, § 8230g[2]). The court stated to the jury the effect of the statute and the conditions under which the defendant would be liable for the act of Victor in putting the plaintiff at work, and referred to his authority, express or implied in fact, as the representative of the defendant. After a verdict for the plaintiff it granted a new trial upon the ground that it submitted to the jury the wrong test of the vice principalship of Victor, that is, the rank or grade of service, instead of the nondelegable character of the duty resting upon the defendant. It is held that the charge adopted the proper

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test of vice principalship, namely, the nondelegable character of the duty imposed upon the defendant; that it properly stated the circumstances under which the defendant would be liable for Victor's act; and that a new trial should not have been granted because of the alleged error in the charge. Gutmann v. Anderson, — Minn. —, 171 N. W. 303..... ..... 19:968-975

12. — When foreman is not.

It is a general principle that the power conferred upon a foreman to direct the work of the employees in the mere manner of its doing does not make him a vice principal. Gutmann v. Anderson, — Minn. —, 171 N. W. 303.....19:968-975

13. Injuries to railroad section foreman — Creosote poisoning — Proximate cause of permanent injuries — Sufficiency of evidence.

In an action against a railroad company by a section foreman for personal injuries caused by his being poisoned by wet creosote on ties which he was unloading, wherein the testimony was conflicting as to whether plaintiff's permanent injuries flowed naturally from defendant's negligence in failing to warn plaintiff of the danger of poisoning and were the proximate consequences thereof, held that there was evidence requiring the submission of such question to the jury and authorizing them to find such issue for the plaintiff. Collins v. Pecos & Northern Texas Ry. Co., — Tex. Civ. App. —, 212 S. W. 477.... ..... 19:890-903

14. — — — Question for jury.

In an action against a railroad company by a section foreman for personal injuries caused by his being poisoned by wet creosote on ties which he was unloading, held that whether or not the permanent injuries sustained by plaintiff were the natural and proximate result of defendant's original negligence in failing to warn plaintiff of the danger of poisoning was a question of fact for the jury. Collins v. Pecos & Northern Texas Ry. Co., — Tex. Civ. App. —, 212 S. W. 477.....19:890-903

MOVING COMPANIES.

Annotation: Liability of transfer company for loss of or damage to goods intrusted to it, to move..... ..... 19:337-361

MUNICIPAL CORPORATIONS.

See also HIGHWAYS AND STREETS.

When city sued in tort not acquitted by acquittal of other defendants.

Where in an action for personal injuries the city defendant was charged with maintaining a defective street and the other defendants were charged with operating an auto at a reckless speed without lights and without signal, the delict charged against the city is of a totally different character from that charged against the other defendants and, there being no sort of relationship between the city and such other defendants, the acquittal of the latter does not in law amount to an acquittal of the city. Sexton v. City of Rockhill, 107 S. C. 506, 93 S. E. 180 ..... 19:619-632

NEGLIGENCE.

See also RES IPSA LOQUITUR.

Annotation: Liability of storekeeper for injury to customer in store 19:586-618

Annotation: Liability of one negligently putting a person in peril, to one injured while attempting rescue.. ..... 19:674-699

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1. When actionable.

Negligence may exist abstractly, but to render it actionable, it must be concretely incorporated into some injury. Collins v. Pecos & Northern Texas Ry. Co., — Tex. Civ. App. —, 212 S. W. 477.....19:890-903

2. Elements.

Negligence rests primarily on two elements: First, reason to anticipate injury, and, second, failure to perform the duty arising on account of that anticipation. Collins v. Pecos & Northern Texas Ry. Co., — Tex. Civ. App. —, 212 S. W. 477....19:890-903

3. — Anticipation of injury—Distinction.

Anticipation of injury as applied in the determination of negligence and proximate cause should not be confused. The former is an element of negligence, while the latter is used to denote the relative position of cause to effect in ascertaining whether cause is so related to effect as to bring negligence in union with the result rendering liable a negligent actor for certain consequences. Collins v. Pecos & Northern Texas Ry. Co., — Tex. Civ. App. —, 212 S. W. 477 .....19:890-903

4. — — Incorporation in proximate cause of anticipation of results.

Proximate cause incorporates in it such anticipation of results as ought, from the circumstances, to have been foreseen as the natural consequences flowing from a negligent act. Collins v. Pecos & Northern Texas Ry. Co., — Tex. Civ. App. —, 212 S. W. 477 ..... 19:890-903

5. Care and diligence — Question of law or fact.

Care and diligence are generally a mixed question of law and fact; when the facts are undisputed and the deductions therefrom indisputable, or the duty is fixed by law and is the same under all circumstances, the question is for the court, but if the facts are disputed or the inference of negligence is a matter of discretion, it must be submitted to the jury. Central of Georgia R. Co. v. Robertson, — Ala. —, 83 So. 102.....19:822-856

6. Contributory negligence—Rule of proof.

The rule that, while contributory negligence is an affirmative defense and to be proved as any other affirmative defense by the party pleading it, such defense may be established by the testimony of the plaintiff upon either direct or cross-examination, is a rule of proof and not a rule of pleading. Bruenn v. North Yakima School Dist. No. 7, Yakima County, 101 Wash. 374, 172 Pac. 569..... ..... 19:857-871

7. Proximate cause—Determination.

Whether a result can be chargeable to a certain dominant cause is determined by ascertaining whether the result flows naturally, without lapse, from the cause, although there may be intervening ancillary or subsidiary causes which contribute to the injury. Collins v. Pecos & Northern Texas Ry. Co., — Tex. Civ. App. —, 212 S. W. 477.....19:890-903

8. — —.

Where some injury has resulted, chargeable to negligence, later followed by serious consequences, to ascertain whether these consequences proximately flow from the negligence, it is always necessary to look back down the line for causation, and if the consequences naturally flow from the negligence, without the intervention of any independent cause, such consequences ought to have been foreseen, and are chargeable to the original negligent act; or, on the other hand, if the negligent act produces an injury, and looking down the line

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to the future it can be ascertained that other and more serious injuries will naturally flow from the negligence, without any intervening independent cause, these consequences are probable and ought to be foreseen and are chargeable to the negligence. Collins v. Pecos & Northern Texas Ry. Co., — Tex. Civ. App. —, 212 S. W. 477 .....19:890-903

9. Rescue of another from danger—Right to effect.

The right of a person to rescue another from danger of any kind, though voluntarily exercised, is as perfect and complete as any other personal right, and the fact that the danger springs from a negligent act of a third person does not in any way affect or impair the right of rescue or the moral obligation to exercise it. Bond v. Baltimore & Ohio R. Co., — W. Va. —, 96 S. E. 932....19:674-699

10. — — Nature of right and obligation.

Such right and obligation are analogous to those of prevention of crime and protection of others from criminal injury. Bond v. Baltimore & Ohio R. Co., — W. Va. —, 96 S. E. 932..... ..... 19:674-699

11. — Rescuer's right of recovery for injuries sustained.

Where a rescuer has himself brought about the danger to the person rescued, or the negligence of such person is imputable to him, he cannot recover for injuries sustained in the rescue. Bond v. Baltimore & Ohio R. Co., — W. Va. —, 96 S. E. 932....19:674-699

12. — —.

A person injured in effecting the rescue of another from danger occasioned by the negligence of a third person is not precluded from right of recovery on the ground of his own immunity from danger or his voluntary incurrence of risk; if his intervention was not a rash nor clearly imprudent act, under the circumstances, he might recover. Bond v. Baltimore & Ohio R. Co., — W. Va. —, 96 S. E. 932 .....19:674-699

13. — Proximate cause of injury sustained in effecting.

The proximate cause of an injury inflicted in the effectuation of a rescue, by means of the negligence causing the danger and necessitating the rescue, is the negligent act causing both the danger and the injury. Bond v. Baltimore & Ohio R. Co., — W. Va. —, 96 S. E. 932.....19:674-699

14. — Contributory negligence on part of rescuer.

A voluntary incurrence of risk in effecting the rescue of another from danger occasioned by the negligence of a third person does not constitute contributory negligence unless the act of intervention was performed under such circumstances as would make it rash or reckless in the estimation of ordinarily prudent persons. Bond v. Baltimore & Ohio R. Co. — W. Va. —, 96 S. E. 932.....19:674-699

15. — Effect of contributory negligence of person rescued.

Contributory negligence on the part of a person rescued from danger occasioned by the negligence of a third person does not preclude the rescuer's right of recovery from such third person for injuries sustained in the rescue. Bond v. Baltimore & Ohio R. Co., — W. Va. —, 96 S. E. 932..... ..... 19:674-699

16. — Imputation to rescuer of antecedent negligence of person rescued.

In such case, the antecedent negligence of the person rescued is not imputable to the person effecting the

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rescue. Bond v. Baltimore & Ohio R. Co., — W. Va. —, 96 S. E. 932..... ..... 19:674-699

17. — Error of judgment.

As the right is usually exercised on occasions of emergency, the actor ordinarily finds it necessary to determine his course of conduct without time or opportunity for deliberation and mature consideration as to the danger to himself, attending his effort, wherefore the law does not hold him responsible for a mere error of judgment. Bond v. Baltimore & Ohio R. Co., — W. Va. —, 96 S. E. 932.... ..... 19:674-699

18. — Intending passenger crossing railroad track—Action by rescuer against railroad company for personal injuries sustained—Last clear chance—Question for jury.

In an action against a railroad company for personal injuries sustained by plaintiff in rescuing an intending passenger who was in danger of being run down by defendant's train which she intended to board as she negligently crossed the track from the station to the boarding platform, held that there was evidence of defendant's last chance to prevent injury amply sufficient to warrant submission to the jury of the issue as to its existence. Bond v. Baltimore & Ohio R. Co., — W. Va. —, 96 S E. 932.... ..... 19:674-699

19. — — Evidence of defendant's negligence.

In an action against a railroad company for personal injuries sustained by plaintiff in rescuing an intending passenger who was in danger of being run down by defendant's train which she intended to board as she crossed the track from the station to the boarding platform, where it appeared that the engineer was keeping a lookout on his side of the engine but there was no evidence of a lookout on the other side by the fireman, held that the failure to maintain an adequate lookout covering the entire track, while running into the station, under the circumstances shown, was evidence of negligence. Bond v. Baltimore & Ohio R. Co., — W. Va. —, 96 S. E. 932.....19:674-699

20. Fall on premises of another—Presumption of negligence on part of owner—Res ipsa loquitur.

A mere fall of a person on the premises of another, without any evidence to show how the fall was occasioned, raises no presumption of negligence on the part of the owner; and the doctrine of res ipsa loquitur, which is only applicable when the thing shown speaks of the negligence of the defendant, not merely of the happening of the accident, does not apply. Garland v. Furst Store, — N. J. L. —, 107 Atl. 38.. 19:586-618

21. — Action for injuries—Sufficiency of evidence—Negligence of storekeeper.

In an action against a storekeeper for personal injuries sustained by a customer when she fell on the floor of defendant's store, held that there was no testimony worthy of the name which showed that the defendant was negligent. Garland v. Furst Store, — N. J. L. —, 107 Atl. 38....19:586-618

22. — — — Safety of floor.

The fact, appearing in an action against a storekeeper for personal injuries sustained by a customer when she fell on the floor of defendant's store, that, while the floor was undoubtedly smooth, it apparently was not slippery as it had been traversed by thousands of people every week during the four years succeeding its construction and no one had ever been known to slip on it before, tends to

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show that the floor was reasonably safe for the use of persons resorting to the store. Garland v. Furst Store, — N. J. L. —, 107 Atl. 38..19:586-618

23. Sufficiency of evidence—Injuries sustained by child on playground.

In an action against a school district for personal injuries sustained by a child while playing on a teeter board on a public school playground, held, on a review of the evidence as to the supervision of the playground, that the claim that the verdict was contrary to the evidence would have to be rejected. Bruenn v. North Yakima School Dist. No. 7, Yakima County, 101 Wash. 374, 172 Pac. 569 ..... 19:857-871

NOTICE.

When proof of giving necessary.

Where liability is made to depend at all upon notice to a party, the adversary party must establish the notice before the other is called upon to contest it. Garland v. Furst Store, — N. J. L. —, 107 Atl. 38..19:586-618

OFFICERS.

Annotation: Liability of school districts, boards or officers for negligence of themselves or their agents..... ..... 19:857-871

OIL.

See also EXPLOSIONS.

Annotation: Liability for damage caused by casting oil or like substance upon water.....19:932-952

RAILROADS.

See also CARRIERS; FEDERAL EMPLOYERS' LIABILITY ACT.

Annotation: Injury by runaway railroad cars.....19:992-1008

1. Runaway freight cars—Damage to property—Liability.

In an action against a railroad company for damage to personal property struck by runaway freight cars which had been left standing on a slight grade, near the edge of a steeper grade, insufficiently secured by brakes which were not locked, and without safe chocks, and which had been set in motion by the action of a 16-year-old boy in releasing the brake and removing the brick which had been used as a chock, held that, although defendant was not an insurer, it was liable for injury to plaintiff's property proximately caused by its negligence. Southern Mirror Co. v. Norfolk & Western Ry. Co., 176 N. C. 397, 97 S. E. 47.....19:992-1008

2. — — Persons liable — Concurrent negligence.

In an action against a railroad company for damage to personal property struck by runaway freight cars which had been left standing on a slight grade near the edge of a steeper grade, insufficiently secured by brakes which were not locked, and without safe chocks, and which had been set in motion by the action of a 16-year-old boy in releasing the brake and removing the brick which had been used as a chock, held that, if the act of the boy and the negligence of the defendant were concurrent, the plaintiff could sue both or either of them. Southern Mirror Co. v. Norfolk & Western Ry. Co., 176 N. C. 397, 97 S. E. 47.....19:992-1008

3. — — Intervening negligence — Proximate cause.

In an action against a railroad company for damage to personal property struck by runaway freight cars which had been left standing on a slight grade, near the edge of a steeper grade, insufficiently secured by brakes

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which were not locked, and without safe chocks, and which had been set in motion by the action of a 16-year-old boy in releasing the brake and removing the brick which had been used as a chock, held that the case was not one of an injury caused by intervening negligence, independent of the defendant's negligence, and without which the injury would not have occurred, but that the position of the cars was the latest and proximate cause of the damage. Southern Mirror Co. v. Norfolk & Western Ry. Co., 176 N. C. 397, 97 S. E. 47..... ..... 19:992-1008

4. — — Sufficiency of evidence.

In an action against a railroad company for damage to personal property struck by runaway freight cars which had been left standing on a slight grade, near the edge of a steeper grade, insufficiently secured by brakes which were not locked, and without safe chocks, and which had been set in motion by the action of a 16-year-old boy in releasing the brake and removing the brick which had been used as a chock, held that the jury were justified upon the evidence in finding that the defendant was guilty of negligence. Southern Mirror Co. v. Norfolk & Western Ry. Co., 176 N. C. 397, 97 S. E. 47.....19:992-1008

5. Unlawful speed of train as negligence per se.

It is negligence per se for a railroad train to run at an unlawful speed at the time of collision with a street car at a crossing. Ellis v. Chicago & N. W. Ry. Co., 167 Wis. 392, 167 N. W. 1048 .....19:142-257

6. — Collision with street car—Proximate cause.

The operation of a railroad train at a prohibited speed, resulting in a collision with a street car at a crossing, was the proximate cause of the accident. Ellis v. Chicago & N. W. Ry. Co., 167 Wis. 392, 167 N. W. 1048... ..... 19:142-257

RELEASE.

Annotation: Reliance upon mistaken or wilfully false statement of physician as to extent of injuries or progress towards recovery, as ground for avoiding release of right of action.. ..... 19:753-821

1. Construction—Applicability of maxim.

In an action against a broker for his negligent loss of money intrusted to him for investment purposes, held that the maxim "verba generalia restringuntur ad habilitatem rei vel personae" might well be applied to a receipt, claimed by the defendant to constitute a release of the claim sued on. Heiser v. Reynolds, — Pa. —, 106 Atl. 888.....19:362-371

2. Personal injuries — Mutual mistake —Trial of issue at law.

The issue as to whether a release for personal injuries was the result of mutual mistake is triable at law. Malloy v. Chicago Great Western R. Co., — Iowa —, 170 N. W. 481..... ..... 19:753-821

3. — Basis of settlement—Statement of physician—Evidence.

In an action against a railroad company for personal injuries sustained by a helper in a switching crew, in which action the defendant pleaded a compromise and release, held that under the evidence the jury might well have found that both the plaintiff and the defendant, acting through its superintendent, based their settlement on the statement by the defendant's physician that the plaintiff was all right "to go to work, now," that he was "all healed up," and that he was "just as good as ever."

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Malloy v. Chicago Great Western R. Co., — Iowa —, 170 N. W. 481..... ..... 19:753-821

4. — **Rescission—Mistake of fact.**

A mistake of fact, to constitute the basis of rescission of a release for personal injuries, must relate to some present or past event. Malloy v. Chicago Great Western R. Co., — Iowa —, 170 N. W. 481....19:753-821

5. — — — **Statements of physician.**

In an action against a railroad company for personal injuries sustained by a helper in a switching crew, in which action the defendant pleaded a compromise and release, held that the statements of the defendant's physician that the plaintiff was all right "to go to work, now," that he was "all healed up," and that he was "just as good as ever," related to the present and described the plaintiff's condition in apt language as it then was, and that they were statements of facts and were intended as such, so as to render a mistake on the part of the physician in the matter ground for rescission of the release. Malloy v. Chicago Great Western R. Co., — Iowa —, 170 N. W. 481 ..... 19:753-821

6. — — **Offer to return consideration —Necessity.**

Ordinarily, as a condition precedent to rescission of a release for personal injuries, an offer to return the consideration received is essential to the maintenance of the action, but where the amount paid is for some specified injury or for loss of time or the like, and it is sought in the action to recover for some additional injury not contemplated in the contract of release or for damages consequent on injuries necessarily excluded in computing the consideration paid for the release, as where such payment is for loss of time only, or specific items other than injuries on which the action is based, then and in any such event tender of return of the consideration is not essential to the maintenance of the action. Malloy v. Chicago Great Western R. Co., — Iowa —, 170 N. W. 481 ..... 19:753-821

7. **Personal injuries to railroad employee—Basis of settlement—Statements of physician — Fraud— Sufficiency of evidence.**

In an action against a railroad company for personal injuries sustained by a helper in a switching crew, in which action the defendant pleaded a compromise and release, held that it would seem that the evidence was sufficient to carry to the jury the issue of fraud in the statements of the defendant's physician on which the release as based. Malloy v. Chicago Great Western R. Co., — Iowa —, 170 N. W. 481 .....19:753-821

8. — **Fraud—Mutual mistake—Direction of verdict for defendant.**

Where, in an action against a railroad company for personal injuries sustained by a helper in a switching crew, the defendant pleaded a compromise and release and the plaintiff replied by pleading both that the release was procured by fraud and that it was based on mutual mistake, and there was no motion to require the plaintiff to elect on which of such issues he would stand and the evidence sustaining either was sufficient to carry it to the jury, it was error for the trial court to direct the return of a verdict for the defendant. Malloy v. Chicago Great Western R. Co., — Iowa —, 170 N. W. 481....19:753-821

9. — **Mutual mistake—Inquiry concerning consideration, etc.**

In an action against a railroad com-

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pany for personal injuries sustained by a helper in a switching crew, in which action the defendant pleaded a compromise and release, held that, though the release was general, covering injuries of every kind and nature and extending forever, inquiry concerning the nature of the consideration and for what computed was permissible and was not precluded by the terms of the release, based as it was on a mutual mistake. Malloy v. Chicago Great Western R. Co., — Iowa —, 170 N. W. 481....19:753-821

10. — Basis of payment — Loss of time—Evidence.

In an action against a railroad company for personal injuries sustained by a helper in a switching crew, in which action the defendant pleaded a compromise and release, held that the fair inference to be drawn from the evidence was that the payment on which the release was based was for loss of time. Malloy v. Chicago Great Western R. Co., — Iowa —, 170 N. W. 481.....19:753-821

11. — Pleading—Evidence.

Where, in an action against a railroad company for personal injuries sustained by a helper in a switching crew, the defendant pleaded a compromise and release and the plaintiff's reply was in two counts, one pleading that the release was procured by fraud and the other that it was based on mutual mistake, held that, the reply having been in no manner assailed, all that was exacted was that the evidence be sufficient to carry either issue to the jury. Malloy v. Chicago Great Western R. Co., — Iowa —, 170 N. W. 481....19:753-821

RES IPSA LOQUITUR.

See also NEGLIGENCE.

1. Doctrine defined.

The doctrine of res ipsa loquitur may be stated thus: When a thing which has caused an injury is shown to be under the management of the party charged with negligence and the accident is such as in the ordinary course of things will not happen if those who have such management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the parties charged, that it arose from the want of proper care. Feldman v. Chicago Rys. Co., 289 Ill. 25, 124 N. E. 334, rev'g 212 Ill. App. 482.....19:279-297

2. Effect of applicability of doctrine.

Negligence is never presumed, but the circumstances surrounding the case where the maxim of res ipsa loquitur applies, amount to evidence from which the facts of negligence may be found; that is, in a case within the maxim of res ipsa loquitur, proof of the circumstances of such case and of the injury constitutes a prima facie case of negligence, and will justify a verdict unless such prima facie case is overcome by proof showing that the party charged is not at fault. Feldman v. Chicago Rys. Co., 289 Ill. 25, 124 N. E. 334, rev'g 212 Ill. App. 482 .....19:279-297

RESCUE.

Annotation: Liability of one negligently putting a person in peril, to one injured while attempting rescue.. ..... 19:674-699

SALES.

Annotation: Liability of vendor of machinery or other mechanical appliance for negligent construction, installation or assembling thereof, causing injury to another than vendee... ..... 19:961-967

1. Faulty installation of article sold—Damage by fire—Liability of seller to buyer.

In an action for damages for fire

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resulting from the operation of a patent baking oven manufactured and installed by defendant for plaintiff in accordance with the terms of a conditional sale contract, held that, if defendant's faulty performance of the work caused the fire, it was liable in damages even if the exact form in which injury to the plaintiff might result was not foreseen. Barabe v. Duhrkop Oven Co., 231 Mass. 466, 121 N. E. 415.....19:961-967

2. — — Liability of seller to owner of premises occupied by buyer.

In an action for damages for fire resulting from the operation of a patent baking oven manufactured by defendant and installed by it for the occupant of plaintiff's premises, in accordance with the terms of a conditional sale contract with such occupant, held that the defendant owed to the plaintiff as the landowner the duty of not causing injury to her property by its tortious acts or misfeasance and that, if the jury found that when properly used and because of insufficient construction, the oven became a dangerous instrumentality which would be likely to set the plaintiff's buildings on fire, the defendant was liable in damages. Barabe v. Duhrkop Oven Co., 231 Mass. 466, 121 N. E. 415.....19:961-967

3. — — Action by buyer—Instruction.

In an action for damages for fire resulting from the operation of a patent baking oven manufactured and installed by defendant for plaintiff in accordance with the terms of a conditional sale contract, held that the jury were correctly instructed that while defendant was under no obligation to remove the truss beam directly over and in contact with the masonry of the arch at the top of the oven, to which, as the jury could find, the fire bursting through the bricks was communicated because the interstices had not been sufficiently filled with mortar, it was required to use reasonable care to protect the truss beam from combustion. Barabe v. Duhrkop Oven Co., 231 Mass. 466, 121 N. E. 415.... ..... 19:961-967

SCHOOL DISTRICTS.

Annotation: Liability of school districts, boards or officers for negligence of themselves or their agents..... ..... 19:857-871

Action against for negligence—Statute prohibiting maintaining of action—Effect on judgment in supreme court on appeal.

Respondent on an appeal from a judgment against a school district for personal injuries sustained by a child on a public school playground, which judgment was rendered approximately a year prior to the taking effect of Laws 1917, p. 332, ch. 92, providing, in effect, that no such action should be brought or "maintained" against any school district, held not to be maintaining an action in the supreme court within the meaning of such statute. Bruenn v. North Yakima School Dist. No. 7, Yakima County, 101 Wash. 374, 172 Pac. 569..... ..... 19:857-871

SHIPPING.

Annotation: Application of common law and state statutes to actions for personal injury to or death of seaman 19:309-336

STATUTES.

Construction—Retroactive operation.

Retroactive statutes are generally regarded with disfavor, and, where it does not clearly appear that such was the legislative intent, the court will not give the statute a retroactive effect where to do so would impair ex-

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isting rights. Bruenn v. North Yakima School Dist. No. 7, Yakima County, 101 Wash. 374, 172 Pac. 569.. ..... 19:857-871

STORES.

Annotation: Liability of storekeeper for injury to customer in store. 19:586-618

STREET RAILROADS.

1. Occupancy of street—Condition of grant of right.

A street railway company does not occupy a city street to the exclusion of other public uses to which the street is adapted, the grant to it being under the implied condition that it could not unreasonably interfere with such uses. Chace Trucking Co. v. Richmond Light & Railroad Co., 225 N. Y. 435, 122 N. E. 210, rev'g 173 N. Y. App. Div. 663, 160 N. Y. Supp. 326.....19:515-538

2. — Rights of company and traveler.

Reasonable use of a city street, occupied by a street railway company, with concurrent rights, is the rule as between the company and travelers on the street. Chace Trucking Co. v. Richmond Light & Railroad Co., 225 N. Y. 435, 122 N. E. 210, rev'g 173 N. Y. App. Div. 663, 160 N. Y. Supp. 326 .....19:515-538

3. — Interference with use of street by travelers.

A street railway company, occupying a city street, may not interfere with the reasonable use of such street by travelers upon it even if their use of it involves temporary obstruction of the company's traffic or interference with its wires. Chace Trucking Co. v. Richmond Light & Railroad Co., 225 N. Y. 435, 122 N. E. 210, rev'g 173 N. Y. App. Div. 663, 160 N. Y. Supp. 326.....19:515-538

4. — Use of street by traveler.

A traveler's use of a city street, occupied by a street railway company, must be reasonable, and the traveler may not unduly interrupt the operations of the road nor negligently injure the company's structures. Chace Trucking Co. v. Richmond Light & Railroad Co., 225 N. Y. 435, 122 N. E. 210, rev'g 173 N Y. App. Div. 663, 160 N. Y. Supp. 326.....19:515-538

5. — Unreasonable use of street by traveler—Moving of pile driver.

The moving of a pile driver in a city street, occupied by a street railway company, is not an unreasonable use of such street as against the company. Chace Trucking Co. v. Richmond Light & Railroad Co., 225 N. Y. 435, 122 N. E. 210, rev'g 173 N. Y. App. Div. 663, 160 N. Y. Supp. 326 ..... 19:515-538

6. Care required as to pedestrian.

A street car company is required to use only ordinary care to avoid injuring a pedestrian. Feldman v. Chicago Rys. Co., 289 Ill. 25, 124 N. E. 334, rev'g 212 Ill. App. 482..19:279-297

7. Electrocution of horses attached to pile driver—Contributory negligence —Question for jury.

In an action against a street railway company for the killing by electrocution of certain of plaintiff's horses when the pile driver to which they were attached and which was being moved in a city street came in contact with defendant's trolley wires, which wires defendant had sent a wrecking gang to lift in order that the pile driver might be taken thereunder in safety, held that, under the circumstances, the question of plaintiff's contributory negligence was for the jury. Chace Trucking Co. v. Richmond Light & Railroad Co., 225 N. Y.

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435, 122 N. E. 210, rev'g 173 N. Y. App. Div. 663, 160 N. Y. Supp. 326.. ..... 19:515-538

8. — Negligence—Question for jury.

In an action against a street railway company for the killing by electrocution of certain of plaintiff's horses when the pile driver to which they were attached and which was being moved in a city street came in contact with defendant's trolley wires, which wires defendant had sent a wrecking gang to lift, in order that the pile driver might be taken thereunder in safety, held that there was a fair question of fact for the jury as to whether defendant's servants were not negligent in stating that they could and would lift the wires if danger became imminent and in inviting the plaintiff to drive on, when they subsequently claimed that such action on their part was impossible. Chace Trucking Co. v. Richmond Light & Railroad Co., 225 N. Y. 435, 122 N. E. 210, rev'g 173 N. Y. App. Div. 663, 160 N. Y. Supp. 326...19:515-538

9. — Authority of servants—Question for jury.

In an action against a street railway company for the killing by electrocution of certain of plaintiff's horses when the pile driver to which they were attached and which was being moved in a city street came in contact with defendant's trolley wires, which wires defendant had sent a wrecking gang to lift in order that the pile driver might be taken thereunder in safety, held that the jury might find that, in stating to the plaintiff that they could and would lift the wires if danger became imminent, defendant's servants were acting within the scope of their authority. Chace Trucking Co. v. Richmond Light & Railroad Co., 225 N. Y. 435, 122 N. E. 210, rev'g 173 N. Y. App. Div. 663, 160 N. Y Supp. 326....19:515-538

10. — Lifting trolley wires for passage of pile driver—Whether acting as volunteer.

A street railway company which sends a wrecking gang to lift its trolley wires in a certain street in order that a pile driver which is being moved by a third person in such street may be taken under the wires is not a mere "volunteer" in so doing, but is performing its legal duty. Chace Trucking Co. v. Richmond Light & Railroad Co., 225 N. Y. 435, 122 N. E. 210, rev'g 173 N. Y. App. Div. 663, 160 N. Y. Supp. 326.....19:515-538

TORTS.

1. Violation of statute or ordinance as defense.

In actions of tort, while a plaintiff cannot obtain the aid of a court to relieve him from the direct consequence of his own illegal act, the mere fact that he was violating a statute or ordinance when injured does not necessarily prevent his recovery. Todd v. Traders' & Mechanics' Ins. Co., 230 Mass. 595, 120 N. E. 142.... ..... 19:428-440

2. — Evidence of negligence.

The violation of a statute, by the plaintiff in a tort action, is considered "evidence of negligence" on his part as to all consequences that the statute was intended to prevent, but if his violation thereof was merely a condition or an attendant circumstance of his injury, and not a proximate contributing cause, he may recover from the wrongdoer. Todd v. Traders' & Mechanics' Ins. Co., 230 Mass. 595, 120 N. E. 142.....19:428-440

TRANSFER COMPANIES.

Annotation: Liability of transfer company for loss of or damage to goods intrusted to it, to move..... ..... 19:337-361

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TRIAL.

1. Conduct of judge—Lack of suavity.

Defendant, in a hotly-contested personal injury action, held to have had a fair trial and to have no ground for complaint notwithstanding the fact that the trial judge was not, at all times, as suave as he would have been under other circumstances. Lang v. Marshalltown Light, Power & Railway Co., — Iowa —, 170 N. W. 463 ..... 19:69-94

2. Motion for directed verdict—How evidence must be viewed.

On defendant's motion for a directed verdict in its favor, made at the close of all of the evidence, it is the duty of the court to take that view of the evidence most favorable to the plaintiff. Pittsburgh, C., C. & St. L. Ry. Co. v. Cole, — C. C. A. —, 260 Fed. 357.....19:559-585

3. Right to dispose of case as matter of law—Testimony not in conflict.

Although testimony is not in conflict, it does not follow that the case should be disposed of as matter of law, if different inferences might reasonably be drawn as to its import. Woods v. Chalmers Motor Car Co., 207 Mich. 556, 175 N. W. 449...19:932-952

4. Questions for jury—Weight of testimony.

The weight of the testimony is a question for the jury to determine in the first instance. Marx v. Schultz, 207 Mich. 655, 175 N. W. 182..... ..... 19:976-991

5. — — Bona fide character of transaction.

Where conflicting inferences may be drawn from the facts proved as to whether a transaction is bona fide, the question is one for the jury. Ellis v. Chicago & N. W. Ry. Co., 167 Wis. 392, 167 N. W. 1048...19:142-257

6. Verdict—Interpretation.

It is the accepted principle in North Carolina procedure that a verdict must be interpreted and allowed significance by proper reference to the testimony and the charge of the court. Jones v. Norfolk Southern R. Co., 176 N. C. 260, 97 S. E. 48..19:258-278

7. — Special questions — Change by court in answers to.

Where the evidence is ample to sustain findings of the jury it is error for the court to change their answers to questions of the verdict. Ellis v. Chicago & N. W. Ry. Co., 167 Wis. 392, 167 N. W. 1048..19:142-257

WATER.

Annotation: Liability for damage caused by casting oil or like substance upon water.....19:932-952

WITNESSES.

1. Examination—Adverse witness.

In view of the fact that a plaintiff in an action for the death of his wife, alleged to have been caused by negligent labeling of a prescription at defendant's drug store, was practically obliged to call the attending physician as a witness, the trial court should have been liberal in allowing a showing of incidents occurring between plaintiff and such physician tending to show that such witness had become adverse and unfriendly to plaintiff's cause. Marx v. Schultz, 207 Mich. 655, 175 N. W. 182..19:976-991

2. — Question calling for conclusion.

In an action against a school district for personal injuries sustained by a child while playing on a teeter board on a public school playground, held that a question to a witness as to whether the school district was in the exercise of reasonable care in providing apparatus of the character in-

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volved was clearly inadmissible since it called for a conclusion to be reached by the jury and not by any witness. Bruenn v. North Yakima School Dist. No. 7, Yakima County, 101 Wash. 374, 172 Pac. 569..... ..... 19:857-871

3. Cross-examination—Matter brought out on direct examination.

Where a broker, sued for his negligent loss of money intrusted to him for investment purposes, claimed that a certain receipt constituted a release of the claim in suit and asked the witness testifying to the receipt whether "the paper was a settlement paper," the plaintiff was entitled on cross-examination to have the jury know of what it was a "settlement." Heiser v. Reynolds, — Pa. —, 106 Atl. 888.....19:362-371

4. — Question bearing on credibility of witness.

Defendant, in an action for personal injuries to a married woman, may, on the cross-examination of her husband, ask the latter, as bearing on his credibility, whether he has an action pending in the same court against the defendant, based upon the same alleged accident, for injuries to his wife. Lang v. Marshalltown Light, Power & Railway Co., — Iowa —, 170 N. W. 463..... 19:69-94

WORDS AND PHRASES.

1. "Remedy."

A "remedy" is the means employed to enforce a right or redress an injury. Chelentis v. Luckenbach Steamship Co., Inc., 247 U. S. 372, 62 L. Ed. 1171, 38 Sup. Ct. 372, aff'g 156 C. C. A. 234, 243 Fed. 536.....19:309-336

2. "Right."

A "right" is a well-founded or acknowledged claim. Chelentis v. Luckenbach Steamship Co., Inc., 247 U. S. 372, 62 L. Ed. 1171, 38 Sup. Ct. 372, aff'g 156 C. C. A. 234, 243 Fed. 536.. ..... 19:309-336

WORKMEN'S COMPENSATION.

Annotation: Liability of third person under compensation acts to injured workman or his employer for injuries negligently caused..19:112-141

Annotation: Liability under the compensation acts of owner, "principal employer" or general contractor, for injury to employee of subcontractor 19:298-308

Annotation: What are "agricultural" and "domestic" pursuits within exemption provisions of compensation acts.....19:372-390

Annotation: Lump sum awards under compensation acts.....19:441-460

Annotation: Apportionment of awards under compensation acts..... ..... 19:546-558

Annotation: Disfigurement as ground for compensation under workmen's compensation acts.....19:633-640

Annotation: Compensation under workmen's compensation acts for loss of or injury to eyes.....19:707-722

Annotation: Injury to or loss of fingers or hands and compensation therefor 19:904-931

Annotation: Status under the compensation acts of minor employees illegally employed or employed at prohibited work 19:968-975

1. Constitutionality—Due process of law—Basis of compensation.

The due process of law clause of the Fourteenth Amendment to the Federal Constitution does not require the states to base compulsory compensation for injuries to employees solely upon loss of earning power. New York Cent. R. Co. v. Bianc, 250 U. S. 596, 63 L. Ed. 1161, 40 Sup. Ct. 44, aff'g 226 N. Y. 199, 123 N. E. 82.. ..... 19:633-640

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2. —Federal Constitution—Amount of compensation—Physical impairment.

There is no reason, under the Federal Constitution, why a state, in ascertaining the amount of compensation to be paid for injury to an employee, may not take into consideration any substantial physical impairment attributable to the injury whether it immediately affects earning capacity or not. New York Cent. R. Co. v. Bianc, 250 U. S. 596, 63 L. Ed. 1161, 40 Sup. Ct. 44, aff'g 226 N. Y. 199, 123 N. E. 82.....19:633-640

3. — California act—Awards against third persons.

Section 25 of the Workmen's Compensation, Insurance and Safety Act of 1917 (Stats. 1917, p. 853), relating to "the liability of principal employers and contracting employers, general or intermediate, for compensation * * * when other than the immediate employer of the injured employee," is unconstitutional in so far as it attempts to authorize the awarding of compensation against a third person not an employer, and such section was not ratified and rendered valid by the amendment of section 21, article 20, of the Constitution, adopted in 1918. Perry v. Industrial Accident Commission of California, — Cal. —, 181 Pac. 788.....19:298-308

4. — New York act—Allowance for serious disfigurement of face or head.

It was not unreasonable, arbitrary, nor contrary to fundamental right to embody in the New York Workmen's Compensation Law, the provision, inserted by the amendment of 1916 (Laws 1916, ch. 622), for a special allowance of compensation for a serious disfigurement of the face or head. New York Cent. R. Co. v. Bianc, 250 U. S. 596, 63 L. Ed. 1161, 40 Sup. Ct. 44, aff'g 226 N. Y. 199, 123 N. E. 82 ..... 19:633-640

5. — — —.

The allowance, prescribed by the 1916 amendment to the New York Workmen's Compensation Law (Laws 1916, ch. 622), of not more than $3,500 for serious disfigurement of the face or head does not exceed the constitutional limitations on state power. New York Cent. R. Co. v. Bianc, 250 U. S. 596, 63 L. Ed. 1161, 40 Sup. Ct. 44, aff'g 226 N. Y. 199, 123 N. E. 82.. ..... 19:633-640

6. Power of state—Award for serious disfigurement of face or head.

Whether an award to an employee of compensation for a serious disfigurement of the face or head should be made in combination with or independently of the compensation allowed for the mere inability to work, and whether the compensation should be paid in a single sum or in instalments are matters of detail for the state to determine. New York Cent. R. Co. v. Bianc, 250 U. S. 596, 63 L. Ed. 1161, 40 Sup. Ct. 44, aff'g 226 N. Y. 199, 123 N. E. 82....19:633-640

7. — — Mode of measuring award.

If a state recognizes or establishes a right of action for compensation to injured workmen upon grounds not arbitrary nor fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law or according to some prescribed scale reasonably adapted to produce a fair result is for the state itself to determine. New York Cent. R. Co. v. Bianc, 250 U. S. 596, 63 L. Ed. 1161, 40 Sup. Ct. 44, aff'g 226 N. Y. 199, 123 N. E. 82.....19:633-640

8. "Agricultural laborer"—Employee of owners of co-operative threshing machine—Utah act.

The primary purpose, in the joint purchase of a threshing machine, to use such machine in threshing the

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grain of the owners is controlling in determining the nature and character of the owners' business for the purpose of the Utah Workmen's Compensation Act, and, even though the machine is used to a certain extent for commercial purposes, one employed to accompany the machine as a pitcher is an "agricultural laborer" within the meaning of such act. Jones v. Industrial Commission of Utah, — Utah —, 187 Pac. 833.....19:372-390

9. Notice of accident—Illinois act—Compliance with act.

Where, within 30 days after the accident, an injured employee tells a foreman of his employer of his injury, section 24 of the Illinois Workmen's Compensation Act [Call. 1916 Stat., par. 5475(24)] is complied with. Swift & Co. v. Industrial Commission, 288 Ill. 132, 123 N. E. 267..19:546-558

10. Proceeding for compensation—Hearsay evidence—Weight.

Conceding that hearsay evidence is admissible, under Stats. 1917, sec. 60a, in a proceeding under Workmen's Compensation, Insurance and Safety Act, it follows that the weight of the evidence is to be determined by the industrial accident commission. Perry v. Industrial Accident Commission of California, — Cal. —, 181 Pac. 788.. ..... 19:298-308

11. — Testimony as to conversations with deceased employee—Admissibility.

In a proceeding under the Workmen's Compensation, Insurance and Safety Act for compensation for the death of an "employee," held that the testimony of the "employer" and his wife as to conversations with the deceased, upon which testimony the "employer" relied to establish a partnership between him and the deceased instead of an employment by him of the deceased, although permitted by statute, was inadmissible under the common law because of the interest of the witnesses in the controversy. Perry v. Industrial Accident Commission of California, — Cal. —, 181 Pac. 788 ..... 19:298-308

12. Award—Injuries resulting in death—Failure to determine shares of beneficiaries—Illinois act.

On a claim for compensation under the Illinois Workmen's Compensation Act [Call. 1916 Stat., par. 5475(1) et seq.] for fatal injuries to an employee who was survived by a widow and a minor child, held that the industrial commission did not err in making the award to the deceased's administratrix who was also his widow without determining the amount to which each beneficiary was entitled. Swift & Co. v. Industrial Commission, 288 Ill. 132, 123 N. E. 267.....19:546-558

13. — Finger injury—Loss of first phalange—Illinois act.

The loss by an employee of about one-sixteenth of the phalange bone of his right index finger does not constitute the loss of the first phalange of such finger within the meaning of clause 6 of paragraph (e) of section 8 of the Illinois Workmen's Compensation Act [Call. 1920 Stat. par. 5475(8)], where, although the bone is more callous than usual, the injury does not interfere with the use of the distal joint, which still remains serviceable, and the tip of the finger will continue to be susceptible to cold and heat, and there remains enough of the bone to give the use of the finger. Edward E. McMorran & Co. v. Industrial Commission, 290 Ill. 569, 125 N. E. 284... ..... 19:904-931

14. — Additional or special compensation—Loss of sight of eye—Rhode Island act.

Where an injured employee, claiming the loss of sight of his right eye,

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has not sustained a total loss of the sight thereof, but, on the contrary, retains about 10 per cent of the normal vision, which is useful to a limited extent for certain purposes, and also retains a stereoscopic vision of some value although it will not afford him any assistance in a vocational pursuit, he is not entitled to additional or special compensation for the entire and irrecoverable loss of sight of an eye under the provisions of paragraph (b) of section 12 of article 2 of the Rhode Island Workmen's Compensation Act. Keyworth v. Atlantic Mills, — R. I. —, 108 Atl. 81.. ..... 19:707-722

15. — Medical services—Under Illinois act—Propriety.

On a claim for compensation under the Illinois Workmen's Compensation Act [Call. 1916 Stat., par. 5475(1) et seq.], held that an award for medical services was improper since the employee had elected to secure his own physician and, under section 8 of the Act [Call. 1916 Stat., par. 5475(8)], had elected to do so at his own expense. Swift & Co. v. Industrial Commission, 288 Ill. 132, 123 N. E. 267.....19:546-558

16. — Proportionate shares of beneficiaries—Illinois act—Determination by industrial commission.

Paragraphs (a) and (f) of section 7 of the Illinois Workmen's Compensation Act [Call. 1916 Stat., par. 5475(7)] do not provide for determination by the industrial commission of the proportionate share which each beneficiary is entitled to receive where the beneficiaries are all of the class specified in paragraph (a) of such section although the commission must, in order to determine the total amount of compensation, determine who is entitled to receive the same. Swift & Co. v. Industrial Commission, 288 Ill. 132, 123 N. E. 267..19:546-558

17. — Reduction on death of beneficiary—Illinois act.

By paragraph (a) of section 7 of the Illinois Workmen's Compensation Act [Call. 1916 Stat., par. 5475(7)], relating to the amount of compensation which shall be paid for death where the employee leaves a widow, child or children, the employer becomes liable, at all events, to pay a sum equal to four times the average earnings of the employee within the limitations there prescribed as to amount, and the legislature did not intend that the provisions of section 21 of the Act [Call. 1916 Stat., par. 5475(21)], regarding reduction of compensation in the event of the death of a beneficiary, should apply to cases enumerated in such paragraph. Swift & Co. v. Industrial Commission, 288 Ill. 132, 123 N. E. 267..19:546-558

18. — — —.

The proviso in section 21 of the Illinois Workmen's Compensation Act [Call. 1916 Stat., par. 5475(21)] concerning the death of a beneficiary receiving compensation provided for in section 7, etc., applies to those cases where such beneficiary dies leaving surviving a parent, sister or brother of the deceased employee who was at the time of his death dependent upon the deceased employee for support and who was receiving from such beneficiary a contribution towards support. Swift & Co. v. Industrial Commission, 288 Ill. 132, 123 N. E. 267..19:546-558

19. Review—Illinois act—End of disability — When petition may be maintained.

A petition for review of an original award for compensation payable in instalments may be maintained by the employer under paragraph (h) of section 19 of the Illinois Workmen's Compensation Act [Call. 1916 Stat., par. 5475(19)], on the ground that the disability of the employee has ended,

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where such petition is filed within 18 months of the original award, although an order for commutation to a lump sum has been entered by the industrial commission and not rejected by either party within the 10 days provided by the act. Peoria Ry. Co. v. Industrial Commission, 290 Ill. 177, 125 N. E. 1.....19:441-460

20. Finding of fact by industrial commission—Conclusiveness on supreme court—Illinois act.

Where there is competent evidence before the industrial commission fairly tending to prove a fact, the finding of such fact by the commission precludes its review by the supreme court. Swift & Co. v. Industrial Commission, 288 Ill. 132, 123 N. E. 267.. ..... 19:546-558

21. — Finding of existence of relationship of employer and employee—Conclusiveness.

The finding of the industrial accident commission, in a proceeding under the Workmen's Compensation, Insurance and Safety Act for the death of an employee, that the relationship between one against whom the award was made and the deceased was that of employer and employee, is binding on the supreme court. Perry v. Industrial Accident Commission of California, — Cal. —, 181 Pac. 788..... ..... 19:298-308

22. Right of action against third persons.

The right of an employee, under the Employers' Liability Act, to compensation from his employer for personal injuries does not exclude the right of an injured person to recover damages from third persons through whose fault the damage happened. City of Shreveport v. Southwestern Gas & Electric Co., 145 La. 680, 82 So. 785.. ..... 19:112-141

23. —— Subrogation of employer—Persons bound by subrogation agreement—Widow and child of deceased employee.

Where a city fireman was electrocuted, while fire fighting, by coming in contact with an electric company's wire which was strung several feet away from the burning building and above a sheet-iron awning which extended from such building, and the city settled with the deceased's widow and minor child under the Workmen's Compensation Act (No. 20 of 1914, p. 44), and at the time of accepting payment from the city the widow entered into an agreement whereby she subrogated it to all of the rights of herself and her child against the electric company, and stipulated that the city should pay over to her the full amount of the judgment recovered less that part which it had already paid to her for herself and her child, held, that the act of subrogation was valid not only as to the widow but as to the child as well. City of Shreveport v. Southwestern Gas & Electric Co., 145 La. 680, 82 So. 785.. ..... 19:112-141

24. — — Death of city fireman—Subrogation of city—Defenses to action by city.

In an action by a city against an electric company for the death of a city fireman by electrocution, resulting from the deceased's coming in contact, while fire fighting, with one of the company's wires strung several feet away from the burning building and above a sheet-iron awning extending from such building, where the city sued not in its own right but as the subrogee of the deceased's widow and children, to whom it had paid compensation under the Employers' Liability Law, held, that the electric company could not defend on the ground of contributory negligence on

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the part of the city, and estoppel because the city's electrician had not condemned the location of the wire, but, on the contrary, by not objecting to such location, had impliedly approved it. City of Shreveport v. Southwestern Gas & Electric Co, 145 La. 680, 82 So. 785.....19:112-141

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MASSACHUSETTS WORKMEN'S COMPENSATION ACT

AND

DECISIONS OF THE INDUSTRIAL ACCIDENT BOARD

WITH REFERENCES TO

NEGLIGENCE AND COMPENSATION CASES ANNOTATED

FRANK J. DONAHUE, Chairman

DUDLEY M. HOLMAN — DAVID T. DICKINSON

JOSEPH A. PARKS — THOMAS F. BOYLE

ROBERT E. GRANDFIELD, Secretary

CHICAGO

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MASSACHUSETTS APPENDIX

In the following appendix the Massachusetts Workmen's Compensation Act, as amended by the Acts of 1916, 1917, 1918, 1919 and 1920, is set forth in full, and is annotated with late decisions of the Supreme Judicial Court, together with a number of the latest British cases construing similar provisions of the English act. In addition to the cases reproduced in whole or in part in these annotations, specific references are made to **N. C. C. A.** where practically all of the American and several hundred British cases (covering the most important decisions of the English Court of Appeal and the House of Lords) are rendered accessible.

This appendix, presented to the Massachusetts subscribers to **N. C. C. A.** with the compliments of the publishers, is a comprehensive and thorough annotation of the Massachusetts act. Presenting, as it does, decisions accessible in no other publication, it enables the user to see at a glance, not only the authoritative construction of the various provisions of the Massachusetts act by the Supreme Judicial Court, but also the construction placed upon similar provisions in other compensation acts by the courts and industrial boards or commissions of other states and by the final tribunals of England.

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MASSACHUSETTS WORKMEN'S COMPENSATION ACT

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Chapter 751, Acts of 1911, as amended by chapters 172 and 571, Acts of 1912, chapters 445, 448, 586, 696, 746, 807 and 813, Acts of 1913, chapters 166, 338 and 708, Acts of 1914, chapters 123, 132, 183, 236, 244 and 275, Acts of 1915, chapters 198, 249, 269 and 297, Acts of 1917, and chapters 113, 119, 125 and 216, Acts of 1918.

PART I

MODIFICATION OF REMEDIES

¶ 1. Defenses removed.

Section 1. In an action[2] to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury[3] so sustained, it shall not be a defense:[4]

1. That the employee was negligent;[5]

2. That the injury was caused by the negligence of a fellow employee;[6]

3. That the employee had assumed the risk of the injury.[7]

¶ 2. Nonapplication to particular classes.

Sec. 2. The provisions of section one shall not apply[8] to actions to recover damages for personal injuries sustained by domestic servants[9] and farm laborers.[10]

1. See 16 N. C. C. A. 1161, note 1.
2. See 17 N. C. C. A. 1212, note 2.
3. See 13 N. C. C. A. 1195, note 3.
4. See 13 N. C. C. A. 1195, note 4.
5. See 17 N. C. C. A. 1212, note 5.
6. See 17 N. C. C. A. 1212, note 6.
7. See 17 N. C. C. A. 1212, note 7.
8. See 16 N. C. C. A. 1162, note 8.
9. See 13 N. C. C. A. 1196, note 9.

Employee waxing floor once a week not employed as janitor. The deceased had been employed as janitor by one K for several years, when he left and went to work for a shipbuilding cor-

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¶ 3. Application—Injuries to employee of subscriber.

Sec. 3. The provisions of section one shall not apply to actions to recover damages for personal injuries sustained by employees of a subscriber.[11]

¶ 4. Statutes not applicable to employees of subscriber.

Sec. 4. The provisions of sections one hundred and twenty-seven to one hundred and thirty-five, inclusive, and of one hundred and forty-one to one hundred and forty-three inclusive, of chapter five hundred and fourteen of the acts of the year nineteen hundred and nine, and of any acts in amendment thereof, shall not apply to employees of a subscriber while this act is in effect.

¶ 5. Waiver by employees, of right at common law.

Sec. 5. An employee of a subscriber shall be held to have waived his right of action at common law[12] to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, notice in writing that he claimed such right, or if the contract of hire was made before the employer became a subscriber, if the employee shall not have given the said notice[13] within thirty days of notice of such subscription. An employee who has given notice to his employer that he claimed his right of action at common law may waive[14] such claim by a notice in writing

poration, where he was employed continuously until his injury. Later the wife of the deceased was engaged to do a substantial part of the janitor work previously performed by her husband. She received a stated weekly compensation therefor. Her husband, at the suggestion of K, occasionally assisted her or worked in her stead when she was tired for which he received no compensation. Later the deceased was engaged by K regularly to wax the floor for which he was paid $1 every two weeks. He received mortal injuries in the course of and arising out of that employment. The court held that these circumstances did not warrant a finding that the deceased was employed as janitor; and that his average weekly wage was 50 cents. Marvin's Case, — Mass. —, 125 N. E. 154. (1919).

10. See 16 **N. C. C. A.** 1162, note 10.

What are "agricultural" and "domestic" pursuits within exemption provisions of compensation acts, 19 **N. C. C. A.** 372-390.

11. See 17 **N. C. C. A.** 1213, note 11.

12. See 13 **N. C. C. A.** 1196, note 11.

Liability of third person under compensation acts to injured workman or his employer for injuries negligently caused, 19 **N. C. C. A.** 112-141.

13. See 18 **N. C. C. A.** 1153, note 13.

Failure to reserve right complete bar to common-law action. The fact that the employer is a subscriber under the compensation act and that the employee has not reserved the common-law rights as provided in part 1, section 5, is a complete bar to such employee's common-law action, provided the injury arose out of and in the course of employment. White v. E. T. Slattery Co., — Mass. —, 127 N. E. 597 (1920).

14. See 13 **N. C. C. A.** 1197, note 13.

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which shall take effect five days after it is delivered to the employer or his agent. [See chapter 666, Acts of 1912.]

PART II

PAYMENTS

¶ 6. Compensation of employee.

Section 1. If an employee[15] who has not given notice of his claim of common law rights of action,[16] as provided in Part I, section five, or who has given such notice and has waived the same, receives a personal injury[17] arising out of[18] and in the course of[19] his employ-

15. See 16 N. C. C. A. 1163, note 14.
16. See 13 N. C. C. A. 1197, note 14.
17. See 18 N. C. C. A. 1154, note 17.
18. See 18 N. C. C. A. 1155, note 18.

Employee injured while attempting to fill bottle at a bubble fountain. The employer provided for the use of its employees a "bubble fountain" designed to be used by drinking from it directly. The employee testified that he had been made ill on an earlier occasion by drinking cold water from the fountain. Therefore he endeavored to fill an empty bottle from the fountain intending to let it stand and thereby to lessen the chill of the water. Finding some difficulty in making the water go into the bottle he pressed hard on it, and very suddenly the bottle burst as a result of which he received the injuries for which compensation was sought. Affirming a decree adverse to the claimant the court held that the injury did not arise out of a hazard connected with the employment. "The employee," said the court, "was acting outside the scope of his employment when he interjected that foreign instrumentality into his method of use of the fountain. His injury was not due to the fountain or the water, but to the bottle, a thing which had no connection whatever with the subscriber (employer) or the course of the employment. The appliance provided by the subscriber was diverted from its natural function to a purpose not disclosed to nor approved by the subscriber, and for which it was not designed." Bolden's Case, — Mass. —, 126 N. E. 668 (1920).

Mill-girl wearing her hair down her back; hair caught in machinery. The applicant, a girl of sixteen years, was employed at the respondents' mill as a "doffer." Her duties consisted of taking full bobbins off the frames and replacing them with empty ones. There were twenty-two frames in the room in which she worked, and she had to work on half of them. Five other girls worked with her. On the day in question, she started work at 8:15 a. m. She helped to doff two frames. Then she went into a place described as the "broad alley," and sat on a skip, where she and the other girls were accustomed to go when they were not required, and until the bobbins were full and ready to be removed. Another girl sat on another skip. The other girl had an apple, and she called to the applicant to sit with her and have a part of the apple. This she did. The applicant sat on the skip with her back leaning against the framework of the machine. She had her hair down. It was alleged by the employers that she and the other girls had been warned against having their hair down, and there were type-

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written notices in the mill prohibiting girls wearing their hair down their backs. It was dangerous to sit on the skips with their hair down, and leaning with their backs against the framework of the machinery as the applicant was doing. Her hair was caught in the machinery and she was injured. The County Court Judge held that the accident arose out of and in the course of the employment, made his award in favour of the applicant, and said that he was not satisfied that the applicant had received any adequate warning as to the danger of working with her hair down, or that she knew of the alleged notices on the subject. He accepted the applicant's evidence that she had been accustomed to work with her hair down except when sweeping. Upon appeal the decision was affirmed. McClure & Sons v. Matthews, 13 B. W. C. C. 221 (1920).

Insurance solicitor struck by street car while out obtaining insurance. The deceased, a solicitor and collector for a life insurance company, was struck and killed by a street car while running across the street to catch a car. He had left his home to take an elevated car and his immediate reason therefor was to make certain collections and to solicit some insurance which his superior officer desired him to obtain that day. His employment compelled him to make use of the public streets and to ride in street cars to call on prospective purchasers of new insurance and to make collections on his route. The insurer contended that the hazards of the street in their relation to the employment of the decedent were hazards common to persons engaged in any employment who have occasion to travel along the streets and were not a causative danger peculiar to decedent's employment. The court held that the contention of the insurer could not be maintained, since the risks to the decedent were greater because more constant than those that were incidental to the occasional and casual use of such streets by persons who used them in the ordinary way; and that the risk and hazard of decedent's employment were not to remote in their causative relation to the employment. Moran's Case, — Mass. —, 125 N. E. 591 (1920).

19. See 18 **N. C. C. A.** 1161, note 19.

Workman away from work on day of accident, going to mine in the afternoon for his week's wages injured by a runaway wagon while waiting about. Claimant a lad of sixteen was employed as a coal picker at the appellants' pit. On the day of the accident claimant had overslept himself. It was pay day and he went to the mine about 1 p. m. to get his wages. Pay lines were given out at about 1 o'clock to a man named S, who distributed them to the employees at work. It was a wet day, and there was a fire burning between the rails, and a short distance away was an empty wagon which was kept in position by a piece of wood to prevent it moving towards the fire. There was a block of wood between the wagon and the fire forming a seat, and on this claimant sat down as he was wet and cold. This was a usual thing for workmen to do and claimant had done it before. After sitting for a quarter of an hour or more at the fire he went to look for S but failing to find him he came back and sat down again by the fire. While waiting a wagon at the saw mill, through the carelessness of the workers there, ran along the rails and struck the empty wagon. The impact set this free, and claimant was run over, with the result that his right leg had to be amputated. On a claim for compensation the Sheriff-Substitute awarded compensation on the ground that the accident arose out of and in the course of the boy's employment,

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[Notes on "in the course of."]

This decision was affirmed by the Court of Session and by the House of Lords. There, Viscount Finley said: "It appears to me that it was a right arising out of the employment of the boy to go and get paid in the usual and proper manner for the work he had done. It was in the course of so going to get paid that he visited the works upon the Friday. Quite true, he did not go there to work, and probably did not expect to work, but he was still, so far as appears, one of the workmen of the appellants, and he came there, as was his right, to be paid for work done. In these circumstances, I think that what he did was something which arose out of his employment, and if not in the course of his employment to the extent of being a piece of work actually done, it was in the course of his employment in so far as he came there, under the terms which subsisted between him and his employer, to get paid for the work he had done." William Baird & Co., Ltd., v. McGraw, 13 B. W. C. C. 233 (1920).

Workman injured while riding his bicycle to work along company's private road leading to colliery where he was employed. The applicant, a boy employed at the respondent's colliery, used a bicycle to get to and from his work. On the morning in question he left his home, and after proceeding along the public road turned down into the company's private road some half a mile long which led to the colliery where the company had provided a cycle store in which their employees' bicycles could be stored. The boy had nearly reached the shed thus provided when he was run into by a man leaving the colliery riding a bicycle, and injured. On claim for compensation the County Court Judge held for the claimant saying: "I am of opinion that it was an implied term of the applicant's contract of service that he should do, or at any rate be entitled to do, that which he was doing at the time of his accident—namely, ride his bicycle along the respondents' private road, from the point where it turned off the highway to the cycle store where the applicant was in the habit of leaving his bicycle. I am, therefore, of opinion that the accident arose out of and in the course of the employment, and I award him the agreed amount of £3 15s. 6d. with costs on the B scale." Upon appeal this decision was affirmed. Simpson v. Bolsover Colliery Co., Ltd., 13 B. W. C. C. 173 (1920).

Farm hands told to go to place of work in van; choose to go in cart driven by employer's man. The applicant was a farm laborer, aged 41, who had been working for the respondent, a farmer, for some time. On October 6, 1919, she was told by the respondent to begin the following day to pick up potatoes with several other women, and was given a tram fare with instructions to take the tram in the morning as far as B where they would be met by a man called Edwards with a van and driven to the field. When the women got to B they found Edwards there with a van and also another man with an ordinary farm cart. Both men were in the employment of the respondent. The van was loaded with the sacks for the potatoes but the cart was empty. For some reason or other the women said they would ride in the cart, and Edwards said, "Come on and get into the van." The women refused; and Edwards said, "You are a lot of old fools," but made no attempt to stop them. He then drove off with the van and the cart followed, the driver of the cart walking by the horse's head. Going round a bend in the road the horse in the cart lost sight of the van in front and got "fussy," with the result that the wheel of the cart went

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[Notes on "in the course of."]

up the bank and the cart overturned. The applicant was thrown out and injured and was unable to work for some time. In the County Court the respondent's case was that the women were told to ride in the van and that they had disobeyed orders by riding in the cart; in other words, that they were making a pleasure trip in the tip-cart to please themselves. The County Court Judge held that the accident did not arise out of the applicant's employment, and made an award in respondent's favour. Reversing the decision Lord Sterndale said: "In my opinion his decision is wrong. The applicant was still in the course of the employment, though she was in a different vehicle from the usual van. And I think that the accident she met with while riding in the cart arose both out of and in the course of her employment, and the appeal must be allowed, and an award made in her favour, with costs here and below." Bird v. Price, 13 B. W. C. C. 143 (1920).

Employee on way to purchase theater tickets during lunch hour. Plaintiff was employed at defendant's store as a millinery buyer. She had a regular lunch hour between 1 and 2, to do with as she saw fit. About twenty minutes after one the plaintiff having eaten her lunch put on her street clothing to go out and purchase theater tickets for herself and mother. She used an elevator in the store which was intended for both employees and customers. When alighting from the elevator on the street floor she received the injuries for which she sought to recover in a common-law action. Holding that the injury arose out of and in the course of plaintiff's employment the court said: "When she entered the store on her way to work and pursued the proper course to her labors, while there in the performance of her duties as an employee and until she had left the store by the ordinary means of exit, she was engaged in the pursuit of her employment, entitled to the protection and subject to the limitations of the Workmen's Compensation Act." The court declared that in leaving the store on her own time she was in the same condition as she would have been if leaving the store at the end of her labor for the day. White v. E. T. Slattery Co., — Mass. —, 127 N. E. 597 (1920).

Employee stopping to talk to fellow workman and killed by electric shock while looking into tank out of curiosity. The deceased employee, while going from a telephone where he had answered a call to the room where he was employed, stopped to talk with a fellow workman on matters unconnected with the employment, and while so engaged leaned on a galvanized iron table and took hold of an electric lamp to enable him to look into a tank, merely for the purpose of satisfying his curiosity. He received a shock from the lamp which caused his death. The court held that the injury did not arise out of and in the course of the employment. Maronofsky's Case, — Mass. —, 125 N. E. 565 (1920).

Dyeing machine operator injured while making repairs on roof without authority from foreman. The employee operated two dyeing machines known as "jigs." In the dyeing room where he was employed there was a large amount of steam and at times water would drip upon him from the ventilator pipe. He complained to his foreman that the ventilators were not working properly and the foreman promised that they would be repaired. The employee testified that, because of a defect in the ventilator, "steam was coming down on him and condensing into water," and "water was dripping from above." Without the knowledge of the employer, he went from the dyeing room to the roof of the building.

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ment, he shall be paid[20] compensation by the association[21] as hereinafter provided[22] if his employer is a subscriber at the time of the injury.

¶ 7. Serious and wilful misconduct.

Sec. 2. If the employee is injured by reason of his serious and wilful misconduct,[23] he shall not receive compensation.

¶ 8. Double compensation.

Sec. 3. [*As amended, Laws* 1912, *c.* 571.] If the employee is injured by reason of the serious and wilful misconduct[24] of a subscriber or of any person regularly entrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled. In such case the subscriber shall repay to the association the extra compensation paid to the employee. If a claim is made under this section the subscriber shall be allowed to appear and defend against such claim only.

for the purpose of repairing the ventilator; a few feet from the window by which he came to the roof, there was a hole through which he fell onto a revolving fan, and was severely injured. Holding that the injury did not arise out of and in the course of the employment, the court said: "It was no part of the employee's occupation to repair the ventilator. Before the day of his injury he had never attempted this work, and without the knowledge or permission of his foreman, and without any express or implied authority from his employer, although seeking to promote its interests, he engaged in an undertaking which was not within the scope of his employment, and could not be found to arise out of it, or in its course." Koza's Case, — Mass. —, 128 N. E. 400 (1920).

Employee eating his lunch on railroad track, leaning against a car. Claimant was in the service of the city and was engaged in general teaming using his own horses and cart. He was paid $6.50 per day for his own services and the use of his property. On the day of the injury he had been hauling coal from a pile near a railroad. During the noon hour he sat on the railroad track and leaned against a railroad car while eating his luncheon. While so sitting an engine was attached to another car, and thereby the car against which he was leaning was caused to "kick" and claimant was "rolled under" that car and injured. While he was eating, his horses stood at the coal pile near by and were being fed. Claimant received no orders except as to places of receipt and delivery of his loads. Affirming a decree unfavorable to claimant the court held that the accident did not arise out of the employment, he not being in a place in which it was necessary for him to be in the course of his work, or in going to or coming therefrom, but rather in a place where he had no business to go incurring a danger of his own choosing. Haggard's Case, — Mass. —, 125 N. E. 565 (1920).

20. See 13 N. C. C. A. 1210, note 17.
21. See 13 N. C. C. A. 1210, note 18.
22. See 16 N. C. C. A. 1171, note 21.
23. See 18 N. C. C. A. 1162, note 23.
24. See 17 N. C. C. A. 1226, note 24.

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¶ 9. When compensation begins.

Sec. 4. [*As amended, Laws* 1916, *c.* 90.] No compensation shall be paid under this act for any injury which does not incapacitate the employee for a period of at least ten days from earning full wages, but if incapacity extends beyond the period of ten days, compensation shall begin on the eleventh day after the injury. When compensation shall have begun, it shall not be discontinued except with the written assent of the employee or the approval of the board, or a member thereof: *provided, however,* that such compensation shall be paid in accordance with section ten of Part II of said chapter seven hundred and fifty-one, as amended by section five of chapter seven hundred and eight of the acts of the year nineteen hundred and fourteen, if the employee in fact earns wages at any time after the original agreement is filed.

¶ 10. Medical and hospital services.

Sec. 5. [*As amended, Laws* 1914, *c.* 708; *Laws* 1917, *c.* 198; *Laws* 1920, *c.* 324.] During the first two weeks after the injury, and, if the employee is not immediately incapacitated thereby from earning full wages, then from the time of such incapacity, and in unusual[25] cases, in the discretion of the board, for a longer period, the association shall furnish[26] adequate and reasonable medical[27] and hospital services, and medicines, when they are needed. The employee shall have the right to select a physician other than the one provided by the association,[28] and in case he shall be treated by a physician of his own selection, or, where, in case of emergency[29] or for other justifiable cause,[30] a physician other than the one provided by the association is called in to treat the injured employee, the reasonable cost of his services shall be paid by the association, subject to the approval of the industrial accident board. Such approval shall be granted only if the board finds that the employee was so treated by such physician, or that there was such emergency or justifiable cause, and, in all cases, that the services were adequate and reasonable and the charges reasonable. In any case where the board is of opinion that the fitting of the employee with an artificial eye, or limb, or other mechanical appliance will promote his restoration to industry, it may order that he be provided with such artificial eye, limb, or appliance, at the expense of the insurer. (In effect April 15, 1920.)

25. See 18 N. C. C. A. 1165, note 25.
26. See 18 N. C. C. A. 1165, note 26.
27. See 18 N. C. C. A. 1165, note 27.
28. See 18 N. C. C. A. 1166, note 28.
29. See 13 N. C. C. A. 1214, note 23.
30. See 15 N. C. C. A. 1146, note 26.

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¶ 11. In case of fatal injury.

Sec. 6. [*As amended, Laws* 1914, *c.* 708, § 2.] If death results from the injury, the association shall pay the dependents[31] of the employee, wholly dependent[32] upon his earnings for support[33] at the time of the injury,[34] a weekly payment equal to sixty-six and two-thirds per cent of his average weekly wages, but not more than ten dollars nor less than four dollars a week for a period of five hundred weeks from the date of the injury;[35] but in no case shall the amount be more than four thousand dollars. If the employee leaves dependents only partially dependent upon his earnings for support at the time of his injury, the association shall pay such dependents a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents[36] bears to the annual earnings of the deceased at the time of his injury.[37] When weekly payments have been made to an injured employee before his death, the compensation[38] to dependents shall begin from the date of the last of such payments, but shall not continue more than five hundred weeks from the date of the injury. (In effect October 1, 1914.)

¶ 12. Dependency.

Sec. 7. [*As amended, Laws* 1914, *c.* 708, § 3; 1919, *c.* 204.] The following persons shall be conclusively presumed[39] to be wholly dependent for support upon a deceased employee:—

(*a*) A wife[40] upon a husband with whom she lives[41] at the time

31. See 16 **N. C. C. A.** 1173, note 30.
Apportionment of awards under compensation acts, 19 **N. C. C. A.** 546-558.
32. See 13 **N. C. C. A.** 1215, note 26.
33. See 13 **N. C. C. A.** 1215, note 27.
34. See 16 **N. C. C. A.** 1173, note 33.
35. See 13 **N. C. C. A.** 1216, note 29.
36. See 17 **N. C. C. A.** 1227, note 36.
37. See 18 **N. C. C. A.** 1166, note 37.
38. See 13 **N. C. C. A.** 1216, note 30.
39. See 16 **N. C. C. A.** 1174, notes 36 and 37.
40. See 16 **N. C. C. A.** 1174, note 38.
41. See 17 **N. C. C. A.** 1228, note 40.
Husband staying with wife and occupying same room at her mother's home, twice a week. The employee, who was killed, at the time of his marriage and until his death, lived with his mother. His wife both before and after marriage lived at the home of her mother. She was employed and earned $15 per week. From the time of the marriage the husband paid her $10 per week for her support and visited her twice a week, usually staying over night, when they occupied the same room. The employee's mother testified that he paid for the household supplies and also paid the house rent, purchased clothing for her and gave her money and that his mail came to her house. The Board awarded weekly compensation to both the widow and the mother. It was contended that the widow was entitled to full compensation as it was to be conclusively presumed that she was wholly depend-

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of his death, or from whom, at the time of his death, the industrial accident board shall find the wife was living apart[42] for justifiable cause[43] or because he had deserted[44] her. The findings of the board upon the question of such justifiable cause and desertion shall be final.

(*b*) A husband upon a wife with whom he lives at the time of her death.

(*c*) A child[45] or children under the age of eighteen years[46] (or over said age, but physically or mentally incapacitated from earning), upon the parent with whom he is or they are living at the time of the death of such parent, there being no surviving dependent parent: *provided,* that in the event of the death of an employee who has at the time of his death a living child[47] or children

ent upon her husband for support. The court affirming the award of the Board held that the widow was not entitled to this presumption, as at the time of her husband's death she was not living with him within the meaning of the act; that the words "with whom she lives" meant living together as husband and wife in the ordinary acceptance of the term, where there is a home and the husband and wife live together in the same household. Breakey's Case, — Mass. —, 126 N. E. 769 (1920).

42. See 16 **N. C. C. A.** 1174, note 40.

43. See 16 **N. C. C. A.** 1174, note 41.

44. See 16 **N. C. C. A.** 1175, note 42.

45. See 18 **N. C. C. A.** 1167, note 45.

Illegitimate children. "Child or children" refers only to a legitimate child or children. Gritta's Case, — Mass. —, 127 N. E. 889 (1920).

Provisions for deserted wife cannot be construed to apply to deserted child. In a proceeding under the act the question was whether a minor under the age of eighteen, who has been deserted by her father and is living apart from him for justifiable cause, is conclusively presumed to be wholly dependent on him for support, there being no surviving dependent parent. The statute of 1911, chapter 751, part 2, section 7, provided for dependents living at the time of the death with the husband, wife or parent. This provision was amended to the effect that a wife, living apart from her husband for justifiable cause or who had been deserted by him, should be conclusively deemed to be wholly dependent upon her husband. Statutes 1914, chapter 708, section 3. The child contended that the statute as thus amended declared in legal intendment, that a minor child under the age of eighteen deserted by her father and living apart from him for justifiable cause should be conclusively presumed to be dependent upon him for support, for the Legislature could not have intended to exclude, from the protection given to the surviving widow, little children incapable of self-support. The court held that such contention could not be maintained; that while the statute is to be construed broadly for the purpose of carrying out its manifest purpose, there cannot be read into it by implication or enlargement, provisions not fairly within its terms, and its express provisions cannot be extended beyond their reasonable import. "No intent," said the court, "to change the statute as to the dependency of children can be inferred from the amendatory act. In fact it expressly re-enacted the original provisions as to children." Moran's Case, — Mass. —, 125 N. E. 591 (1920).

46. See 18 **N. C. C. A.** 1167, note 46.

47. See 16 **N. C. C. A.** 1175, note 44.

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by a former wife or husband, under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning),[48] said child or children shall be conclusively presumed to be wholly dependent[49] for support upon such deceased employee, and the death benefit shall be divided between the surviving wife or husband and all the children of the deceased employee in equal shares, the surviving wife or husband taking the same share as a child.[50] The total sum due the surviving wife or husband and her or his own children shall be paid directly to the wife or husband for her or his own use and for the benefit of her or his own children and the sums due to the children by the former wife or husband of the deceased employee shall be paid to their guardians or legal representatives, for the benefit of such children.

In all other cases questions of dependency,[51] in whole or in part,[52] shall be determined in accordance with the fact, as the fact may be at the time of the injury; and in such other cases, if there is more than one person wholly dependent, the death benefit shall be divided[53] equally among them, and persons partly dependent, if any, shall receive no part thereof, and if there is no one wholly dependent and more than one person partly dependent, the death benefit shall be divided among them according to the relative extent of their dependency.[54]

(*d*) A child or children under the age of sixteen (or over the said age but physically or mentally incapacitated from earning) upon a parent who was at the time of his death legally bound to support, although living apart from, such child or children. (In effect May 29, 1919.)

¶ 13. Expenses of burial, etc., if no dependents.

Sec. 8. [*As amended, Laws* 1917, *c.* 269.] In all cases the association shall pay the reasonable expense of burial[55] which shall not exceed one hundred dollars. If the employee leaves dependents, such sum shall be a part of the compensation payable, and shall to that extent diminish the period of payment. (In effect June 20, 1917.)

¶ 14. Total incapacity.

Sec. 9. [*As amended, Laws* 1914, *c.* 708, § 4; *Laws* 1917, *c.* 249; *Laws*

48. See 17 N. C. C. A. 1228, note 46.
49. See 17 N. C. C. A. 1229, note 47.
50. See 17 N. C. C. A. 1229, note 48.
51. See 18 N. C. C. A. 1168, note 51.
52. See 18 N. C. C. A. 1168, note 52.
53. See 15 N. C. C. A. 1149, note 42.
54. See 16 N. C. C. A. 1176, note 48.
55. See 16 N. C. C. A. 1177, note 49.

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1919, *c.* 197.] While the incapacity for work resulting from the injury is total,[56] the association shall pay the injured employee a weekly compensation equal to sixty-six and two-thirds per cent of his average[57] weekly wages,[58] but not more than sixteen dollars nor less than seven dollars a week, and in no case shall the period covered by such compensation be greater than five hundred weeks, nor the amount more than four thousand dollars. (In effect May 29, 1920.)

¶ 15. Partial incapacity.

Sec. 10. [*As amended, Laws* 1914, *c.* 708, § 5; *Laws* 1919, *c.* 205.] While the incapacity[59] for work resulting from the injury is partial,[60] the association shall pay the injured employee a weekly compensation equal to sixty-six and two-thirds per cent of the difference between his average[61] weekly wages before the injury and the average weekly wages which he is able[62] to earn thereafter, but not more than sixteen

56. See 18 N. C. C. A. 1170, note 56.
57. See 16 N. C. C. A. 1177, note 51.
58. See 16 N. C. C. A. 1177, note 52.
59. See 13 N. C. C. A. 1220, note 42.

Disfigurement as ground for compensation under Workmen's Compensation Acts, 19 N. C. C. A. 633-640.

60. See 18 N. C. C. A. 1171, note 60.
61. See 16 N. C. C. A. 1177, note 55.
62. See 18 N. C. C. A. 1172, note 62.

Employee working one night a week; impracticability of computing average weekly wage by dividing yearly earnings by 52. King, the employee, received fatal injury while in the employ of a newspaper company. The widow was awarded compensation of $10 a week for 400 weeks. King was regularly employed each week by a printing company from Monday until Saturday noon at a weekly wage of $28. Saturday nights he worked for the newspaper company and received $9.20 for each night's work. The Industrial Accident Board awarded compensation based on a weekly wage of $31.52, that being the average weekly amount earned by a person in the same grade, employed at the same work by the same employer. Statutes 1911, chapter 751, part 5, section 2. The insurer contended that the weekly compensation should have been $6.13 based on a weekly wage of $9.20. King had been employed by the newspaper company for 12 calendar months immediately preceding his injury. Because he worked for this company, but one night each week during that time, the Board found that while so employed it was impracticable to compute his average weekly wages by dividing his earnings during the 12 months by 52. Holding that the contention of the insurer was correct the court said: "In computing wages under the Workmen's Compensation Act regard may be had to the average weekly amount earned by one in 'the same grade, employed at the same work and by the same employer, when by reason of the shortness of the time of the employment, or by reason of its nature or terms, it becomes impracticable to compute the employee's average weekly wages earned during the twelve months preceding his injury by dividing this amount by 52.' King had been employed each Saturday night during the year by the newspaper company, and the shortness of the time during which he had been in its employ did not make it impracticable to ascertain his weekly earnings received from the newspaper

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dollars a week; and in no case shall the amount of such compensation be more than four thousand dollars.[63] (In effect May 29, 1919.)

¶ 16. Specified injuries, additional compensation for.

Sec. 11. [*As amended, Laws* 1912, *c.* 571; *Laws* 1913, *c.* 445, *c.* 696; *Laws* 1914, *c.* 708.] In case of the following specified[64] injuries the amounts hereinafter named shall be paid in addition to all other compensation:[65]—

(*a*) For the loss by severance of both[66] hands at or above the wrist, or both feet at or above the ankle, or the loss of one hand

company during the preceding year. Nor were the nature and terms of his employment of such a character as to render the computation of the compensation impracticable. He was regularly employed by the newspaper company, his wages were established, and for each Saturday night's work he received a fixed sum. The amount earned by an employee in a particular employment should govern in all cases, in computing the compensation to be paid under the Workmen's Compensation Act unless the computation becomes impracticable; and the wages which determine the compensation, with the exceptions referred to, are the wages earned in the employment where the injury happens." King's Case, — Mass. —, 125 N. E. 153 (1919).

Schoolboy employed in holiday time injured on first day of his employment. The applicant, a schoolboy, aged eleven years, was employed by the respondents, with other schoolboys, during the Christmas holidays in December. Permission had been obtained from the Government for the respondents to employ boys between twelve and fourteen years of age during school holidays, for limited periods per diem. The applicant was employed, although he was under the proper age. On December 31, 1918, while engaged in shifting barrel staves from railway trucks, the applicant had his left leg cut off by a moving truck. This was the first day of his employment. He claimed compensation, and alleged that his average weekly earnings were 6s. He was being paid 1s. a day by the respondents, and he said he also earned 2s. a week from a greengrocer. The respondents admitted liability, but they disputed the amount of the compensation, which they assessed at 2s. 2d. a week, that is to say, 2s. in respect of his employment with the greengrocer, which they admitted, and 2d. in respect of his employment with them, based on a wage of 6s. per week for one week's employment, which they said would be the probable duration of the employment. They accordingly offered 2s. 2d. a week. There was no evidence before the County Court Judge that the boy was employed at other periods of the year antecedent to the time of the accident. Nor was there any evidence that he had any continuity of employment beyond the period during which he was or would be employed by the respondents. The County Court Judge founded his award on the offer of 2s. 2d. a week made by the respondents, holding that that was the time measure of compensation. Upon appeal it was held that there was evidence to support the award and no misdirection. Bones v. Associated Portland Cement Manufacturers, 13 B. W. C. C. 120 (1920).

63. See 13 N. C. C. A. 1222, note 44.
64. See 18 N. C. C. A. 1175, note 64.
65. See 18 N. C. C. A. 1175, note 65.
66. See 18 N. C. C. A. 1175, note 66.

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and one foot,[67] or the reduction to one-tenth of normal vision in both[68] eyes with glasses, sixty-six and two-thirds per cent of the average weekly wages of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of one hundred weeks.

(*b*) For the loss by severance of either[69] hand,[70] at or above the wrist, of either foot at or above the ankle,[71] or the reduction to one-tenth of normal vision in either eye[72] with glasses, sixty-six and two-thirds per cent of the average weekly wages of the injured person, for each hand or foot so severed, but not more than ten dollars nor less than four dollars a week for a period of fifty weeks.

(*c*) For the loss by severance at or above the second joint of two or more fingers,[73] including thumbs, of the same hand, or of two or more toes of the same foot, sixty-six and two-thirds per cent of the average weekly wages of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of twenty-five weeks for each hand or foot so injured.

(*d*) For the loss by severance of at least one phalange[74] of a finger, thumb, or toe, sixty-six and two-thirds per cent of the average weekly wages of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of twelve weeks for each hand or foot so injured.

(*e*) The additional amounts provided for in this section in case of the loss[75] of a hand, foot, thumb, finger, toe, or phalange, shall also be paid for the number of weeks above specified, in case the injury is such that the hand,[76] foot,[77] thumb, finger,[78] toe or phalange[79] is not lost, but so injured as to be permanently incapable of use.[80] (In effect October 1, 1914.)

¶ 17. Savings not to be considered.

Sec. 12. No savings or insurance of the injured employee, independent of this act, shall be taken into consideration in determining the compensation to be paid hereunder, nor shall benefits[81]

67. See 13 **N. C. C. A.** 1222, note 46.
68. See 18 **N. C. C. A.** 1175, note 68.
69. See 16 **N. C. C. A.** 1178, note 61.
70. See 18 **N. C. C. A.** 1176, note 70. **Injury to or loss of fingers or hands** and compensation therefor, 19 **N. C. C. A.** 904-931.
71. See 18 **N. C. C. A.** 1176, note 71.
72. See 15 **N. C. C. A.** 1151, note 52. **Compensation** under Workmen's Compensation Acts for loss of or injury to eyes, 19 **N. C. C. A.** 707-722.
73. See 13 **N. C. C. A.** 1223, note 49.
74. See 18 **N. C. C. A.** 1176, note 74.
75. See 18 **N. C. C. A.** 1176, note 75.
76. See 18 **N. C. C. A.** 1176, note 76.
77. See 18 **N. C. C. A.** 1176, note 77.
78. See 18 **N. C. C. A.** 1176, note 78.
79. See 13 **N. C. C. A.** 1223, note 53.
80. See 18 **N. C. C A.** 1176, note 80.
81. See 14 **N. C. C. A.** 1212, note 57.

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derived from any other source than the association be considered in fixing the compensation under this act.

¶ 18. To whom payable, in case of death.

Sec. 13. [*As amended, Laws* 1914, *c.* 708.] The compensation payable under this act in case of the death of the injured employee shall be paid to his legal representative; or, if he has no legal representative, to his dependents;[82] or, if he leaves no dependents, to the persons to whom payment of the expenses for the last sickness and burial are [is] due. If the payment is made to the legal representative of the deceased employee, it shall be paid by him to the dependents or other persons entitled thereto under this act. When the appointment of a legal representative of a deceased employee, not otherwise necessary, is required for carrying out the provisions of this act, the association shall furnish or pay for all legal services[83] rendered in connection with the appointment of such legal representative, or in connection with any of his duties, and shall pay the necessary disbursements for such appointment, the necessary expenses of such legal representative, and reasonable compensation to him for time necessarily spent in carrying out said provisions. All said payments shall be in addition to all sums paid for compensation. (In effect October 1, 1914.)

¶ 19. Guardian, minor incompetent.

Sec. 14. If an injured employee is mentally incompetent or is a minor[84] at the time when any right or privilege accrues to him under this act, his guardian or next friend may in his behalf claim and exercise such right or privilege.[85]

¶ 20. Notice of injury.

Sec. 15. No proceedings for compensation for an injury under this act shall be maintained unless a notice[86] of the injury shall have been given to the association or subscriber as soon as practicable[87] after the happening thereof, and unless the claim[88] for

82. See 14 N. C. C. A. 1212, note 58.
83. See 17 N. C. C. A. 1233, note 74.
84. See 18 N. C. C. A. 1177, note 84.
85. See 17 N. C. C. A. 1234, note 75.
86. See 15 N. C. C. A. 1152, note 61.
87. See 17 N. C. C. A. 1234, note 77.

Notice "as soon as practicable"; verbal notice to fireman three days after through fellow workman. Claimant was a collier employed by the respondents who had always been blind in his left eye, and was illiterate. On March 15, 1919, he was working at the coal face when a chip of coal struck him in the right eye. His evidence was that he stopped for a minute or two and then went on working until dinner time. He then went home and bathed the eye with boracic lotion and continued this treatment for two days,

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compensation with respect to such injury shall have been made within six months[89] after the occurrence of the same; or, in case of the death of the employee, or in the event of his physical or mental[90] incapacity, within six months after death or the removal of such physical or mental incapacity.

¶ 21. Form of notice.

Sec. 16. [*As amended, Laws* 1912, *c.* 172, *c.* 571.] The said notice shall be in writing,[91] and shall state in ordinary language the time,[92] place and cause of the injury, and shall be signed by the person injured, or by a person in his behalf,[93] or, in the event of

when he went to see Dr. P and was attended by him until March 25, when he went into hospital, from which he was discharged on April 4. He gave no notice at the time to the fireman or any official, giving as his reason that the accident having happened on a Saturday, he thought his eye would be right by the following Monday morning. A check-weighman named K was was going with the applicant to a football match in the afternoon and found him bathing his eye and unable to go. K informed D, the men's check-weighman, of this. The fireman, A, on Monday (March 17) asked a workman named M where the applicant was, and M replied that he did not know. He went that evening to inquire and saw the applicant. The next day in reply to A who had asked, "Where's Jimmy?" M said that he had had a pelt in the eye with a piece of coal, but it was "a matter of nothing." Later M visited the applicant at the hospital and told A that he had seen him and that he (the applicant) had a very bad eye. A in his own evidence denied that M had told him about the injury to the applicant's eye as early as March 18, and said that when he asked, M replied that he did know. By the General Regulation of 1913, made under section 86 of the Coal Mines Act, 1911, it is provided as follows: "Rule 29. Every workman receiving in or about the mine, any personal injury * * * causing him to absent himself from his work, shall as soon as possible report the same to one of the officials, and if required by the official shall forthwith proceed to the appointed place for First Aid Treatment." Under the heading of "Firemen, Extinguishers, and Deputies," Rule 59 provides that a fireman, examiner, or deputy shall report as soon as may be to a superior official, dangerous occurrences or defects which may come to his knowledge. The County Court Judge found that verbal notice had been given to the firemen within three days of the accident, namely, March 18, through a fellow workman, but that the fireman whose duty it was to report such accident, had forgotten to do so. He also found that the workman was acting reasonably in not reporting the accident before, as the same appeared to be trivial. He further found that the employers were not prejudiced by want of notice, and he made his award in favor of the workman. Upon appeal his decision was affirmed. Howarth v. Clifton & Kersley Coal Co., Ltd., 13 B. W. C. C. 179 (1920).

88. See 14 N. C. C. A. 1213, note 61.
89. See 17 N. C. C. A. 1235, note 79.
90. See 14 N. C. C. A. 1214, note 62.
91. See 17 N. C. C. A. 1235, note 81.
92. See 17 N. C. C. A. 1235, note 82.
93. See 14 N. C. C. A. 1214, note 64.

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his death, by his legal representative or by a person in his behalf, or by a person to whom payments may be due under this act or by a person in his behalf. Any form of written[94] communication signed by any person who may give the notice as above provided, which contains the information that the person has been so injured, giving the time,[95] place and cause of the injury, shall be considered a sufficient notice.[96]

¶ 22. Service of notice.

Sec. 17. The notice shall be served upon the association, or an officer or agent thereof, or upon the subscriber, or upon one subscriber, if there are more subscribers than one, or upon any officer or agent of a corporation if the subscriber is a corporation, by delivering the same to the person on whom it is to be served, or leaving it at his residence or place of business, or by sending it by registered mail[97] addressed to the person or corporation on whom it is to be served, at his last known residence or place of business.

¶ 23. Inaccuracy in notice.

Sec. 18. [*As amended, Laws* 1920, *c.* 223.] A notice given under the provisions of this act shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury, unless it is shown that it was the intention to mislead and the association was in fact misled thereby. Want of notice shall not be a bar[98] to proceedings under this act, if it be shown[99] that the association, subscriber,[1] or agent[2] had knowledge[3] of the injury, or if it is found that the insurer was not prejudiced by such want of notice. (In effect March 30, 1920.)

¶ 24. Medical examination, if requested by association, etc.

Sec. 19. [*As amended, Laws* 1912, *c.* 571.] After an employee has received an injury, and from time to time thereafter during the continuance of his disability he shall, if so requested by the association or subscriber, submit himself to an examination by a physician or surgeon authorized to practice medicine under the laws of the commonwealth, furnished and paid for by the association or subscriber. The employee shall have the right to have a physician provided and paid for by himself present at the examination.[4] If he

94. See 14 N. C. C. A. 1214, note 65.
95. See 17 N. C. C. A. 1235, note 85.
96. See 16 N. C. C. A. 1180, note 79.
97. See 13 N. C. C. A. 1228, note 61.
98. See 17 N. C. C. A. 1236, note 88.
99. See 17 N. C. C. A. 1236, note 89.
1. See 14 N. C. C. A. 1215, note 68.
2. See 13 N. C. C. A. 1228, note 64.
3. See 17 N. C. C. A. 1236, note 92.
4. See 13 N. C. C. A. 1229, note 66.

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refuses[5] to submit himself for the examination, or in any way obstructs[6] the same, his right to compensation shall be suspended, and his compensation during the period of suspension may be forfeited.[7]

¶ 25. No agreement to waive compensation valid.

Sec. 20. No agreement by an employee to waive his rights to compensation under this act shall be valid.[8]

¶ 26. No payment assignable, etc.

Sec. 21. No payment under this act shall be assignable or subject to attachment, or be liable in any way for any debts.

¶ 27. Lump sum payment.

Sec. 22. [*As amended, Laws* 1914, *c.* 708.] Whenever any weekly payment has been continued for not less than six months, the liability therefor may in unusual cases where the parties agree and the board deems it to be for the best interests of the employee or his dependents, be redeemed by the payment, in whole or in part,[9] by the association, of a lump sum[10] which shall be fixed by the board, but in no case to exceed the amount provided by said act. The board may, however, in its discretion at any time in the case of a minor[11] who has received permanently disabling injuries, either partial or total, provide that he be compensated, in whole or in part. by the payment of a lump sum, the amount of which shall be fixed by the board, but in no case to exceed the amount provided by said act. (In effect October 1, 1914.)

¶ 28. Claim for compensation.

Sec. 23. [*As amended, Laws* 1912, *c.* 571; *Laws* 1918, *c.* 119; *Laws* 1920, *c.* 223.] The claim for compensation shall be in writing[12] and shall state the time, place, cause and nature of the injury; it shall be signed by the person injured or by a person in his behalf,[13] or, in the event of his death, by his legal representative or by a person in his behalf,[14] or by a person to whom payments[15] may be due under this act or by a person in his behalf, and shall be filed[16] with the industrial acci-

5. See 18 **N. C. C. A.** 1179, note 5.
6. See 18 **N. C. C. A.** 1179, note 6.
7. See 15 **N. C. C. A.** 1155, note 75.
8. See 18 **N. C. C. A.** 1179, note 8.
9. See 17 **N. C. C. A.** 1237, note 97.
10. See 16 **N. C. C. A.** 1181, note 89.
Lump sum awards under compensation acts, 19 **N. C. C. A.** 441-460.
11. See 18 **N. C. C. A.** 1180, note 11.
12. See 17 **N. C. C. A.** 1239, note 99.
13. See 14 **N. C. C. A.** 1218, note 76.
14. See 16 **N. C. C. A.** 1181, note 92.
15. See 13 **N. C. C. A.** 1230, note 71.
16. See 14 **N. C. C. A.** 1218, note 78.

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dent board. A claim for compensation shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, cause or nature of the injury, unless it is shown that it was the intention to mislead and that the association was in fact misled thereby.[17] The failure to make a claim within the period prescribed by section fifteen shall not be a bar[18] to the maintenance of proceedings under this act if it is found that it was occasioned by mistake or other reasonable cause,[19] or if it is found that the insurer was not prejudiced by the delay. (In effect March 30, 1920.)

¶ 29. Interest on payments in appealed cases.

Sec. 24. [*Added, Laws* 1914, *c.* 708.] Whenever any question involving the compensation of an injured employee, or his dependents, is appealed to the supreme judicial court, and the decision rendered is in favor of the employee or his dependents, interest to the date of payment shall be paid by the association on all sums due as compensation to such employee or dependents. (In effect October 1, 1914.)

COMPENSATION TO YOUNG AND INEXPERIENCED WORKMEN

Chapter 236, General Acts of 1915

¶ 30. Natural wage increase to be taken into consideration.

Section 1. Whenever an employee is injured under circumstances that would entitle him to compensation under the provisions of chapter seven hundred and fifty-one of the acts of the year nineteen hundred and eleven, and acts in amendment thereof and in addition thereto, if it be established that the injured employee was of such age and experience when injured that, under natural conditions, his wages[20] would be expected to increase,[21] that fact may be taken in consideration in determining his weekly wages.

Sec. 2. This act shall take effect upon its passage.

Approved May 10, 1915.

17. See 17 N. C. C. A. 1240, note 5.
18. See 13 N. C. C. A. 1230, note 72.
19. See 17 N. C. C. A. 1240, note 7.
20. See 15 N. C. C. A. 1157, note 84.
21. See 16 N. C. C. A. 1182, note 98.

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PART III

PROCEDURE

¶ 31. Industrial Accident Board.

Section 1. [*As amended, Laws* 1912, *c.* 571.] There shall be an industrial accident board[22] consisting of five members, to be appointed by the governor, by and with the advice and consent of the council, one of whom shall be designated by the governor as chairman. The term of office of members of this board shall be five years, except that when first constituted one member shall be appointed for one year, one for two years, one for three years, one for four years, and one for five years. Thereafter one member shall be appointed every year for the full term of five years.

By Laws 1917, c. 297, the number of members was increased from five to seven. It is also provided that the chairman shall, from time to time, designate five members to serve as a reviewing board, and three members shall constitute a quorum to decide all matters which are required to be heard by the board.

¶ 32. Salaries, expenses, etc.

Sec. 2. [*As amended, Laws* 1912, *c.* 571.] The salaries and expenses of the board shall be paid by the commonwealth. The salary of the chairman shall be five thousand dollars a year, and the salary of the other members shall be forty-five hundred dollars a year each. The board may appoint a secretary at a salary of not more than three thousand dollars a year, and may remove him. It shall also be allowed an annual sum, not exceeding ten thousand dollars, for clerical service, and traveling and other necessary expenses. The board shall be provided with an office in the state house or in some other suitable building in the city of Boston, in which its records shall be kept.

¶ 33. Rules of board—Simple procedure, witnesses, etc.—Depositions and letters rogatory—Superior court to enforce provisions as to witnesses.

Sec. 3. [*As amended, Laws* 1912, *c.* 571; *Laws* 1915, *c.* 123, *c.* 275.] The board may make rules not inconsistent with this act for carrying out the provisions of the act. Process and procedure[23] under this act shall be as simple and summary as reasonably may be. The board or any member thereof shall have the power[24] to subpoena

22. See 13 N. C. C. A. 1231, note 73.
23. See 18 N. C. C. A. 1182, note 23.
24. See 13 N. C. C. A. 1232, note 75.

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witnesses, administer oaths, and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute. Upon the written request of the board or of any member thereof, together with interrogatories and cross-interrogatories, if any there be, filed with the clerk of the superior court for any county of this commonwealth, commissions to take depositions[25] of persons or witnesses residing without the commonwealth, or in foreign countries, or letters rogatory to any court in any other of the United States or to any court in any foreign country, shall forthwith issue from the said superior court, as in cases pending in said superior court, and upon the return of the said depositions or answers to letters rogatory the same shall be opened by the clerk of the court which issued the commissions or letters, and the said clerk shall endorse thereon the date upon which any deposition or answer to letters rogatory was received and the same shall forthwith be delivered to the board. No entry fee shall be charged in such cases. The fees for attending as a witness before the industrial accident board shall be one dollar and fifty cents a day, for attending before an arbitration committee fifty cents a day; in both cases five cents a mile for travel out and home. The superior court shall have power to enforce by proper proceedings the provisions of this section relating to the attendance and testimony of witnesses and the examination of books and records.

¶ 34. Agreements regarding compensation—Memorandum to be filed —How enforcible.

Sec. 4. [*As amended, Laws* 1912, *c.* 571.] If the association and the injured employee reach an agreement[26] in regard to compensation under this act, a memorandum of the agreement shall be filed with the industrial accident board and, if approved by it, thereupon the memorandum shall for all purposes be enforcible[27] under the provisions of Part III, section eleven. Such agreements shall be approved by said board only when the terms conform to the provisions of this act.[28]

¶ 35. Assignment of case to member of board for hearing.

Sec. 5. [*As amended, Laws* 1912, *c.* 571; *Laws* 1914, *c.* 708; *Laws* 1917, *c.* 297.] If the association and the injured employee fail to reach an agreement in regard to compensation under this act, or if they

25. See 18 N. C. C. A. 1183, note 25.
26. See 18 N. C. C. A. 1184, note 26.
27. See 17 N. C. C. A. 1244, note 15.
28. See 18 N. C. C. A. 1285, note 28.

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have reached such an agreement, which has been signed and filed in accordance with the provisions of this act, and compensation has been paid or is due in accordance therewith and the parties thereto then disagree as to the continuance of any weekly payments under such agreement, either party may notify the industrial accident board which shall thereupon assign the case for hearing by a member of the board.

¶ 36. Appointment of arbitrators.

Repealed, Laws 1917, c. 297.

¶ 37. Hearings, etc., by board member.

Sec. 7. [*As amended, Laws* 1912, *c.* 571; *Laws* 1917, *c.* 297.] The member of the board shall make such inquiries and investigations as shall be deemed necessary. The hearing shall be held in the city or town where the accident occurred, or in such other place as the board may designate; and the decision of the member, together with a statement of the evidence,[29] his findings of fact, rulings of law and any other matters pertinent to questions arising before him shall be filed with the industrial accident board. Unless a claim for review is filed by either party within seven days,[30] the decision shall be enforcible under the provisions of section eleven of Part III.

¶ 38. Examination of employee by physician for board.

Sec. 8. [*As amended, Laws* 1914, *c.* 708; *Laws* 1916, *c.* 72.] The industrial accident board or any member thereof may appoint a duly qualified impartial physician to examine the injured employee and to report. The fee for this service shall be five dollars and traveling expenses, but the board may allow additional reasonable amounts in extraordinary cases, and the association shall reimburse the board for the amount so paid. The report of the physician shall be admissible as evidence in any proceeding before the industrial accident board or a committee of arbitration, provided that the employee and insurer have seasonably been furnished with copies thereof. (In effect March 23, 1916.)

¶ 39. Fees of arbitrators.

Repealed, Laws 1917, c. 297.

29. See 16 N. C. C. A. 1185, note 8. | 30. See 16 N. C. C. A. 1186, note 8a.

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¶ 40. Review of decision by member.

Sec. 10. [*As amended, Laws* 1912, *c.* 571; *Laws* 1917, *c.* 297.] If a claim for a review[31] is filed, as provided in Part III, section seven, the board shall hear[32] the parties and may hear evidence[33] in regard to any or all matters pertinent thereto and may revise[34] the decision of the member in whole or in part, or may refer the matter back to the member[35] for further findings of fact, and shall file its decision with the records of the proceedings and notify the parties thereof. No party shall as a matter of right be entitled to a second hearing[36] upon any question of fact.

¶ 41. Court decrees and appeals.

Sec. 11. [*As amended, Laws* 1912, *c.* 571; *Laws* 1917, *c.* 297.] Any party in interest may present certified copies of an order or decision of the board, a decision of a member from which no claim for review has been filed within the time allowed therefor, or a memorandum of agreement approved by the board, and all papers in connection therewith, to the superior[37] court for the county in which the injury occurred or for the county of Suffolk, whereupon said court shall render a decree in accordance therewith and notify the parties. Such decree[38] shall have the same effect and all proceedings[39] in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determined by said court,[40] except that there shall be no appeal[41] therefrom upon questions of

31. See 16 **N. C. C. A.** 1186, note 9.

32. See 13 **N. C. C. A.** 1235, note 77.

33. See 14 **N. C. C. A.** 1224, note 88.

34. **Board may revise decision on same evidence produced before member.** The Industrial Accident Board on a "claim for review," "upon all the evidence," found and ruled "that at the time the employee received the injury complained of he was not in the employ of the subscriber," reversed the findings and rulings of the member who heard the parties and their witnesses, and dismissed the claim for compensation. Upon appeal the claimant contended that the Board had no power, on a review, to set aside or reverse the findings and decision of the member unless such findings and rulings were clearly erroneous and had no support in the evidence. The court held that the answer to this contention was section 10 supra; and that under this section, as there was evidence to support the finding of the Board, though it could well have come to the conclusion of fact arrived at by the member, the Board upon the same evidence produced before the member had full power to find facts at variance with and contrary to those found by the member. Sonia's Case, — Mass. —, 125 N. E. 574 (1920).

35. See 16 **N. C. C. A.** 1186, note 12.

36. See 16 **N. C. C. A.** 1186, note 13.

37. See 18 **N. C. C. A.** 1187, note 36.

38. See 18 **N. C. C. A.** 1187, note 37.

39. See 18 **N. C. C. A.** 1187, note 38.

40. See 18 **N. C. C. A.** 1188, note 39.

41. See 18 **N. C. C. A.** 1189, note 40.

Question that policy of insurance was subscribed by only one member of a

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fact,[42] or where the decree is based upon a decision of a member or a memorandum of agreement,[43] and that there shall be no appeal[44] from a decree based upon an order or decision of the board which has not been presented[45] to the court within ten days after the notice of the filing thereof by the board. Upon the presentation to it of a certified copy of a decision of the industrial accident board ending, diminishing or increasing a weekly payment under the provisions of Part II, section twelve, the court shall revoke or modify the decree to conform to such decision.

¶ 42. Review of payments by board or member.

Sec. 12. [*As amended, Laws* 1914, *c.* 708; *Laws* 1917, *c.* 297.] Any weekly payment under this act may be reviewed[46] by the industrial accident board, or any member thereof, and on such review the

partnership cannot be raised on appeal for the first time. Claimant at the time of his injury was working for a copartnership composed of one Gray and one Humphrey. The argument of the insurer was that there could be no recovery because the policy of insurance was subscribed by Gray alone. This question was not raised at the trial before the Industrial Board. The court held that this question could not be raised for the first time upon appeal from the decree of the Superior Court. "It would be manifestly unjust," said the court, "to permit the case to turn now upon a contention not raised at the trial and as to which evidence was not directed." Goff's Case, — Mass. —, 125 N. E. 145 (1919).

42. See 18 **N. C. C. A.** 1190, note 41.
43. See 18 **N. C. C. A.** 1192, note 42.
44. See 14 **N. C. C. A.** 1227, note 93.
45. See 13 **N. C. C. A.** 1237, note 82.
46. See 17 **N. C. C. A.** 1248, note 30.

Only matters respecting weekly payments properly upon review under this section. An employee received injuries which he claimed arose out of and in the course of his employment. After a hearing to determine whether the employee was incapacitated as a result of his injury, it was so found and compensation was awarded at the rate of $6 weekly to be continued for an indeterminate period. No claim for review of these findings was ever filed and compensation was paid for three and one-half years when a hearing was had before a single member of the board under part 3, section 12, Revised Statutes 1911, chapter 751, as amended by Statutes 1914, chapter 708, section 11 (Statutes 1917, chapter 297, section 8), at which the insurer contended and offered evidence, to show that the employee did not receive his injuries in the course of his employment, that they did not arise out of it, and that he was not an employee of the city at that time. It was held that under part 3, section 12, it was not open to the insurer to show that the injury did not arise out of the employment, the court saying: "In the later proceedings instituted under part 3, section 12, the only matters then properly before the single member were the review of the previous decision respecting the weekly payment awarded and the issuance of such order as might be deemed advisable. An order having been so issued the effect of which is to continue the compensation previously allowed, the employee is entitled to be paid at the rate of $6 a week since April 2, 1918" (date of last payment). Hurley's Case, — Mass. —, 126 N. E. 775 (1920).

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board or member may, in accordance with the evidence and subject to the provisions of this act, issue any order[47] which may be deemed advisable.[48] If the case is heard and decided by a member, his decision shall be subject to review as provided by sections seven and ten of Part III and the general provisions of the act.

¶ 43. Fees subject to board's approval.

Sec. 13. [*As amended, Laws* 1914, *c.* 708; *Laws* 1917, *c.* 297.] Fees of attorneys[49] and physicians[50] and charges of hospitals[51] for services under this act shall be subject to the approval of the industrial accident board. If the association and any physician or hospital, or the employee and any attorney, fail to reach an agreement as to the amount to be paid for such services, either party may notify the board, which may thereupon assign the case for hearing by a member of the board in accordance with the provisions of this act, and all proceedings thereunder shall be in accordance with the provisions of this act. The member shall report the facts to the industrial accident board for decision, and the decision shall be enforcible as provided by Part III of section eleven [section eleven of Part III].

¶ 44. Assessment of costs.

Sec. 14. [*As amended, Laws* 1917, *c.* 297.] If the industrial accident board, any member thereof or any court before whom any proceedings are brought under this act determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, it shall assess the whole cost of the proceedings upon the party who has so brought, prosecuted or defended them.[52]

¶ 45. Optional procedure.

Sec. 15. [*As amended, Laws* 1913, *c.* 448.] Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the subscriber[53] to pay damages in respect thereof, the employee may at his option[54] proceed either at law[55] against that person to recover damages, or against the association for compensation under this act, but not against both;[56] and if compensation be paid under

47. See 17 N. C. C. A. 1248, note 31.
48. See 18 N. C. C. A. 1193, note 47.
49. See 17 N. C. C. A. 1248, note 32.
50. See 15 N. C. C. A. 1163, note 4.
51. See 15 N. C. C. A. 1163, note 5.
52. See 17 N. C. C. A. 1249, note 35.
53. See 14 N. C. C. A. 1229, note 1.
54. See 17 N. C. C. A. 1249, note 37.
55. See 16 N. C. C. A. 1190, note 27.
56. See 17 N. C. C. A. 1250, note 39.

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this act, the association may enforce[57] in the name of the employee, or in its own name and for its own benefit, the liability of such other person, and in case the association recovers a sum greater[58] than that paid by the association to the employee four-fifths of the excess shall be paid over to the employee.

¶ 46. Questions determined by board.

Sec. 16. [*As amended, Laws* 1912, *c.* 571.] All questions arising under this act, if not settled by agreement by the parties interested therein, shall, except as otherwise herein provided, be determined by the industrial accident board.[59] The decisions of the industrial accident board shall for all purposes be enforcible under the provisions of Part III, section eleven.

¶ 47. Employees of independent contractor.

Sec. 17. If a subscriber enters into a contract, written or oral, with an independent contractor[60] to do such subscriber's work, or if such a contractor enters into a contract with a sub-contractor[61] to do all or any part of the work comprised in such contract with the subscriber, and the association would, if such work were executed by employees immediately employed by the subscriber, be liable to pay compensation under this act to those employees, the association[62] shall pay to such employees[63] any compensation which would be payable to them under this act if the independent or sub-contractors[64] were subscribers. The association, however, shall be entitled to recover indemnity[65] from any other person who would have been liable to such employees independently of this section, and if the association has paid compensation under the terms of this section, it may enforce in the name of the employee, or in its own name and for the benefit of the association, the liability of such other person. This section shall not apply to any contract of an independent or sub-contractor which is merely ancillary and incidental to, and is no part of or process in, the trade or business carried on by the subscriber, nor to any case where the injury occurred elsewhere than on, in, or about the premises on which the contractor

57. See 17 N. C. C. A. 1250, note 40.
58. See 14 N. C. C. A. 1229, note 5.
59. See 17 N. C. C. A. 1250, note 42.
60. See 17 N. C. C. A. 1250, note 43.

Liability under the compensation acts of owner, "principal employer" or general contractor, for injury to employee of subcontractor, 19 N. C. C. A. 298-308.

61. See 15 N. C. C. A. 1165, note 13.
62. See 13 N. C. C. A. 1241, note 92.
63. See 17 N. C. C. A. 1251, note 46.
64. See 13 N. C. C. A. 1241, note 93.
65. See 13 N. C. C. A. 1241, note 94.

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has undertaken to execute the work for the subscriber or which are under the control or management of the subscriber.[66]

¶ 48. Employers to report all injuries—Supplemental report—Form of report of injury—Penalty.

Sec. 18. [*As amended, Laws* 1913, *c.* 746.] Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within forty-eight hours, not counting Sundays and legal holidays, after the occurrence of an injury, a report[67] thereof shall be made in writing to the industrial accident board on blanks to be procured from the board for the purpose. Upon the termination of the disability of the injured employee, the employer shall make a supplemental report upon blanks to be procured from the board for that purpose. If the disability extends beyond a period of sixty days, the employer shall report to the board at the end of such period that the injured employee is still disabled, and upon the termination of the disability shall file a final supplemental report as provided above.

The said reports shall contain the name and nature of the business of the employer, the situation of the establishment, the name, age, sex, and occupation of the injured employee, and shall state the date and hour of any accident causing the injury, the nature and cause of the injury, and such other information as may be required by the board.

Any employer who refuses or neglects to make the report required by this section shall be punishable by a fine of not more than fifty dollars for each offense.

Copies of all reports of injuries filed by employers with the industrial accident board and all statistics and data compiled therefrom shall be kept available by the said board and shall be furnished on request to the state board of labor and industries for its own use.

Within sixty days after the termination of the disability of the injured employee, the association or other party liable to pay the compensation provided for by Part II of this act shall file with the board a statement showing the total payments made or to be made for compensation and for medical services for such injured employee.

66. See 15 N. C. C. A. 1166, note 17. | 67. See 17 N. C. C. A. 1251, note 50.

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APPEALS UNDER THE WORKMEN'S COMPENSATION ACT

Chapter 132, General Acts of 1915

¶ 49. Compensation to be paid, despite appeal, until otherwise ordered.

Section 1. An order or decision of the industrial accident board, a decree of the superior court upon such an order, a decision of an arbitration committee from which no claim for review has been filed within the time allowed therefor, or a memorandum of agreement approved by the industrial accident board, shall have effect, notwithstanding an appeal, until it is otherwise ordered by a justice[68] of the supreme judicial court who may, in any county, suspend or modify such decree, order or decision, during the pendency of the appeal.

¶ 49a. Effective.

Sec. 2. This act shall take effect upon its passage.

Approved April 2, 1915.

PART IV

THE MASSACHUSETTS EMPLOYEES' INSURANCE ASSOCIATION

¶ 50. Massachusetts Employees' Insurance Association.

Section 1. The Massachusetts Employees' Insurance Association is hereby created a body corporate with the powers provided in this act and with all the general corporate powers incident thereto.[69]

¶ 51. Directors.

Sec. 2. The board of directors of the association shall consist of not less than fifteen members, to be elected by ballot by the members, who shall hold office for such term or terms as the by-laws may provide in accordance with the provisions of section twenty-six of chapter five hundred and seventy-six of the acts of the year nineteen hundred and seven and until their successors are elected.

¶ 52. Powers of directors and by-laws.

Sec. 3. Until the first meeting of the subscribers the board of directors shall have and exercise all the powers of the subscribers,

68. See 17 N. C. C. A. 1252, note 51. | 69. See 13 N. C. C. A. 1243, note 96.

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and may adopt by-laws not inconsistent with the provisions of this act, which shall be in effect until amended or repealed by the subscribers.

¶ 53. Officers.

Sec. 4. The board of directors shall annually choose by ballot a president, who shall be a member of the board, a secretary, a treasurer, and such other officers as the by-laws shall provide.

¶ 54. Quorum and vacancies.

Sec. 5. Seven or more of the directors shall constitute a quorum for the transaction of business.

Vacancies in any office may be filled in such manner as the by-laws shall provide.

¶ 55. Any employer may become subscriber.

Sec. 6. Any employer in the commonwealth may become a subscriber.[70]

¶ 56. First meeting of subscribers.

Sec. 7. The board of directors shall, within thirty days of the subscription of twenty-five employers, call the first meeting of the subscribers by a notice in writing mailed to each subscriber at his place of business not less than ten days before the date fixed for the meeting.

¶ 57. Subscribers' voting power.

Sec. 8. In any meeting of the subscribers each subscriber shall be entitled to one vote, and if a subscriber has five hundred employees to whom the association is bound to pay compensation he shall be entitled to two votes, and he shall be entitled to one additional vote for each additional five hundred employees to whom the association is bound to pay compensation, but no subscriber shall cast, by his own right or by the right of proxy, more than twenty votes.

¶ 58. Minimum standard.

Sec. 9. No policy shall be issued by the association until not less than one hundred employers have subscribed, who have not less than ten thousand employees to whom the association may be bound to pay compensation.

70. See 17 N. C. C. A. 1253, note 53.

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¶ 59. Other requirements.

Sec. 10. No policy shall be issued until a list of the subscribers, with the number of employees of each, together with such other information as the insurance commissioner may require, shall have been filed at the insurance department, nor until the president and secretary of the association shall have certified under oath that every subscription in the list so filed is genuine and made with an agreement by every subscriber that he will take the policies subscribed for by him within thirty days of the granting of a license to the association by the insurance commissioner to issue policies.

¶ 60. When further policies not to be issued.

Sec. 11. If the number of subscribers falls below one hundred, or the number of employees to whom the association may be bound to pay compensation falls below ten thousand, no further policies shall be issued until other employers have subscribed who, together with existing subscribers, amount to not less than one hundred who have not less than ten thousand employees, said subscriptions to be subject to the provisions contained in the preceding section.

¶ 61. License.

Sec. 12. Upon the filing of the certificate provided for in the two preceding sections the insurance commissioner shall make such investigation as he may deem proper and, if his findings warrant it, grant a license to the association to issue policies.

¶ 62. Subscribers to be distributed into groups.

Sec. 13. The board of directors shall distribute the subscribers into groups in accordance with the nature of the business and the degree of the risk of injury.

Subscribers within each group shall annually pay in cash, or notes absolutely payable, such premiums as may be required to pay the compensation herein provided for the injuries which may occur in that year.[71]

¶ 63. Contingent liability.

Sec. 14. The association may in its by-laws and policies fix the contingent mutual liability of the subscribers for the payment of losses and expenses not provided for by its cash funds; but such contingent liability of a subscriber shall not be less than an amount equal to and in addition to the cash premium.

71. See 13 N. C. C. A. 1245, note 97.

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¶ 64. Assessments.

Sec. 15. If the association is not possessed of cash funds above its unearned premiums sufficient for the payment of incurred losses and expenses, it shall make an assessment for the amount needed to pay such losses and expenses upon the subscribers liable to assessment therefor in proportion to their several liability.

Every subscriber shall pay his proportional part of any assessments which may be laid by the association, in accordance with law and his contract, on account of injuries sustained and expenses incurred while he is a subscriber.

¶ 65. Dividends, etc.

Sec. 16. The board of directors may, from time to time, by vote fix and determine the amount to be paid as a dividend upon policies expiring during each year after retaining sufficient sums to pay all the compensation which may be payable on account of injuries sustained and expenses incurred.

All premiums, assessments, and dividends shall be fixed by and for groups as heretofore provided in accordance with the experience of each group, but all the funds of the association and the contingent liability of all the subscribers shall be available for the payment of any claim against the association.

¶ 66. Approval and withdrawal of approval by insurance commissioner.

Sec. 17. Any proposed premium, assessment, dividend or distribution of subscribers shall be filed with the insurance department and shall not take effect until approved by the insurance commissioner after such investigation as he may deem necessary. [See chapter 666, Acts 1912.]

¶ 67. Rules for the prevention of injuries.

Sec. 18. The board of directors shall make and enforce reasonable rules and regulations for the prevention of injuries on the premises of subscribers, and for this purpose the inspectors of the association shall have free access to all such premises during regular working hours.

Any subscriber or employee aggrieved by any such rule or regulation may petition the industrial accident board for a review, and it may affirm, amend, or annul the rule or regulation.

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¶ 68. False oath by officer of association.

Sec. 19. If any officer of the association shall falsely make oath to any certificate required to be filed with the insurance commissioner, he shall be guilty of perjury.

¶ 69. Notice to employees of insurance.

Sec. 20. Every subscriber shall, as soon as he secures a policy, give notice, in writing or print, to all persons under contract of hire with him that he has provided for payment to injured employees by the association.[72]

¶ 70. Further notice.

Sec. 21. [*As amended, Laws* 1912, *c.* 571.] Every subscriber shall give notice in writing or print to every person with whom he is about to enter into a contract of hire that he has provided for payment to injured employees by the association. If an employer ceases[73] to be a subscriber he shall, on or before the day on which his policy expires, give notice thereof in writing or print to all persons under contract with him. In case of the renewal of the policy no notice shall be required under the provisions of this act. He shall file a copy of said notice with the industrial accident board. The notices[74] required by this and the preceding section may be given in the manner therein provided or in such other manner as may be approved by the industrial accident board.

¶ 71. Subscriber indemnified from actions at law.

Sec. 22. If a subscriber, who has complied with all the rules, regulations and demands of the association, is required by any judgment of a court of law to pay to an employee any damages on account of personal injury sustained by such employee during the period of such subscription, the association shall pay to the subscriber the full amount of such judgment and the cost assessed therewith, if the subscriber shall have given the association notice in writing of the bringing of the action upon which the judgment was recovered and an opportunity to appear and defend the same.

¶ 72. Application of regular insurance laws.

Sec. 23. The provisions of chapter five hundred and seventy-six of the acts of the year nineteen hundred and seven and of acts in

72. See 17 **N. C. C. A.** 1256, note 55. See Gilbert v. Wire Goods Co., ¶ 5, note 13.

73. See 13 **N. C. C. A.** 1247, note 99.

74. See 18 **N. C. C. A.** 1201, note 73.

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amendment thereof shall apply to the association, so far as such provisions are pertinent and not in conflict with the provisions of this act, except that the corporate powers shall not expire because of failure to issue policies or make insurance.

¶ 73. Expenses of directors.

Sec. 24. The board of directors appointed by the governor under the provisions of Part IV, section two, may incur such expenses in the performance of its duties as shall be approved by the governor and council. Such expenses shall be paid from the treasury of the commonwealth and shall not exceed in amount the sum of fifteen thousand dollars.

PART V

MISCELLANEOUS PROVISIONS

¶ 74. Release of subscriber from claims at law.

Section 1. If an employee of a subscriber files any claim with or accepts any payment from the association on account of personal injury, or makes any agreement, or submits any question to arbitration, under this act, such action shall constitute a release to the subscriber of all claims or demands at law,[75] if any, arising from the injury.

¶ 75. Definition—Employer—Employee—Dependents—Average weekly wages—Association—Subscriber.

Sec. 2. [*As amended, Laws* 1913, *c.* 568; *Laws* 1914, *c.* 708.] The following words and phrases, as used in this act, shall, unless a different meaning is plainly required by the context, have the following meaning:—

"Employer"[76] shall include the legal representative of a deceased employer.

"Employee"[77] shall include every person in the service of another[78]

75. See 16 **N. C. C. A.** 1197, note 43.

76. See 18 **N. C. C. A.** 1203, note 75.

77. See 18 **N. C. C. A.** 1203, note 76.

Status under the compensation acts of minor employees illegally employed or employed at prohibited work, 19 **N. C. C. A.** 968-975.

Teamster in general employ of one injured while unloading wool for another. H, at the time he received the injury complained of, was a teamster in the general employ of A Company. On the morning of the accident he drove the team from the general employer's stable to B Company, and received an order from the foreman of

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under any contract of hire, express or implied, oral or written, except masters of and seamen on vessels engaged in interstate[79] or foreign commerce, and except one whose employment is not in the usual course[80] of the trade, business, profession or occupation of his employer. Any reference to an employee who has been injured shall, when the employee is dead, also include his legal representatives, dependents and other persons to whom compensation may be payable. (In effect October 1, 1914.)

"Dependents" shall mean members of the employee's family[81] or

that company to go to the freight house for some wool and deliver it at the store house of the owner. Two loads had been disposed of, and as H was delivering the third to C Company he was injured. In unloading the wool a rope and tackle owned by C Company were used. The rope was lowered from the building to the wagon by an employee of C Company and H fastened the tackle to one of the bags of wool which in some way broke away and fell upon him. The court held that since only the most general instructions as to where to go and what to do had been given to H by B Company, the manner in which he was to unload the wool being left entirely to himself, he was in this respect still under the control of A Company and that therefore the finding of the Board that he was A Company's employee at the time of the accident should not be disturbed. "The act of the employee at the time of the injury," said the court, "was one in which, under the practice of the parties, the employee continued subject to the direction and control of his general employer, and did not become subject to that of the company to whom he was lent or hired." Hogan's Case, — Mass. —, 127 N. E. 892 (1920).

Wood chopper paid by the cord. Plaintiff was employed as a wood chopper and his compensation was at the rate of $2 per cord. While so employed he received an injury to his eye. It was held that a finding that he was an employee and not an independent contractor was not erroneous as a matter of law. Goff's Case, — Mass. —, 125 N. E. 145 (1919).

78. See 16 N. C. C. A. 1197, note 46.

79. See 17 N. C. C. A. 1259, note 62.

80. See 18 N. C. C. A. 1206, note 79.

81. **Illegitimate children living with father are members of his family.** The evidence showed that the alleged widow of deceased was married in Italy and lived there with her husband; that before she left that country her husband had been convicted of serious offenses and committed to prison for life; that she then came to America, met the deceased employee and later went through a marriage ceremony, legal in form, with him; that thereafter the parties lived together as husband and wife and at no time was any question raised in their mind as to the legality of the marriage; that two children were born, and the parents and children lived together until the employee received an injury which resulted in his death; and that the children were totally dependent upon him. It was the contention of the insurer that as the act does not specifically include illegitimate children, the children of the deceased should not be held to be members of his family. The court held that as these children were not responsible for their existence or status and had committed no wrong and as they were now deprived of the care and maintenance which they had previously received from the deceased as head of the family, they were entitled to compensation

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next of kin who were wholly or partly dependent upon the earnings of the employee for support at the time of the injury.[82]

"Average weekly wages"[83] shall mean earnings[84] of the injured employee during the period of twelve calendar months[85] immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost[86] more than two weeks' time during such period then the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time[87] during which the employee has been in the employment of his employer, or the nature or terms of the employment,[88] it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer; or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

"Association" shall mean the Massachusetts Employees' Insurance Association.

"Subscriber" shall mean an employer who has become a member of the association by paying a year's premium in advance and receiving the receipt of the association therefor, provided that the association holds a license issued by the insurance commissioner as provided in Part IV, section twelve.

¶ 76. Rights of any liability company under act same as association.

Sec. 3. [*As amended, Laws* 1912, *c.* 571.] Any liability insurance company authorized to do business within this commonwealth shall have the same right as the association to insure the liability to pay the compensation provided for by Part II of this act, and when such liability company issues a policy conditioned to pay such compensation the holder of such policy shall be regarded as a subscriber so far as applicable within the meaning of this act, and when any such company insures such payment of compensation it shall be subject to the provisions of Parts I, II, III and V and of section twenty-two

under the act and were members of deceased's family. Gritta's Case, — Mass. —, 127 N. E. 889 (1920).

82. See 18 **N. C. C. A.** 1207, note 80.

83. See 15 **N. C. C. A.** 1174, note 29.

84. See 16 **N. C. C. A.** 1198, note 51.

85. See 15 **N. C. C. A.** 1175, note 30.

86. See 17 **N. C. C. A.** 1259, note 68.

87. See 15 **N. C. C. A.** 1175, note 32.

88. See 15 **N. C. C. A.** 1175, note 33.

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of Part IV of this act,[89] and shall file with the insurance department its classification of risks and premiums relating thereto and any subsequent proposed classifications or premiums, none of which shall take effect until the insurance commissioner has approved the same as adequate for the risks to which they respectively apply.

¶ 77. Repeal.

Sec. 4. [*As amended, Laws* 1912, *c.* 571.] Sections one hundred and thirty-six to one hundred and thirty-nine, inclusive, of chapter five hundred and fourteen of the acts of the year nineteen hundred and nine are hereby repealed.

¶ 78. Not retroactive.

Sec. 5. The provisions of this act shall not apply to injuries sustained prior to the taking effect thereof.[90]

¶ 79. When act takes effect.

Sec. 6. [*As amended, Laws* 1912, *c.* 571.] Part IV of this act shall take effect on the first day of January, nineteen hundred and twelve; sections one to three, inclusive, of Part III shall take effect on the tenth day of May, nineteen hundred and twelve; the remainder thereof shall take effect on the first day of July, nineteen hundred and twelve.

¶ 80. Information and statistics to be furnished by insurer.

Sec. 7. [*Added, Laws* 1914, *c.* 708.] The association and all insurance companies insuring employees under the provisions of this act shall, at the request of the industrial accident board, furnish to said board in writing any information required in connection with the administration by said board of said act, including any statistical facts and figures and the names of all employers insured by them. (In effect October 1, 1914.)

¶ 81. Branch offices.

Sec. 8. [*Added, Laws* 1914, *c.* 708.] There may be established and maintained under the care and direction of the industrial accident board not more than four branch offices, in such cities as may be selected by said board from time to time after proper investigation, for the purpose of the better adjustment of disputed cases, and for the better information of all parties as to their rights under this act. Said board is hereby authorized to provide such of-

89. See 15 N. C. C. A. 1176, note 34. | 90. See 13 N. C. C. A. 1254, note 8.

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fices with useful rooms, furniture and equipment required for the transaction of the business authorized by this act, also to appoint such officers, agents, clerks, and assistants as are necessary to discharge in connection with such offices the duties required by said act, under the direction of said industrial accident board. (In effect October 1, 1914.)

¶ 82. Medical adviser.

Sec. 9. [*Added, Laws* 1914, *c.* 708.] The industrial accident board may appoint a medical adviser who shall be a duly qualified physician. Said board shall prescribe the duties of said medical adviser. His compensation shall be fixed by said board, subject to the approval of the governor and council, and shall not exceed the sum of four thousand dollars a year. (In effect June 25, 1914.)

¶ 83. Present insurance rates to apply until approval is withdrawn.

Sec. 16. [*Added, Laws* 1914, *c.* 708.] All insurance rates under said chapter seven hundred and fifty-one [Acts of 1911], and acts in amendment thereof and in addition thereto, now on file and approved by the insurance commissioner, shall continue to apply to the several classifications after the taking effect of the provisions of this act, unless the insurance commissioner withdraws approval in accordance with the provisions of chapter six hundred and sixty-six of the acts of the year nineteen hundred and twelve. (In effect October 1, 1914.)

¶ 84. Dates upon which sections of chapter become effective.

Sec. 17. [*Added, Laws* 1914, *c.* 708.] Sections one, two, four, five, six, seven, eight, thirteen and fourteen of this act shall take effect on the first day of October next, except that all policies of insurance under chapter seven hundred and fifty-one of the acts of the year nineteen hundred and eleven and acts in amendment thereof and in addition thereto, written after the passage of this act, shall provide for the payment after said first day of October of the additional benefits provided by said sections, and in all other respects this act shall take effect upon its passage.

Approved June 25, 1914.

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CERTAIN MUTUAL INSURANCE COMPANIES AUTHORIZED TO TRANSACT THE BUSINESS OF EMPLOYERS' LIABILITY INSURANCE

Chapter 311, Acts of 1912

¶ 85. Mutual insurance companies.

Section 1. Section one of chapter two hundred and fifty-one of the acts of the year nineteen hundred and eleven is hereby amended by adding at the end thereof the words:—Mutual companies doing business and organized prior to April sixth, nineteen hundred and eleven, to transact employers' liability business may have and exercise all the rights and powers conferred by this section upon companies which may be organized hereunder, but such rights and powers shall not be exercised unless authorized by a two-thirds vote of the policy-holders present and voting at a meeting duly called for that purpose,—so as to read as follows:—*Section* 1. Ten or more persons who are residents of this commonwealth may form an insurance company on the mutual plan to insure any person, firm or corporation against loss or damage on account of the bodily injury or death by accident of any person, or against damage caused by automobiles to property of another, for which loss or damage such person, firm or corporation is responsible. The corporation shall be formed in the manner described in, and be subject to, the provisions of section[s] fifteen to twenty, inclusive, of chapter one hundred and ten of the Revised Laws, except as is otherwise provided herein. Mutual companies doing business and organized prior to April sixth, nineteen hundred and eleven, to transact employers' liability business may have and exercise all the rights and powers conferred by this section upon companies which may be organized hereunder, but such rights and powers shall not be exercised unless authorized by a two-thirds vote of the policy-holders, present and voting at a meeting duly called for that purpose.

¶ 85a. Effective.

Sec. 2. This act shall take effect upon its passage.

Approved March 22, 1912.

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WITHDRAWAL OF INSURANCE COMMISSIONER'S APPROVAL OF PREMIUM OR DISTRIBUTION

Chapter 666, Acts of 1912

¶ 86. Withdrawal of approval by insurance commissioner.

Section 1. The insurance commissioner may withdraw his approval of any premium or distribution of subscribers given by him to the Massachusetts Employees' Insurance Association under the provisions of section seventeen of Part IV of chapter seven hundred and fifty-one of the acts of the year nineteen hundred and eleven, or of any premium or rate made by an insurance company and approved by him under the provisions of section three of Part V of said chapter seven hundred and fifty-one as amended by section seventeen of chapter five hundred and seventy-one of the acts of the year nineteen hundred and twelve.

¶ 87. Manner of giving notice.

Sec. 2. The notices required by section five of Part I of said chapter seven hundred and fifty-one shall be given in such manner as the industrial accident board may approve.

¶ 88. Effective.

Sec. 3. This act shall take effect upon its passage.

Approved May 28, 1912.

COMPENSATION FOR CERTAIN PUBLIC EMPLOYEES FOR INJURIES

Chapter 807, Acts of 1913

¶ 89. Commonwealth shall, and county, city, town or district may, pay compensation to laborers, workmen and mechanics.

Section 1. The commonwealth[91] shall and any county,[92] city,[93] town,[94] or district[95] having the power of taxation, may pay the compensation provided by Part II of chapter seven hundred and fifty-one of the acts of the year nineteen hundred and eleven and acts in amendment thereof and in addition thereto to such laborers,[96] workmen and mechanics[97] employed by it as receive injuries

91. See 14 N. C. C. A. 1246, note 25.
92. See 14 N. C. C. A 1246, note 26.
93. See 14 N. C. C. A. 1246, note 27.
94. See 13 N. C. C. A. 1257, note 12.
95. See 13 N. C. C. A. 1257, note 13.
96. See 14 N. C. C. A. 1246, note 30.
97. See 14 N. C. C. A. 1247, note 31.

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arising out of and in the course of their employment, or, in case of death resulting from any such injury, may pay compensation as provided in section[s] six, seven and eight of said Part II, and in any amendments thereof, to the persons thereto entitled.

¶ 90. Procedure and jurisdiction—Payment of compensation.

Sec. 2. Procedure under this act and the jurisdiction of the industrial accident board shall be the same as under the provisions of said chapter seven hundred and fifty-one and the commonwealth or a county, city, town or district which accepts the provisions of this act shall have the same rights in proceedings under said chapter as the association thereby created. The treasurer and receiver general, or the treasurer or officer having similar duties of a county, city, town or district which accepts the provisions of this act, shall pay any compensation awarded for injury to any person in its employment upon proper vouchers without any further authority.

¶ 91. How provisions may be accepted—Form of ballot—Notice of result of vote.

Sec. 3. Counties, cities, towns,[98] and districts having the power of taxation, may accept the provisions of this act by vote of a majority of those legal voters who vote on the question of its acceptance at an annual meeting or election as hereinafter provided. In towns and districts which have an annual meeting of the legal voters, this act shall be submitted for acceptance to the voters of the town or district at the next annual meeting after its passage. In cities, and in towns which do not have annual meetings, this act shall be submitted to the voters at the next municipal election, and in counties and in districts which do not have an annual meeting, at the next state election after its passage. At every such election, and at every annual meeting where ballots are used, the following question shall be printed on the ballot:

"Shall chapter [807] of the acts of nineteen hundred and thirteen, being an act to provide for compensating laborers, workmen and mechanics for injuries sustained in public employment, and to exempt from legal liability counties and municipal corporations which pay such compensation, be accepted by the inhabitants of this (county, city, town, water district, fire district, etc.) of ?"

YES
NO

The vote shall be canvassed by the county commissioners, city

98. See 13 N. C. C. A. 1258, note 16.

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council or commission, or selectmen, or, in the case of a district, by the district commissioners or other governing board of the district. A notice stating the result of the vote shall be posted in the county court house, or city or town hall, or, in the case of a district, in the public building where the employees of the district are paid. Except as provided in section four, a county, city, town or district which accepts the provisions of this act shall not be liable in any action for a personal injury sustained by a laborer, workman or mechanic in the course of his employment by such county, city, town or district, or for death resulting from such injury.

¶ 92. Claim or waiver of right of action at law.

Sec. 4. A laborer, workman or mechanic entering or remaining in the service of a county, city, town or district, who would, if injured, have a right of action against the county, city, town or district by existing law, may, if the county, city, town or district has accepted the provisions of this act, before he enters its service, or accepts them afterward, claim or waive his right of action as provided in section five of Part I of said chapter seven hundred and fifty-one, and shall be deemed to have waived such right of action unless he claims it. Section four of said Part I shall apply to actions by laborers, workmen or mechanics employed by a county, city, town or district which accepts the provisions of this act.

¶ 93. Person injured shall elect whether to receive compensation or pension, if entitled to latter.

Sec. 5. Any person entitled to receive from the commonwealth or from a county, city, town or district the compensation provided by Part II of said chapter seven hundred and fifty-one, who is also entitled to a pension[99] by reason of the same injury, shall elect whether he will receive such compensation or such pension, and shall not receive both. In case a person entitled to such compensation from the commonwealth or from a county, city, town or district receives by special act a pension for the same injury, he shall forfeit all claim for compensation, and any compensation received by him or paid by the commonwealth or by the county, city, town or district which employs him for medical or hospital services rendered to him may be recovered back in an action at law. No further payment shall be awarded by vote or otherwise to any person who has claimed and received compensation under this act.

99. See 14 N. C. C. A. 1249, note 33.

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¶ 94. Act applicable to all laborers, workmen and mechanics.

Sec. 6. This act shall apply to all laborers, workmen and mechanics in the service[1] of the commonwealth or of a county, city or town, or district having the power of taxation, under any employment or contract of hire, expressed or implied, oral or written, including those employed in work done in performance of governmental duties as well as those employed in municipal enterprises conducted for gain or profit. For the purposes of this act all laborers, workmen and mechanics paid by the commonwealth, but serving under boards or commissions exercising powers within defined districts, shall be deemed to be in the service of the commonwealth.

¶ 95. Persons to whom act inapplicable.

Sec. 7. [*As amended, Laws* 1916, *c.* 307.] The provisions of chapter seven hundred and fifty-one of the acts of the year nineteen hundred and eleven, and acts in amendment thereof and in addition thereto, shall not apply to any persons in public employments other than laborers, workmen and mechanics employed by counties, cities, towns, or districts having the power of taxation. (In effect June 2, 1916.)

¶ 96. Effective.

Sec. 8. This act shall take effect upon its passage.

Approved June 16, 1913.

INDUSTRIAL ACCIDENTS AND OCCUPATIONAL DISEASES

Chapter 813, Acts of 1913

¶ 97. Joint board to investigate employments—Prevention of accidents and occupational diseases.

SECTION 1. The state board of labor and industries and the industrial accident board, sitting jointly, shall investigate from time to time employments and places of employment within the commonwealth, and determine what suitable safety devices or other reasonable means or requirements for the prevention of accidents shall be adopted or followed in any or all such employments or places of employment; and also shall determine what suitable devices or other reasonable means or requirements for the prevention of industrial or occupational diseases shall be adopted or followed in any or all such employments or places of employment; and shall make reasonable rules, regula-

1. See 15 N. C. C. A. 1182, note 45.

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tions and orders for the prevention of accidents and the prevention of industrial or occupational diseases in such employments or places of employment. Such rules, regulations and orders may apply to both employer and employee.

¶ 98. Hearing before adoption of regulation.

Sec. 2. Before the adoption of any rule or regulation by the said joint board a hearing shall be given, and not less than ten days before the hearing a notice thereof shall be published in at least three newspapers, of which one shall be published in the city of Boston. Such rules or regulations shall upon adoption be published in like manner, and shall take effect thirty days after such publication, or at such later time as the board may fix. Before the adoption of any order a hearing shall be given thereon, of which a notice of not less than ten days shall be given to the individuals, firms, corporations or associations affected thereby.

¶ 99. Appointment of committees.

Sec. 3. The joint board may appoint committees, on which employers and employees shall be represented, to investigate and recommend rules and regulations.

¶ 100. To prevent duplication of inspection and investigation.

Sec. 4. The joint board shall make such general arrangements between the two boards as will prevent duplication of effort but the inspection and investigation carried on by the state board of labor and industries shall be a regular and systematic inspection and investigation of all places of employment and the conditions of safety and health pertaining thereto, and the inspection and investigation carried on by the industrial accident board shall be that relating to causes of injuries for which compensation may be claimed.

¶ 101. Right to enter places of employment.

Sec. 5. Any member or employee of either board may enter any place of employment for any purpose under this act at any time when the place of employment is being used for business purposes.

¶ 102. Physicians may be required to report diseases.

Sec. 6. The joint board may require every physician treating a patient whom he believes to be suffering from any ailment or disease contracted as a result of the nature, circumstances or conditions of the patient's employment to report such information relat-

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ing thereto as it may require, within such time as it may fix, to the state board of labor and industries, and it may issue a list of such diseases which shall be regularly reported upon by physicians and may add to or change such list at any time. Copies of all such reports and all statistics and data compiled therefrom shall be kept by the state board of labor and industries, and shall be furnished on request to the industrial accident board and the state board of health.

¶ 103. Hearings open to the public.

Sec. 7. All hearings by the joint board shall be open to the public. The chairman of the state board of labor and industries and the chairman of the industrial accident board shall act alternately as chairman of the joint board, and the said board may designate one of the employees of either board to act as secretary.

¶ 104. Amendment to section 8, chapter 726, Acts of 1912.

Sec. 8. Section eight of chapter seven hundred and twenty-six of the acts of the year nineteen hundred and twelve is hereby amended by adding at the end of the first paragraph thereof the words:—or persons especially qualified by technical education in matters relating to health and sanitation.

¶ 105. Industrial Accident Board inspectors.

Sec. 9. The industrial accident board may appoint and remove not more than six inspectors, subject to the laws relating to the appointment and removal of employees in the classified civil service. They shall be required to pass examinations of a comprehensive and practical character based upon the particular requirements of the kinds of work to be done, shall be graded in such manner as the board may deem expedient, and shall receive such salaries as the board, with the approval of the governor and council, may fix.

¶ 106. Joint board rules or regulations control.

Sec. 10. If any rule or regulation made under authority of section eighteen of Part IV of chapter seven hundred and fifty-one of the acts of the year nineteen hundred and eleven conflicts with or differs from a rule or regulation of the joint board, the rule or regulation of the joint board shall prevail.

¶ 107. Annual appropriation.

Sec. 11. There may be expended annually by the joint board in

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carrying out the provisions of this act such sums as the general court may appropriate. The joint board shall annually submit to the auditor of the commonwealth such statements of estimates to cover its expenses as are required by section three of chapter seven hundred and nineteen of the acts of the year nineteen hundred and twelve.

¶ 108. Meaning of terms and phrases—Employment—Place of employment—Safe and safety—Industrial or occupational disease.

Sec. 12. The following terms and phrases, as used in this act, shall have the following meanings:—

(*a*) The term "employment"[2] shall mean and include any trade, occupation or branch of industry, any particular method or process used therein, and the service of any particular employer; but shall not include private domestic service[3] or service as a farm laborer.[4]

(*b*) The phrase "place of employment" shall mean and include every place whether indoors or out or underground and the premises appurtenant thereto, into, in or upon which any employee goes or remains either temporarily or regularly in the course of his employment.

(*c*) The terms "safe" and "safety," as used in this act, shall be held to relate to such freedom from danger to the life, safety and health of employees as the nature of the employment will reasonably permit.

(*d*) The terms "industrial disease" and "occupational[5] disease" shall mean and include any ailment or disease caused by the nature, circumstances or conditions of the employment.

¶ 109. Violation of regulations.

Sec. 13. Whoever violates any reasonable rule, regulation, order or requirement made by the joint board under authority hereof, shall be punished by a fine of not more than one hundred dollars for each offense.

¶ 110. All acts inconsistent herewith repealed.

Sec. 14. All acts and parts of acts inconsistent herewith are hereby repealed; but this provision shall not be construed to take away any of the existing powers of the industrial accident board,

2. See 14 N. C. C. A. 1254, note 34.
3. See 13 N. C. C. A. 1263, note 19.
4. See 16 N. C. C. A. 1209, note 70.
5. See 14 N. C. C. A. 1254, note 37.

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the board of railroad commissioners, the state board of health, the board of boiler rules, the boiler inspection department of the district police, or the building inspection department of the district police, or any power given to the state board of labor and industries by chapter seven hundred and twenty-six of the acts of the year nineteen hundred and twelve.

¶ 111. Effective.

Sec. 15. This act shall take effect upon its passage.

Approved June 16, 1913.

WITHDRAWAL OF FOREIGN INSURANCE COMPANY FROM COMMONWEALTH—SECURITY OF PAYMENTS

Chapter 183, General Acts of 1915

¶ 112. Insurers withdrawing shall deposit certain sums—Such sums shall be used to pay obligations.

Section 1. Every foreign insurance company transacting the business of workmen's compensation insurance in this commonwealth shall within five days after its withdrawal from the transaction of business herein, or after the revocation of its license issued by the insurance commissioner or of his refusal to renew the same,[6] deposit with a trustee to be named by the industrial accident board, an amount equal to twenty-five per cent of its obligations, incurred or to be incurred, under workmen's compensation policies issued to employers in this commonwealth, and within thirty days after such withdrawal, revocation of license or refusal to renew a license, such company shall deposit with said trustee an amount equal to the remainder of such obligations, incurred or to be incurred, the amount of which obligations shall be determined by the industrial accident board. The amounts so deposited shall be available for the payment of the said obligations of the company to the same extent as if the company had continued to transact business in this commonwealth, and it shall be the duty of the trustee so receiving said deposits to pay such obligations of the retiring company at the times and in a manner satisfactory to the industrial accident board.

6. See 15 **N. C. C. A.** 1187, note 50.

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¶ 113. Bond shall be furnished.

Sec. 2. [*As amended, Laws* 1916, *c.* 29.] Every such foreign insurance company shall, within sixty days after the passage of this act, furnish a bond running to the commonwealth, with some surety company authorized to transact business in this commonwealth as surety, for such term and such amount and in such form and with such surety as may be approved by the insurance commissioner, the bond being conditioned upon the making by such company of the deposits required by section one of this act. The annual license of such a company shall not be issued or renewed until it has filed with the insurance commissioner a bond as aforesaid covering a future period at least as long as that covered by the license. In place of a bond as aforesaid, the company may furnish other security, upon a like condition, satisfactory to the insurance commissioner. (In effect March 8, 1916.)

¶ 114. Effective.

Sec. 3. This act shall take effect upon its passage.

Approved April 19, 1915.

PAYMENT OF WORKMEN'S COMPENSATION BY COMMONWEALTH AND BY COUNTIES, CITIES, TOWNS AND DISTRICTS

Chapter 244, General Acts of 1915

¶ 115. Agent shall be designated.

Section 1. Every board, commission and department of the commonwealth employing laborers, workmen and mechanics, the Boston transit commission, and every county, city, town and district which has accepted the provisions of chapter eight hundred and seven of the acts of the year nineteen hundred and thirteen shall, through its executive officer or board, designate a person to act as its agent in furnishing the benefits due under chapter seven hundred and fifty-one of the acts of the year nineteen hundred and eleven and acts in amendment thereof and in addition thereto. Such agent shall be held responsible for the proper carrying out of this act under the direction and supervision of the industrial accident board until his agency is revoked and a new agent designated. The name and address of every such agent shall be filed with the industrial accident board immediately upon his designation; and each of the foregoing boards, commissions, departments, counties, cities, towns and dis-

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tricts shall designate such an agent within thirty days after this act takes effect.

¶ 116. Agent not to be appointed if insured.

Sec. 2. This act shall not apply to counties, cities, towns and districts which are insured under the provisions of chapter seven hundred and fifty-one of the acts of the year nineteen hundred and eleven and acts in amendment thereof.

¶ 117. Effective.

Sec. 3. This act shall take effect on the first day of June, in the year nineteen hundred and fifteen.

Approved May 10, 1915.

COMPENSATION FOR INJURIES TO WORKMEN AND MECHANICS OF THE BOSTON TRANSIT COMMISSION

Chapter 270, Special Act of 1915

¶ 118. Compensation to laborers, workmen and mechanics of Boston transit commission.

Section 1. Section one of chapter six hundred and thirty-six of the acts of the year nineteen hundred and fourteen is hereby amended by inserting after the word "laborers," in the first and ninth lines, the words:—workmen and mechanics, so as to read as follows: *Section* 1. Laborers, workmen and mechanics employed by the Boston transit commission shall be deemed to be in the service of the city of Boston within the provisions of chapter eight hundred and seven of the acts of the year nineteen hundred and thirteen, and shall be entitled to compensation provided for by that act. Such compensation shall be paid out of the proceeds of the rapid transit loans and shall be included in the net cost of the tunnel or subway in the construction of which such laborers, workmen and mechanics receive personal injuries arising out of and in the course of their employment.

¶ 118a. Effective.

Sec. 2. This act shall take effect upon its passage.

Approved April 12, 1915.

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WORKMEN'S COMPENSATION INSURANCE TO BE SUBJECT TO APPROVAL BY THE INSURANCE COMMISSIONER

Chapter 287, General Acts of 1915

¶ 119. Liabilities covered by insurance.

Section 1. Every policy of workmen's compensation insurance issued or delivered in this commonwealth shall cover separately and for a separate consideration all the liabilities which are imposed upon an insurer by the provisions of chapter seven hundred and fifty-one of the acts of the year nineteen hundred and eleven and amendments thereof, whatever other contingencies may be insured by riders attached thereto or endorsements made thereon. On the face of every such policy there shall be printed conspicuously the words: "Insurance under this policy is in Class of the company's Workmen's Compensation Classification Manual," and in the blank thus provided the number or other designation in said manual under which the said policy is written shall be placed before the policy is issued.

¶ 120. Workmen's compensation insurance policies subject to approval of insurance commissioner.

Sec. 2. No such policy of insurance or rider to be used therewith shall be issued or delivered until a copy thereof has been filed with the insurance commissioner at least thirty days prior to such issue or delivery, unless before the expiration of the thirty days the said commissioner shall have approved the form of the policy in writing; nor if the insurance commissioner notifies the company in writing that in his opinion the form of said policy or rider does not comply with the laws of this commonwealth, specifying the reasons for his opinions: *provided,* that upon petition of the company the opinion of the insurance commissioner shall be subject to review by the supreme judicial court of this commonwealth.

¶ 121. Effective.

Sec. 3. This act shall take effect on the first day of July, in the year nineteen hundred and fifteen.

Approved May 27, 1915.

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COMPENSATION AND LIABILITY INSURANCE

Chapter 200, General Acts of 1916

¶ 122. Workmen's compensation and liability insurance.

Section 1. Any mutual liability company authorized to do business in this commonwealth may, with the approval of the insurance commissioner, have and exercise any or all of the rights, powers and privileges relating to the transaction of the business of workmen's compensation insurance by law vested in or conferred upon the Massachusetts Employees' Insurance Association.[7]

Sec. 2. The Massachusetts Employees' Insurance Association may with the approval of the insurance commissioner have and exercise, within or without the commonwealth, all of the rights, powers and privileges vested in or conferred upon domestic mutual liability companies under general laws, and shall be subject to all the laws now or hereafter in force relating to such companies.

Sec. 3. This act shall take effect upon its passage.

Approved May 12, 1916.

COMPENSATION FOR CERTAIN PUBLIC BRIDGE EMPLOYEES

Chapter 125, General Acts of 1918

¶ 123. Compensation for certain employees on bridges between Boston and Cambridge.

Section 1. Laborers, workmen, mechanics, drawtenders and assistant drawtenders employed in the management and maintenance of the bridges between the cities of Boston and Cambridge shall be entitled to the compensation provided for by chapter eight hundred and seven of the acts of nineteen hundred and thirteen, and acts in amendment thereof, for injuries received in the course of and arising out of their employment. The said compensation shall be paid in the manner specified in section fourteen of chapter four hundred and sixty-seven of the acts of eighteen hundred and ninety-eight and any amendment thereof for the maintenance, policing, support, management and repair of the said bridges.

¶ 124. Commission to designate agent.

Sec. 2. The commission in charge of the said bridge shall designate a person to act as its agent in furnishing the benefits provided

7. See 18 N. C. C. A. 1222, note 5.

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for by this act in accordance with the provisions of chapter two hundred and forty-four of the General Acts of nineteen hundred and fifteen.

¶ 125. Effective.

Sec. 3. This act shall take effect upon its passage.

Approved April 2, 1918.

JOINT AND SEVERAL COMPENSATION INSURANCE POLICIES

Chapter 216, General Acts of 1918

¶ 126. Joint and several compensation insurance policies authorized.

Section 1. Two or more insurance companies authorized to make such insurance in this commonwealth may unite in issuing joint and several workmen's compensation policies, subject to approval by the insurance commissioner as provided in chapter two hundred and eighty-seven of the General Acts of nineteen hundred and fifteen, in which case the policies may be headed by the names of all the companies assuming the joint and several obligations under the contract.

¶ 127. Effective.

Sec. 2. This act shall take effect upon its passage.

Approved May 21, 1918.

SPECIAL FUND FOR PAYING ADDITIONAL COMPENSATION TO CERTAIN INJURED EMPLOYEES

Chapter 272, Acts of 1919

¶ 128. Fund established.

Section 1. For every case of personal injury resulting in death, covered by the provisions of chapter seven hundred and fifty-one of the acts of nineteen hundred and eleven and acts in amendment thereof and in addition thereto, in which there are no dependents, the insurance company insuring the liability of the employer shall pay into the treasury of the commonwealth the sum of one hundred dollars. All payments hereunder shall constitute a special fund, of which the treasurer and receiver general shall be the custodian. He shall make payments therefrom for the purposes specified in the following section upon the written order or the industrial accident board.

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¶ 129. Payments of additional compensation.

Section 2. Whenever an employee who has previously suffered a personal injury resulting in the loss by severance, or the permanent incapacity, of one hand, at or above the wrist, one foot at or above the ankle, or the reduction to one tenth of normal vision of one eye, with glasses, incurs further disability by reason of the occurrence of a subsequent personal injury arising out of and in the course of his employment, through the loss by severance, or the permanent incapacity, of either a hand, at or above the wrist, or a foot, at or above the ankle, or the reduction to one tenth of normal vision of an eye, with glasses, he shall be paid the compensation provided for by sections nine and ten of Part II of said chapter seven hundred and fifty-one; or if death results from such subsequent injury, his dependents shall be paid the compensation provided for by sections six and seven of said Part II, in the following manner: One-half of such compensation shall be paid by the terasurer and receiver general from the fund established under section one, and the other half by the insurance company insuring the liability of the employer at the time of the subsequent injury; except that the additional compensation due under section eleven of said Part II for the specified injury so sustained, shall be paid solely by the company insuring liability at the time of the subsequent injury.

¶ 130. Payments in cases not specifically provided for.

Section 3. All cases not specifically provided for in the above section shall be covered by, and compensation shall be paid under, the provisions of said chapter seven hundred and fifty-one and acts in amendment thereof and in addition thereto. (Approved July 1, 1919.)

Exhibit
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